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COMPRISING ALL THE REPORTED DECISIONS OF THE
SUPREME COURTS OF MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND
CONNECTICUT, AND PENNSYLVANIA; COURT OF ERRORS AND APPEALS
COURT OF CHANCERY, AND SUPREME AND PREROGATIVE
COURTS OF NEW JERSEY; SUPREME COURT, COURT OF
CHANCERY, SUPERIOR COURT, COURT OF GEN-
ERAL SESSIONS, AND COURT OF OYER
AND TERMINER OF DELAWARE
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OF MARYLAND

WITH
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(117 Me. 276)

EASTMAN v. EASTMAN et al.
(Supreme Judicial Court of Maine. June 21, 1918.)

1. SPECIFIC PERFORMANCE §86—REMEDY AT LAW—DEVISE OF HOMESTEAD.

Specific performance of oral agreement to devise a homestead in return for services during testator's life is a subject for equity, and devisee is not required to seek redress at law.

2. SPECIFIC PERFORMANCE §180—DEVISE OF HOMESTEAD—RETAINING PROPERTY DEVISED—RELIEF.

In a suit for specific performance of contract to devise a homestead and personal property, testator having willed the property to plaintiff for life only, with a bequest of the personalty, contention that, if a conveyance is to be made of realty, plaintiff must give up the personalty devised as a condition thereof is without merit, where such was the property contracted for, and plaintiff seeks no other.

3. SPECIFIC PERFORMANCE §106(3)—DEVISE OF HOMESTEAD—NECESSARY PARTIES—CLAIMANTS BY REPRESENTATION.

In a suit for specific performance of an oral contract to devise a homestead descendants of testator, whose rights under the codicil are by representation, are not necessary parties, where those under whom they must claim are defendants.

4. EXECUTORS AND ADMINISTRATORS §439—SPECIFIC PERFORMANCE OF CONTRACT TO DEVISE—NECESSARY PARTIES.

The executors of a will are not necessary parties to a suit for specific performance of a contract to devise a homestead, where they are not charged with any duty involving the homestead.

5. WILLS §59—CONTRACT TO DEVISE HOMESTEAD—ADEQUATE CONSIDERATION.

A contract to devise a homestead to plaintiff in return for plaintiff's services until testator's death, and fully carried out by plaintiff during such period of more than nine years, was founded upon adequate consideration.

6. SPECIFIC PERFORMANCE §121(6)—DEVISE OF HOMESTEAD—FINDINGS—SUFFICIENCY.

Evidence held sufficient to sustain a decree against heirs for the specific performance of an oral contract to devise a homestead.

7. APPEAL AND ERROR §1006(7)—FINDINGS OF SINGLE JUSTICE—EQUITY HEARING.

The decree of a single justice upon matters of fact in an equity hearing will not be reversed, unless it clearly appears that the decree is erroneous.

Appeal from Supreme Judicial Court, Cumberland County, in Equity.

Bill by James Edward Eastman against George I. Eastman and others. Decree for plaintiff, and defendants appeal. Appeal dismissed.

Argued before CORNISH, C. J., and SPEAR, KING, BIRD, HANSON, and MADIGAN, JJ.

Robert E. Randall, of Freeport, and William A. Connellan, of Portland, for appellants. Wheeler & Howe, of Brunswick, for appellee.

HANSON, J. This is a bill in equity, praying for the specific performance of an oral agreement made by James Eastman, father of the plaintiff, to devise his homestead farm in Brunswick to the plaintiff. The cause was heard by a single justice of this court, who sustained the bill. Final decree was made and filed, and the defendants appealed therefrom to the law court. The sitting justice found the following facts to be established:

"James Eastman, late of Brunswick in the county of Cumberland, died on the 10th day of June, A. D. 1915, seised and possessed of a certain homestead farm situated in said Brunswick. About nine or ten years before his death the said James Eastman entered into an agreement with the plaintiff, who was his eldest son, that if the plaintiff would remain with the said James Eastman during the remaining lifetime of the latter and assist him in the proper care, cultivation, and management of said farm, he would devise the said farm to the plaintiff, together with the stock, tools, and other goods and chattels thereon, so that the plaintiff would become the owner thereof in fee simple after the death of said James Eastman. Relying upon said agreement and in fulfillment thereof, the plaintiff remained with the said James Eastman continuously from the time said agreement was made until the death of said James Eastman, fully and faithfully performing all of the duties and obligations imposed upon him by the terms and conditions of said agreement.

"On the 7th day of December, A. D. 1911, the said James Eastman made and executed his last will and testament, whereby the said farm was devised in fee simple to the plaintiff, together with the personal property above mentioned.

"On the 19th day of December, A. D. 1914, the said James Eastman made and executed a codicil to his said last will and testament whereby the devise to the plaintiff of said farm was revoked, and the same was devised to the plaintiff for the term of his natural life only, and an estate in remainder in said farm was thereby devised to any of the children of James Eastman who might be living at the death of the plaintiff, with the provision that if any of said children should die prior to the death of the plaintiff, leaving descendants, the descendants of such child or children would take the share their parent would have taken

if living, per stirpes. By the terms of said codicil the personal property above described was bequeathed to the plaintiff. Both the will and codicil have been duly proved and allowed in the probate court for said county of Cumberland.

"Upon the foregoing facts I find and rule that the plaintiff is entitled to receive and retain the personal property bequeathed to him by said will and codicil, and is also entitled to a specific performance of the agreement to devise the farm made by said James Eastman as aforesaid, and that the defendants should be required to convey to the plaintiff all of the right, title, and interest which they have acquired to said premises, the same being all of the real estate owned by the said James Eastman at the time of his decease in the county of Cumberland. A decree may be made and filed to carry out these findings and conclusions.

"Dated this 8th day of January, A. D. 1917."

And thereafter, on the 4th day of January, 1917, made and filed the final decree, which follows:

"This cause came on to be heard this day upon bill, answer, replication, and proofs, and was argued by counsel, and thereupon, upon consideration thereof, the plaintiff's bill is sustained, with costs, and it is ordered, adjudged, and decreed as follows, viz: That the defendants, George I. Eastman, Winnie Holbrook, Clara G. Soule, and Clarence E. Eastman, shall make, execute, acknowledge, and deliver to the plaintiff, James Edward Eastman, a quitclaim deed, with special covenants of warranty against the lawful claims or demands of all persons claiming by, through, or under them of the premises described in the plaintiff's bill, and being all of the real estate owned by James Eastman, the father of the parties to this cause, within 21 days from the date of this decree.

"Dated this 24th day of January, A. D. 1917."

The defendants in their answer invoke the statute of frauds, but waive the same in brief and argument. At the hearing no defense was offered, the appellants relying wholly upon technical objections raised on appeal and urged in their behalf. They contend that: (1) The plaintiff should be left to pursue his remedy in a court of law, as the circumstances connected with this case do not call for the exercise of equitable powers. (2) If any conveyance of the property should be made to the plaintiff, he must be required, as a condition thereof, to give up the bequest made to him under the will. (3) All parties concerned in the property covered by the finding of facts and decree are not parties to this action. (4) No evidence as to personal property that conditions named in the codicil have been performed.

[1] These objections to the complaint and the equity power of the court are not well taken. In such circumstances a complainant is not required to seek redress as in a suit at law. The equity side of the court is open to him as affording the best means of settling rights so involved, and administering adequate relief.

The law defining the power of the court and governing procedure in similar cases is stated in *Nugent v. Smith*, 85 Me. 433, 27 Atl. 342, in these words:

"Among the equity powers expressly conferred upon the court is the power to compel the spe-

cific performance of written contracts. *R. S. c. 77, § 6, cl. 3*. True, this is a discretionary power; and, generally, it will not be exercised when the party seeking to have it exercised has a full and adequate remedy by an action at law. But an action at law has never been regarded as an adequate remedy for breach of an agreement to convey real estate; and when such an agreement is founded on an adequate consideration, and is obtained without fraud or oppression, the duty of the court to compel its specific performance is universally acknowledged."

That compensation in damages for the breach of an agreement to convey real estate is not regarded as adequate relief is well settled. *Foss v. Haynes*, 81 Me. 89; *Woodbury v. Gardner*, 77 Me. 69; *Twiss v. George*, 33 Mich. 253; *Bennett v. Dyer*, 89 Me. 17, 35 Atl. 1004; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; 36 Cyc. 673, and cases cited; *Howe v. Benedict*, 176 Mich. 522, 142 N. W. 768.

[2-4] The second objection has no merit, inasmuch as the plaintiff has received and retains the personal property involved in the contract and seeks no other. The third and fourth objections deal only with questions raised in view of the codicil, which in no manner affect the main question involved here. The parties directly interested are in court and answering, and the parties who are pointed out as having an indirect interest under the codicil, the other children of James Eastman or their descendants, are not necessary parties to this proceeding. If there is a remote or contingent interest in the parties named, it would be by right of representation, and they would be bound by any decree made against the defendants under whom they must claim, if they should claim at all. *Morse v. Machias Co.*, 42 Me. 119. Nor are the executors necessary parties, as they are not in this instance charged with any duty involving the real estate in question.

[5] Here as the sitting justice finds, there was full performance on the part of the plaintiff. The contract was founded on an adequate consideration, was finally put into writing when the will was made, and the plaintiff relied thereon.

In addition to the performance of his obligation, and the payment of the consideration, the plaintiff must be held to have been in possession under the contract for the last three months at least with the knowledge and consent of the decedent, and that on entering upon the contract the plaintiff abandoned other plans and business prospects at the request of his father, who well knew that such abandonment caused the plaintiff financial loss. Again the plaintiff from time to time earned money from other work and used the same in the development, use, and improvement of the farm.

[6] The findings of fact by the sitting justice are amply sustained by the evidence, and in accord with the cases above cited, announcing a uniform rule that specific per-

formance may be decreed in such cases against heirs.

[7] It is well settled that the decree of a single justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decree is erroneous. *Paul v. Frye*, 80 Me. 26, 12 Atl. 544; *Sposedo v. Merriman*, 111 Me. 530, 90 Atl. 387.

We find no error. The entry will be:

Appeal dismissed, with additional costs.

(117 Me. 291)

BRAMAN, DOW & CO. v. KENNEBEC GAS & FUEL CO. et al.

(Supreme Judicial Court of Maine. July 8, 1918.)

1. SALES \Leftrightarrow 32—CORRESPONDENCE—COMPLETED CONTRACTS.

Where defendant gave printed order for pipe, stating terms of payment, and plaintiff replied asking guaranty or offering to ship with sight draft attached to the bill of lading, and defendant wrote plaintiff that he had arranged for guaranty and to consider the pipe purchased, and plaintiff again wrote, stating that the order would be filled, there was a completed contract for the sale and purchase of the pipe.

2. CORPORATIONS \Leftrightarrow 399(7)—POWERS OF OFFICERS—GENERAL MANAGER.

General manager of gas company in town where only one director resided, who stated his duties as conducting the local affairs, buying and paying for materials, and operating the plant, had apparent authority to order and agree to pay for pipe to be used in construction.

3. CORPORATIONS \Leftrightarrow 303—POWERS OF OFFICERS—"GENERAL MANAGER."

The term "general manager" of a corporation indicates one who has general direction and control, as distinguished from one having management of a particular branch of the business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Manager.]

4. CORPORATIONS \Leftrightarrow 519(3)—EXECUTION—EVIDENCE.

Evidence held to show that sales contract was made with the general manager of the corporation, and not with an unauthorized agent.

5. CORPORATIONS \Leftrightarrow 426(2)—POWERS OF OFFICERS—GENERAL MANAGER.

A general manager of a corporation may have authority to ratify a contract within the scope of his authority to make, though actually made by an unauthorized person.

Report from Superior Court, Kennebec County.

Action by Braman, Dow & Co. against the Kennebec Gas & Fuel Company and its trustee. Case reported. Judgment for plaintiffs.

Argued before SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Carroll N. Perkins, of Waterville, and Allen & Smith, of Boston, Mass., for plaintiffs. Mark J. Bartlett, of Waterville, for defendant.

MORRILL, J. This is an action to recover damages for failure to accept certain quan-

titles of pipe which plaintiffs claim that the defendant agreed to purchase of them and to accept and pay for, upon presentation at any bank in Waterville of sight drafts with bills of lading attached. The case is before us on report, and it is agreed that, if plaintiffs are entitled to recover, the damages shall be fixed at \$1,048.30.

The position of defendant is thus stated in the brief of its counsel:

"The contention of the defendant is that the goods were never purchased or contracted for by it, and the shipment was made, in the way it was, without its consent, that the agreement made for the purchase of the goods and shipment was made by a party not connected with the defendant in any way as officer or agent, and whom it had never held out as authorized to act for it in the matter of the purchase and shipment of the goods, and that it never ratified or confirmed any contract of purchase."

The facts are not seriously in controversy. The transaction had its inception upon July 25, 1917, when one Morrill, a salesman of the plaintiffs, called at the office of the defendant corporation in Waterville and asked the general manager of the defendant, one Colton, if they were in the market for anything in his line. Inquiries by Mr. Colton for prices on certain amounts of 6-inch, 4-inch, 3-inch, and 2-inch pipe followed. The prices quoted being apparently satisfactory, the salesman, in the presence of Mr. Colton, called by telephone the Boston office of the plaintiffs and ascertained by talking with Mr. Sheldon, one of the plaintiffs, that the firm had in stock the desired amount of 4-inch, 3-inch, and 2-inch pipe. By direction of Mr. Colton the order was placed by telephone with the assurance that copy would be forwarded that night. Mr. Colton then gave to Mr. Morrill a printed order blank of Kennebec Gas & Fuel Company, and the latter then wrote the order, and Mr. Colton signed it, "Kennebec Gas and Fuel Co., by Francis Colton, Superintendent." This written order specified the terms of payment to be "60 das. net 2 per cent. 10 das.," and the pipe was to be "f. o. b. Waterville." These details had not been communicated to Mr. Sheldon, but were inserted in the written order by the salesman.

The next day, July 26, 1917, upon receipt of the written order, plaintiffs wrote defendant as follows:

"In regard to your valued order and conversation over the telephone on Wednesday in regard to the shipment of material, we should want a guaranty for the payment from you from bank or else payment before shipping the material. We will be willing however, to ship the order with sight draft attached to the bill of lading if you will arrange with the bank in Waterville to pay each draft on arrival of each car.

"We have the pipe at present in stock and can make shipment at once. There will probably be four carloads of it. Pipe is scarce and some sizes are about out of the market, and we wish you would advise us as soon as possible in regard to the above."

On July 30th Mr. Colton wrote plaintiffs as follows:

"Referring to your letter of July 26th and to our conversation on the telephone at a previous date.

"I have arranged to furnish you ample guaranty for the payment of pipe ordered from your office. Mr. Patrick Hirsch, president of the Constructive Utility Corporation, 149 Broadway, New York, who also represents A. B. Benesch & Co., of New York, will call upon you in your office Thursday and arrange to your satisfaction any payment guarantee necessary.

"In the meantime kindly consider the pipe purchased from this office sold to us. We wish this pipe could be delivered in Waterville as soon as possible."

On the same day plaintiffs wrote the defendant asking—

"if you can give us the information and security or guaranty that we desired, and if not, if you wish us to release this pipe on other orders. We have been holding it for you, and it is extremely scarce in the market, particularly the 4" size. We have an inquiry to-day taking all that you specified; we cannot replace this for some little time and need to know whether or not we are to cancel your order before giving this party the final answer."

And on the next day, July 31st, plaintiffs wrote defendant as follows:

"Replying to your letter of 30th inst., we shall be glad to talk with your representative when he calls on Thursday, and, in the meantime, understanding that you wish the pipe covered by the original order, we are holding the same and letting the other proposition go by, as we cannot fill both."

[1] These letters, with the order, must be regarded as evidence of a completed contract for the sale and purchase of the pipe, in which the defendant by Mr. Colton acceded to the terms of the plaintiffs that satisfactory guaranty be furnished. We have quoted the correspondence at length, because counsel for defendant earnestly contends that the contract was not closed with Mr. Colton, but with Mr. Hirsch, on August 11th, and in support of his position he relies on a letter from his client to the plaintiffs, dated August 7th, as showing that the matter was still open. That letter contains this sentence which is relied upon:

"As he [Mr. Hirsch] stated to you we intend to purchase the pipe and if sufficient cash discount is allowed pay for same in this manner; i. e., after pipe has been received and quantity checked."

We do not construe this letter in accord with counsel's views; it seems to have been written by Mr. Colton to reassure plaintiffs that the pipe would be taken—a reassurance which might have been considered opportune on account of the failure of Mr. Hirsch to furnish the promised guaranty—and to advise plaintiffs that their suggestion of cash payment was under consideration.

Was Mr. Colton authorized to make this purchase and to arrange terms of payment or guarantee? Did defendant clothe him with such apparent authority that it must be held bound by his acts?

[2] We have no doubt that Mr. Colton had such authority. He had been elected "general

manager" of the defendant corporation. The by-laws of the defendant empower the directors—

"from time to time to provide for the management of the affairs of the company at home or abroad in such measure as they see fit, and in particular from time to time to delegate any of the powers of the board in the course of the current business of the company to any standing or special committee, or any officer or agent, and to appoint any person to be the agent of the company, with such powers (including the power to subdelegate) and upon such terms as may be thought fit, so far as it may legally do so."

Mr. Colton was not only appointed by the board of directors "general manager of the company," but, so far as appears, was the only executive officer of the company in the state. Of the five directors of the company, four resided in New York, and one in Waterville, but the latter does not appear to have exercised any active duties in the management of the corporate affairs. Mr. Colton himself says:

"My duties as general manager, as I understand them, are to conduct the local affairs of the company, and to buy materials and pay for materials as necessary in the operation of the plant."

While his duties and authority do not appear to have been defined by express vote of the directors, when Mr. Colton was elected general manager, under the authority of the by-laws quoted, the company must be held to have clothed him with all the authority which the term implies, and which is ordinarily incident to that position.

A general manager of a business corporation, such as this defendant corporation is, has general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas, its distribution, and the general ways and means of accomplishing the object of the corporation. *Washington Gas-light Co. v. Lansdell*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543.

[3] The term "general manager" of a corporation, according to the ordinary meaning of the term, indicates one who has the general direction and control of the affairs of the corporation, as contradistinguished from one who may have the management of some particular branch of the business. *Railway Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

We think that the defendant must be held to be bound by the action of Mr. Colton in purchasing the pipe and arranging for shipment thereof, as he did. It must be conceded that the material was suitable and of a kind required for the company's business, and that the amount was not unreasonably large. We must hold that a general manager of a company of this kind has authority to buy and arrange to pay for such material. The authorities in this state as to

powers of general agents are in harmony with this conclusion. *Trundy v. Farrar*, 82 Me. 227; *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547.

But the defendant contends that the agreement for the purchase of the goods and shipment was made August 11th with one Patrick Hirsch, who was not connected with the defendant corporation.

[4, 5] We think that the evidence does not sustain this position. It is true that no arrangements had been closed about shipping the pipe until the interview between Mr. Sheldon and Mr. Hirsch on August 11th; but, as we have seen, Mr. Colton had closed the trade for the pipe on July 30th. He had arranged the required guaranty with Mr. Hirsch; later, on August 7th, he notified plaintiffs that defendant would pay cash if sufficient discount was allowed. It is very clear that Mr. Colton made the arrangements through Mr. Hirsch for the shipment of the pipe, with sight draft, bill of lading attached. It is a reasonable inference from his testimony and from his letter to plaintiffs of August 16th acknowledging advice that the pipe was being so shipped that he knew that Mr. Hirsch, through whom he was making his financial arrangements, had made the arrangements on which the pipe was shipped, and that those arrangements were satisfactory to him, and were in accordance with his understanding of the terms of the sale. A general manager may have authority to ratify a contract which is within the scope of his authority to make, when such contract is made by an unauthorized person. *Railway Co. v. McVay*, supra. Mr. Colton, as general manager of the company, and not Mr. Hirsch, was the active representative of the defendant corporation. Under the broad powers of a general manager appointed under the authority of the by-laws quoted Mr. Colton had authority to arrange through Mr. Hirsch for the shipment. Indeed, it is difficult to understand the object of Mr. Hirsch's call at the office of plaintiffs on August 11th, except to learn from Mr. Sheldon's lips the terms which had already been stated in correspondence and to assure Mr. Sheldon that the funds would be in Waterville to meet the drafts.

The suggestion now made by Mr. Colton that he should have had an opportunity to check up the pipe impresses us as an afterthought. The pipe was in Waterville several weeks, and no request was made, so far as appears, for opportunity to inspect it. Mr. Colton permitted the drafts to be returned twice without any such suggestion.

A careful study of the evidence makes clear that the failure of defendant to accept and pay for the pipe was not on account of want of authority in the person contracting for

same, nor for lack of opportunity to inspect the shipment.

Judgment for plaintiffs for \$1,048.80, with interest from date of writ.

(117 Me. 269)

STATE v. DODGE

(Supreme Judicial Court of Maine. June 17, 1918.)

1. COMMERCE — 63 — OCCUPATIONS—FISHERIES.

The imposition by Rev. St. c. 45, § 30, of a reasonable license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the state, and moving in interstate commerce, is not a burden on interstate commerce.

2. EVIDENCE — 20(1) — JUDICIAL NOTICE—GEOGRAPHICAL FACTS — INDUSTRIES—POLICY.

The court takes judicial notice that the lobster fisheries is one of the great industries of the state of Maine which it is the established policy of the state to protect.

3. COMMERCE — 10 — INTERSTATE COMMERCE — NONEXERCISE OF POWER BY CONGRESS.

The state has the right to legislate as in Rev. St. c. 45, § 30, providing for licensing of smacks and vessels, except common carriers engaged in interstate shipments of lobsters, until Congress exercises its authority over the subject.

4. CONSTITUTIONAL LAW — 208(6) — VALIDITY OF STATUTE RELATING TO CLASSES — LOBSTER FISHERIES.

Rev. St. c. 45, § 30, requiring a license for transportation of lobsters to another state, but excepting common carriers, deals with a class, and does not discriminate against individuals of that class, but affects all alike, and is valid.

5. CONSTITUTIONAL LAW — 236 — EQUAL PROTECTION OF LAWS.

Rev. St. c. 45, § 30, requiring a license and bond for transportation of lobsters to another state, excepting common carriers, is not in violation of Const. U. S. Amend. 14, § 1, prohibiting denial of equal protection of the laws.

6. FISH — 10(1) — OCCUPATIONS—LOBSTER FISHERIES—STATUTE—REASONABLENESS.

The regulations of Rev. St. c. 45, § 30, providing that persons, except common carriers, transporting lobsters beyond the limits of the state, must secure a license and provide a bond to be forfeited upon violation of the lobster fisheries laws, held reasonable, fair, and uniform.

7. CONSTITUTIONAL LAW — 48 — STATUTES — WHO MAY ASSAIL VALIDITY—DISCRIMINATION.

The party assailing the constitutionality of a state police statute must clearly show that it offends constitutional guaranties in order to justify the court in declaring it void.

Appeal from Supreme Judicial Court, Hancock County, at Law.

Charles P. Dodge was convicted of transporting lobsters out of the state in a manner contrary to law, and he appeals. Judgment for the State.

Argued before CORNISH, C. J., and SPEAR, HANSON, and PHILBROOK, JJ.

W. R. Pattangall and H. E. Locke, both of Augusta, for appellant. Fred L. Mason, of Ellsworth, for the State.

HANSON, J. This case is reported to the law court upon the following agreed statement of facts:

"This is a criminal prosecution for breach of section 30 of chapter 45 of the Revised Statutes, for the failure of the respondent, Charles P. Dodge, to file bond and receive a license from the department of sea and shore fisheries to transport lobsters for commercial purposes beyond the limits of the state of Maine in the smack Grace M. Cribbey, said respondent being in control of said smack, and said smack not being a common carrier within the meaning of said statute.

"The respondent, Charles P. Dodge, who is a resident of the state of Maine, on the 20th day of June, A. D. 1917, filed with the commissioner of sea and shore fisheries at Augusta, an application for a license to transport lobsters in said smack Grace M. Cribbey beyond the limits of the state, together with fee of \$5 for same, but refused and neglected to file a bond as required by said statute, although requested so to do by said Commission in his letter of June 20, A. D. 1917.

"On June 26, A. D. 1917, the commissioner of sea and shore fisheries received from said respondent an application for a license to transport lobsters within the boundaries of said state of Maine in said smack Grace M. Cribbey, as provided in section 18 of said chapter 45 of the Revised Statutes, stating that there had been a change in his plans, and asking that the fee of \$1 for same be taken out of the \$5 still held by said commissioner, and the balance returned to him, which was done.

"The respondent thereafter, on the 1st day of July, A. D. 1917, and on other days between said date and August 11, A. D. 1917, purchased lobsters of legal length and legally caught in Maine, and, not having obtained a license or filed a bond in compliance with said section 30, chapter 45, of the Revised Statutes, transported them in said smack Grace M. Cribbey, from Stonington in the county of Hancock beyond the limits of the state of Maine, for which offense he was arraigned before the Western Hancock municipal court on a warrant properly drawn and properly charging the offense of transporting lobsters beyond the limits of the state without a license, whereupon he entered a plea of not guilty, was found guilty, and sentenced to pay a fine of \$250 and costs, \$7.87, from which sentence he appealed to the Supreme Judicial Court for Hancock county.

The sole question raised by the respondent is as to whether or not the provisions of section 30, chapter 45, of the Revised Statutes, under which the offense of which he is accused of committing is charged, namely, the provisions relating to the procurement of a license to transport lobsters beyond the limits of the state, and requiring the applicant to file a bond as set forth therein as a condition of procuring said license, are valid and in accordance with the provisions of the Constitution of the state of Maine, and the Constitution of the United States.

If, on these facts, judgment is for the state, judgment and sentence of the lower court shall be affirmed; otherwise respondent shall be discharged."

Section 30 of chapter 45, R. S., reads as follows:

"Sec. 30. No lobsters shall be transported beyond the limits of this state, whether of legal length or otherwise, except by common carriers as provided in section seventeen, unless by persons licensed to transport lobsters outside the limits of the state under the following conditions; the commissioner of sea and shore fisheries shall issue a license, which shall not be transferable, to the owner or party in control

of any smack, vessel, or other means of transportation, either foreign or domestic, authorizing him to purchase and to transport lobsters within or beyond the limits of the state upon the following conditions: The license in each instance shall state the name of the smack, vessel or other conveyance to be used in so purchasing or transporting lobsters, and will give no authority to purchase or transport in any other smack, vessel or other conveyance except that named in the license. The name of the smack, vessel or other conveyance may, however, be changed by the licensee upon application to said commissioner, within the license period, without further charge. The fee for issuing said license shall be five dollars, and a record shall be kept of the same, similar to that provided for other licenses in section eighteen. Besides the name of the conveyance, the license shall bear the date of taking effect and the termination thereof, which last-named date shall be the last day of November next after it becomes effective, and shall state that such license, together with the bond hereinafter provided for, shall be forfeited upon the violation of any law of this state relating to lobsters; and it shall further provide that such smack, vessel or other conveyance shall, at all times, be subject to inspection and search by the commissioner of sea and shore fisheries, or his wardens or deputy wardens, with warrant or without, in which inspection and search they shall in no way be obstructed. Before said license is issued, the applicant shall file with the said commissioner a bond in the penal sum of five hundred dollars, conditioned that the same shall be forfeited to the state upon conviction of the licensee of any breach of any laws of this state pertaining to lobsters. All licensees under this section shall be required to load all smacks, vessels or other contrivances within the waters over which this state has jurisdiction, and any licensee loading outside the jurisdictional waters of this state, or who refuses to come within the jurisdictional waters of this state when ordered so to do by the commissioner, or any of his wardens or deputy wardens, shall be deemed to have violated the provisions of this section, and his bond shall be forfeited. Any license issued under this section shall become void on conviction for the breach of any law of this state pertaining to lobsters. No new license shall be issued for a period of one year to any party whose license has been revoked because of such conviction. Any license issued contrary to the provisions of this section is void and of no effect."

Counsel for the respondent in argument says that "various constitutional objections to the admissibility of the statute suggest themselves," and considers them in argument in the following order:

1. Is the commerce clause of the United States Constitution violated?
2. Is the license fee illegally discriminatory?
3. Is the penal liability illegally discriminatory?
4. Is the penalty excessive and unreasonable?

[1] The imposition of a license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the state, and moving in interstate commerce, if reasonable, is not a burden on interstate commerce. License Cases, 5 How. 504, 12 L. Ed. 256. The general power of police is in the states. Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835.

And neither the power itself, nor the discretion to exercise it as need may require, can be bargained away by the state. *Cooley*, Const. Limitations (7th Ed.) 831. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution. *Id.* 832. The same authority states the guiding rule upon questions of conflict between federal and state authority thus: If the power extends only to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities. Page 833 and note (a). The right to license is not questioned; and it is not claimed that the license fee is intended for revenue or a tax. License laws are of two kinds; those which require the payment of a license fee by way of raising a revenue, and are therefore the exercise of the power of taxation, and those which are mere police regulations, and require the payment only of such license fee as will cover the expense of the license and of enforcing regulation.

[2, 3] This court takes judicial notice that the lobster fisheries is one of the great industries of the state of Maine. It is a part of the sea and shore interests of the state that has been the subject of constant investigation by the lawmaking power for nearly a century, and year by year as the Legislature has convened the attention of the representatives has been enlisted in the direction of the best means of fostering the industry and protecting the state against means and methods calculated to impair it. Legislation to this end has been enacted from time to time until it is believed that the regulations now in force are sufficient to meet all reasonable requirements, and fully preserve the interests of all concerned. And this is the stated and accepted policy of the state, founded upon experience and conscientious investigation. Has the state the right to so legislate? The state has the right to legislate in this instance, even if interstate commerce is indirectly involved, until Congress exercises its authority over the subject. *Sligh v. Kirkwood*, 237 U. S. 58, 35 Sup. Ct. 501, 59 L. Ed. 835. See *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. If the Legislature has the right to legislate for the protection of the fishing industry, it follows that it has

the power to prescribe rules and regulations, for the proper execution of the laws deemed necessary. *Cooley*, Const. Lim. 98.

[4, 5] Are the established rules and regulations illegally discriminatory and the penalty excessive? It needs no citation to support the statement that every person and all property in the state are subject to some restraints and burdens in order to secure the general comfort, health, and prosperity of the state. From the beginning, our shore fisheries have been important, and have received from the executive and legislative departments the attention their importance demanded. There have been many branches of the industry, and necessarily as many classes, of those engaged in the various branches. The laws and rules intended to control and regulate the fishing business have been passed for the benefit and regulation of the classes in the conduct of the business of each class. No other method is practicable. It is, then, with a class we are dealing—a class engaged in the lobster fisheries, and so long as the regulation is intended to operate upon the class and does not in its operation discriminate against an individual of that class, but affects all alike, it is lawful. It is clear that the asserted discriminations are within the power of classification which the state has made.

The agreed facts show a deliberate intention to evade or violate the statute, the setting up of the individual will against the clearly expressed judgment of the Legislature. The respondent did not file a bond, nor did he pay the \$5 required for the license to do an interstate business. He paid the minimum license and attempted to do the maximum business provided by the regulations, without paying the license or filing the required bond. In other words, the respondent desired to carry on the lobster business at the least expense to himself, and that meant practically to disregard the law altogether. The position he takes is against the best interest of the people of the state, while the whole course of legislation has been directed to preventing so far as possible the exercise of such individual practice. That a state may so legislate in the exercise of its highest functions is well settled. "A state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. * * * If a class is deemed to present a conspicuous example of what the Legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law." *Hall v. Gelger-Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas.

1917C, 643. The same principle is stated in another leading case, as follows:

"The Fourteenth Amendment does not prohibit legislation special in character. * * * It does not prohibit a state from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. * * * If a class is deemed to present a conspicuous example of what the Legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164. "A state which, at its own expense, furnishes special facilities for the use of those engaged in interstate and intrastate commerce may exact compensation therefor; and if the charges are reasonable and uniform they constitute no burden on interstate commerce. The action of the state in such respect must be treated as correct, unless the contrary is made to appear."

In view of the many decisions of this court, there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and, so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce." *Hendrick v. Maryland*, 235 U. S. 611, 35 Sup. Ct. 140, 59 L. Ed. 385, and cases cited; *Cooley, Const. Lim.* 857.

[6, 7] It is clear that the regulations complained of are reasonable, fair, and uniform, and reflect the judgment of those best qualified to settle questions of public policy and police regulations, and it is equally clear that the respondent has failed to bring himself within the rule that the party assailing the constitutionality of a state police statute must clearly show that it offends constitutional guaranties in order to justify the court in declaring it invalid. *Eubank v. City of Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; *Hendrick v. Maryland*, 235 U. S. 611, 35 Sup. Ct. 140, 59 L. Ed. 385.

The entry will be:

Judgment for the state.

(117 Me. 321)

BRIGGS HARDWARE CO. v. AROOSTOOK VALLEY R. CO.

(Supreme Judicial Court of Maine. July 17, 1918.)

1. CARRIERS — 177(3) — NEGLIGENCE OF TERMINAL CARRIER — LIABILITY OF INITIAL CARRIER.

Under Act Cong. Feb. 4, 1887, § 1, as amended by Act Cong. June 29, 1906, § 1 (U. S. Comp. St. 1916, § 8563), defining transportation and section 20, as amended by section 7, par. 11 (section 8604a), initial carrier liable for damages accruing on connecting lines where terminal carrier notified party of arrival of shipment, and shipment was not removed within 48 hours, held initial carrier's liability thereafter, for acts of terminal carrier, was that of warehouseman, in view of bill of lading.

2. WAREHOUSEMEN — 24(1) — DEGREE OF CARE.

A warehouseman must use ordinary care, and is liable only for negligence.

3. STIPULATIONS — 14(10) — SHIPMENT OF GOODS — NEGLIGENCE.

In action for damages against initial carrier for carload of potatoes destroyed by fire after reaching destination, stipulation that contents of car "were damaged by fire originating, either from heating apparatus, or from a stove placed in the car, without the knowledge of the terminal carrier," without evidence as to cause and circumstances of fire, would not authorize judgment for plaintiff; causes stipulated being disjunctive, excluding operation of both.

Agreed Case from Supreme Judicial Court, Aroostook County at Law.

Action by the Briggs Hardware Company against the Aroostook Valley Railroad Company. Case submitted upon agreed statement of facts. Judgment for defendant.

Argued before SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Cyrus F. Small, of Caribou, for plaintiff. Powers & Guild, of Ft. Fairfield, for defendant.

BIRD, J. This case is before us upon the following agreed statement of facts:

"On January 24, 1916, the plaintiff delivered to the defendant, which is a common carrier engaged in interstate commerce, a carload of potatoes loaded in an Eastman heater car, upon receipt of which the defendant issued a bill of lading, a copy of which is hereto annexed.

"The car was transported to its destination by the defendant and connecting carriers, arriving at Atlantic Terminal, Brooklyn, February 2, 1916.

"The terminal carrier gave notice of the arrival of the car to E. Waterman & Co., the notify party named in the bill of lading, on February 4, 1916, and the car was placed for delivery on February 5, 1916. The car remained on the track of the terminal carrier until the night of February 14th, when its contents were damaged by fire, originating either from defective heating apparatus or from a stove placed in the car without the knowledge of the terminal carrier. The contents of the car were damaged to the amount of \$487.81.

"It is agreed that a reasonable time for unloading the car had elapsed after notice of arrival was given and before the occurrence of the fire.

"It is agreed that the plaintiff made claim against the defendant for its loss within the four-month period provided for in the bill of lading.

"Immediately upon receipt of the bill of lading, the plaintiff drew a draft upon the notify party for the purchase price of the car of potatoes, attached the bill of lading, properly indorsed, thereto, and forwarded the draft through its bank for collection. At the time of the fire the draft and bill of lading were in the possession of the collecting bank of New York City and had not been surrendered to the carrier.

"The parties agree that if the defendant is liable upon the above facts, judgment is to be rendered for the plaintiff for the amount of damages specified, with interest from the date of the writ. If the defendant is not liable upon these facts, judgment is to be rendered for the defendant."

The bill of lading referred to is of the standard form approved by the Interstate Commerce Commission. Section 5 thereof is as follows:

"Property not removed by the party entitled to receive it within forty-eight hours (exclusive

of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The action is an action on the case for negligence whereby the car "containing said potatoes * * * caught fire and completely destroyed said potatoes. * * *"

By the act (1906) to amend the act to regulate commerce, transportation is defined as including, among other things, "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Act Cong. Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. 1916, § 8563). By a later section of the amendatory act (U. S. Comp. St. 1916, § 8604a), it is provided:

"That any common carrier, railroad, or transportation company so receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, * * * and no contract, receipt, rule, regulation * * * shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. * * *"

[1] We think, in view of section 5 of the conditions of the bill of lading, there can be no question upon the facts of this case; that defendant is liable to plaintiff for all damages claimed to be caused by the terminal carrier in the "transportation" of the potatoes, if any, and that the liability, if any, from the acts done by the latter must arise from his acts as warehouseman and not as carrier. Discussion is unnecessary, however, as we regard *Southern Railway v. Prescott*, 240 U. S. 632, 637, 640, 36 Sup. Ct. 469, 60 L. Ed. 836, as decisive of the question.

[2] The care required of a warehouseman over the property in his charge is ordinary care. He is liable only for negligence. In *Southern Railway Co.*, supra, it is said:

"The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence."

[3] This case presents no evidence as to the cause and circumstances of the fire or the precautions taken by the terminal carrier as warehouseman, except the statement agreed upon by the parties to the effect that the contents of the car "were damaged by fire originating either from defective heating apparatus or from a stove placed in the car without the knowledge of the terminal carrier." The cause is thus stated disjunctively, or in the alternative, and such statement excludes the operation of both as the cause. *Austin v. Oakes*, 48 Hun, 492, 498, 1 N. Y. Supp. 307.

The court has, in the absence of other evidence or other statement, no means of determining whether the defective heater or the stove was the cause of the fire, and, as that which would constitute lack of ordinary care in the one case would not necessarily be lack of ordinary care in the other, it is difficult to see how the court can find negligence or lack of ordinary care on the part of the terminal carrier as warehouseman. In regard to the alleged defective heater, there is no evidence as to the nature of the defect, the period of its existence, the care actually exercised by defendant, or the time when the fire developed after the last visit of defendant's employes to the car. Nor does the agreed statement show when the stove was placed in the car "without the knowledge of the terminal carrier," nor whether or not the circumstances were such as to warrant the inference that the warehouseman did not exercise ordinary care in preventing its introduction into the car or in ascertaining its presence there. We conclude that neither the statements agreed upon nor the inferences to be drawn therefrom are sufficient to justify the conclusion that plaintiff has sustained the burden of proof imposed upon him. *De Grau v. Wilson* (D. C.) 17 Fed. 608, 701; *Southern Railway Co. v. Prescott*, 240 U. S. 632, 641, 36 Sup. Ct. 469, 60 L. Ed. 836.

Judgment must be entered for defendant. So ordered.

(32 Vt. 388)

WHITE v. THORP et al.

(Supreme Court of Vermont. Chittenden. May 29, 1918.)

APPEAL AND ERROR \Leftrightarrow 82(5) — MATTERS APPEALABLE—ORDERS GRANTING EXECUTION—"DECREE."

An appeal does not lie from an order that execution issue in a chancery case, such order not being a "decree," but entered under P. S. 1302, to enforce a decree previously rendered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decree.]

Suit by Wesley G. White against Ira G. Thorp, trustee in bankruptcy of the estate of W. L. White, and W. L. White. From an order granting an execution against defendant Thorp, he appeals. On motion to dismiss. Appeal dismissed.

Argued before WATSON, C. J., and HAS-
ELTON, POWERS, TAYLOR, and MILES,
JJ.

E. C. Mower and C. H. Darling, both of
Burlington, for plaintiff. Sherman R. Moul-
ton, of Burlington, for defendant.

PER CURIAM. The motion heard is to
dismiss an appeal in chancery. The decree
was rendered on May 22, 1917, and filed two
days later. Thereby a certain sum of money
was ordered, adjudged, and decreed to be
paid by defendant Thorp to the plaintiff.
No appeal was taken therefrom. On July
30, 1917, the chancellor, on petition of the
plaintiff, ordered that execution issue against
the chattels and lands of defendant Thorp,
and for want thereof against his body, for
the amount due the plaintiff under the de-
cree, according to the prayer of said peti-
tion. The order was filed August 6, 1917,
and on the same day a motion was filed by
Thorp, praying "for an appeal from the order
and decree * * * granting an execution
against him in said cause."

The plaintiff moves that the appeal be dis-
missed, for that the order from which it was
taken is not a final decree. The motion must
be sustained. The order that execution issue
was not a decree. It was made under the
statute as a method of enforcing the per-
formance of the decree previously rendered.
P. S. 1302. See *Kopper v. Dyer*, 59 Vt. 477, 9
Atl. 4, 59 Am. Rep. 742; *Vilas v. Burton*,
27 Vt. 56.

Appeal dismissed.

(92 Vt. 390)

GILBO & SWARTZ v. MERRILL'S ESTATE
et al.

(Supreme Court of Vermont. Chittenden. May
17, 1918.)

SALES \Rightarrow 273(5)—**GUARANTY—BREACH.**

Where contract for windmill water supply
system specified sizes of the pipes and further
guaranteed efficiency and operation of the plant,
the guaranty was no more than a guaranty of
such efficiency as the work properly carried out
according to specifications would afford, and
contractor was not responsible for inefficiency re-
sulting because pipes specified were too small.

Exceptions from Chittenden County Court;
W. W. Miles, Judge.

Proceedings in the matter of the estate
of Anna S. Merrill, wherein Gilbo & Swartz
filed a claim which was opposed by James A.
Merrill, as administrator. On plaintiff's ex-
ceptions to judgment for defendant. Re-
versed and remanded.

Argued before WATSON, C. J., and HA-
SELTON, POWERS, and TAYLOR, JJ.

Powell & Powell, of Burlington, for plain-
tiff. V. A. Bullard and Sherman R. Moulton,
both of Burlington, for defendant.

HASELTON, J. This is an appeal to the
county court from the disallowance by the
commissioners on the estate of Anna S. Mer-

rill of the plaintiffs' claim. In county court
the case was tried on a declaration in as-
sumpsit in the common counts. The plea was
the general issue. The trial was by the court,
and on findings made judgment was rendered
for the defendant. The plaintiff brings a bill
of exceptions.

The plaintiffs are successors to Gilbo & To-
bin, who contracted with Anna S. Merrill and
her husband, James A. Merrill, to install on
the Merrill farm in Addison, on the shore of
Lake Champlain, a water system comprising
a windmill, a tank and tankhouse, a pipe
leading from the lake to the windmill, a pipe
leading from the windmill to the tank, and
other pipes. Gilbo & Tobin and Gilbo &
Swartz, who have been treated throughout
as standing in the shoes of Gilbo & Tobin,
will herein be spoken of indifferently as the
plaintiffs. Following the language of the bill
of exceptions the word "defendant" is herein
used to designate the intestate, her husband,
a party to the contract, her estate, or her
administrator as the sense may require. No
confusion can result. The defense on trial
was by way of recoupment and the claim of
nonacceptance. The contract was not fully
performed by the plaintiffs within the time
specified in the contract in certain respects
as found and designated by the court. Some
time after the expiration of the period fixed
for the completion of the contract the defend-
ant caused a letter to be written to the plain-
tiffs pointing out certain failures to perform,
and stating that the things left undone must
be done by a day named or the defendant
would proceed to do them and charge the
plaintiffs therefor. No one appearing in
answer to the letter, the defendant undertook
the completion of the work, and in doing so
paid out various sums. Thereafter the de-
fendant commenced to operate the plant, and
because of inefficient or improper construc-
tion the windmill fell and the defendant was
obliged to expend a sum named to repair it.
The court finds that the plant, from the com-
mencement of its use until the defendant sold
the premises on which it stood, never operat-
ed in a satisfactory and efficient manner;
that it was at no time an efficient working
windmill water plant; and that the main
trouble with it lay in the size of the pipe from
the windmill to the tank or in the intake pipe.
The court finds that the pipe from the wind-
mill to the tank was too small for the intake
pipe. There is expressed an inability to find
how much it would have cost to correct this
defect, which is treated as chargeable to the
plaintiffs, but there is a finding that in addi-
tion to making the repairs referred to the de-
fendant was obliged to purchase a gasoline
engine costing \$51 in order to make this wind-
mill plant constantly available. The contract
price for the plant agreed upon was some-
thing over \$800. The defendant had paid the
plaintiffs \$400 on account, and claimed to
have been damaged through the default of

the plaintiffs under the contract to an amount more than the balance unpaid under the terms of the contract. On its findings and failures to find the court rendered judgment for the defendant as stated at the outset.

The finding which the court makes the main cause of damages to the defendant is, as already appears, the finding as to the size of the pipes. The pipes were, however, of the precise size fixed by the contract, and the plaintiffs took an exception on this ground. The force of the claim under this exception the defendant attempts to meet by pointing out, what is true, that the contract contained this clause, "The efficiency and the operation of the plant is guaranteed," and by calling attention to the finding that the plant was not efficient. But the contractors were nevertheless bound to follow the specifications, and the guaranty of efficiency was no more than a guaranty of such efficiency as the work properly carried out in accordance with the specifications would afford. *Bush v. Jones*, 144 Fed. 942, 75 O. C. A. 582, 6 L. R. A. (N. S.) 774; *MacKnight Co. v. Mayor & Co.*, 160 N. Y. 72, 54 N. E. 661; 6 R. O. L. 866. There are in the case no findings that reach back of the contract and make the plaintiffs responsible to the defendant on account of its terms and specifications. So in regard to this fundamental basis of the judgment very substantial error intervened.

The court found that the contract was not complied with because the floor of the tank-house within its walls, the floor upon which the tank rested, was of an unstable character. The plaintiff excepted to this finding and also to the finding already mentioned that the windmill accident was due to improper construction. These two exceptions the plaintiff briefs. But there was some evidence to support each finding, and as to the tank floor, windmill, and some other matters there were no specifications which prevented the full operation of the undertaking for the construction of an efficient plant.

Some exceptions to the exclusion of evidence were taken, but the evidence shut out against exception was properly excluded, either because of remoteness or because its admissibility under the plaintiffs' specification was not made to appear. Some questions that might naturally have arisen in the trial of the case are not presented by the bill of exceptions.

Judgment reversed and cause remanded.

MILES, J., did not sit.

(92 Vt. 313)

BRADLEY v. BLANDIN et al.

(Supreme Court of Vermont, Brattleboro. May 8, 1918.)

1. PLEADING \S 77—PRACTICE ACT.

Practice Act (Laws 1915, No. 90) \S 18, applies to an action pending at the time of its passage.

2. PLEADING \S 78—ANSWER—DEFENSES.

Under Practice Act (Laws 1915, No. 90) \S 2, all the defenses relied upon must be stated in the answer.

3. PLEADING \S 93(1)—ANSWER—INCONSISTENT DEFENSES.

Under Laws 1915, No. 90, \S 2, the answer cannot contain inconsistent defenses, which cannot both be true.

4. PLEADING \S 94—SEPARATE PARAGRAPHS.

Under Laws 1915, No. 90, \S 2, the answer may be divided into separate paragraphs, although this is not essential.

5. PLEADING \S 362(4)—DEFENSE IN ANSWER—REMEDIES.

If the answer sets forth inconsistent defenses, advantage thereof should preferably be taken by motion to strike out.

6. PLEADING \S 369(4)—INCONSISTENT DEFENSES—ELECTION.

If the answer sets forth inconsistent defenses, advantage thereof may be taken by moving for election, although motion to strike out is preferable.

7. BROKERS \S 82(2)—ACTIONS—ANSWER—SUFFICIENCY.

In broker's action for commission, answer setting forth the contract alleging that there was no other contract, and that the sale was not made, was proper, being in effect the general issue.

8. PLEADING \S 204(7)—DEMURRER TO PART OF ANSWER—EFFECT.

A demurrer to part of the answer cannot be sustained, unless the part demurred to as a whole shows no defense.

Exceptions from Bennington County Court; E. L. Waterman, Judge.

Action by Gilbert W. Bradley against Amos N. Blandin and the Somerset Land Company. On plaintiff's exceptions to order overruling demurrer to the answers. Affirmed and remanded.

Argued before WATSON, C. J., and HAS-ELTON, POWERS, TAYLOR, and MILES, JJ.

Batchelder & Bates, of Bennington, and F. C. Archibald, of Manchester Center, for plaintiff. Harvey & Whitney, of Brattleboro, Robert E. Healy, of Bennington, and Hale K. Darling, of Chelsea, for defendants.

WATSON, C. J. This is an action of assumpsit on contract. The case (which has been here twice before, and is reported in 89 Vt. 542, 95 Atl. 894, and in 91 Vt. 472, 100 Atl. 920), is here on plaintiff's demurrer to the so-called "second plea" of defendants' answer; more properly speaking, it is the second paragraph of the answer.

[1] Though the action was pending at the time of the passage of the Practice Act, the law of that act applies. Laws of 1915, No. 90, \S 18.

[2] By section 2, pleadings in defense shall consist of: "(b) An answer, which shall contain either a denial of the allegations of the complaint or some of them; or a brief and simple statement of the facts relied upon in defense." By subdivision (c), a demurrer may be filed, which shall distinctly

specify the reason why the pleading demurred to is insufficient. By section 3, no pleading shall fail for want of form, but shall be amended in such respects at any stage of the proceeding, if the fault be pointed out, and the sufficiency of all pleadings in this respect shall be for the discretionary determination of the trial court. Subdivision (d) provides for such further pleadings as may be required, etc.; but this has reference to pleadings subsequent to the answer.

[3-6] It is very apparent that, in contemplation of the act, the answer shall, in the manner stated, contain all the defenses relied upon. This is in accordance with the general rule governing pleadings under re-form procedure acts, where, as here, the primary object of the Practice Act is to simplify and improve practice and procedure in civil actions. The answer, as in equity pleadings, should be drawn in a way stating all grounds of defense upon which the defendant relies. In doing this the answer may properly be divided into separate paragraphs, thus distinguishing the different grounds; but this is not essential, for all may be stated in one paragraph. *Greenthal v. Lincoln*, 67 Conn. 372, 35 Atl. 266; *Freeman's Appeal*, 71 Conn. 708, 43 Atl. 185. A limitation of the rule is that the answer cannot contain inconsistent defenses. But defenses are inconsistent only when they cannot both be true, and the proof of one necessarily proves the falsity of the other. *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Susznik v. Alger Logging Co.*, 76 Or. 189, 147 Pac. 922, Ann. Cas. 1917C, 700. If the answer sets forth inconsistent defenses, advantage thereof should be taken by motion to strike out, or perhaps by moving that the defendant be directed to elect upon which of the inconsistent defenses he will rely. *Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757; *Strouse v. Leipf*, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122; *Hart-Parr Co. v. Keeth*, 62 Wash. 464, 114 Pac. 169, Ann. Cas. 1912D, 243. The former should seem to be the better practice, since thereby the plaintiff may be informed of the particular grounds of defense in season to prepare his case for trial accordingly.

[7, 8] The paragraph of the answer demurred to sets forth, as one ground of defense, that on or about the day named the Somerset Land Company promised to pay the plaintiff a 2½ per cent. commission if certain lands were sold to Finch-Pruyn & Co., of Glen Falls, N. Y., for the sum of \$1,000,000; that neither said lands, nor the timber growing thereon, nor any part thereof, was then or ever sold to said Finch-Pruyn & Co.; that no other or different contract existed between said plaintiff and said defendants, or either of them. It is said that this part of the answer amounts to the general issue. We think it does, because it is equivalent to

a denial of the making of the contract alleged in the complaint, and in making such denial it was proper for the defendants to state the facts as explanatory of their denials, thus making the denial more fairly to meet the substance of the allegations denied. Thereby the plaintiff was more fully apprised of the real issue raised by the denial. The demurrer was properly overruled. *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069; *British American Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293. A demurrer to part of the answer (as in this case) cannot be sustained, unless the part demurred to, as a whole, shows no defense.

Whether by the revision of 1917, of the statutes, the Practice Act was materially altered in any of its provisions discussed above, is not considered.

Judgment affirmed, and cause remanded.

(41 R. I. 444)

DORRANCE et al. v. GREENE et al.
(No. 418.)

(Supreme Court of Rhode Island. July 5, 1918.)

1. WILLS ⇨524(2)—CONSTRUCTION—ESTATES CREATED—"HEIRS."

The word "heirs" refers to living persons holding such relation at time of testator's death, in the absence of an intention to the contrary clearly evidenced in the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

2. WILLS ⇨524(6)—ESTATES CREATED—CONSTRUCTION—RESIDUARY LEGATEES.

Under will giving wife cash in lieu of dower or other interest, creating trust estate, to pay annuities for life of daughter, and if she died without children to pay a further annuity to the wife and to pay other bequests and to distribute the remainder to the heirs, the heirs at law, as ultimate distributees, were to be determined at the date of the daughter's death.

3. WILLS ⇨634(8)—ESTATES CREATED—CONSTRUCTION—RESIDUARY LEGATEES.

Will giving wife cash in lieu of dower or other interest, creating trust estate, to pay annuities for life of daughter, and, if she died without children, to pay a further annuity to the wife and to pay pecuniary bequests, mostly of small amounts, and to distribute the remainder to the heirs, gave the pecuniary legatees only contingent and nontransmissible interests, which failed when they predeceased the daughter.

4. WILLS ⇨858(1)—ESTATES CREATED—CONSTRUCTION—RESIDUARY BEQUESTS.

Under will giving wife cash in lieu of dower or other interest, creating trust estate, to pay annuities for life of daughter, and, if she died without children, to pay a further annuity to the wife and to pay other pecuniary bequests and to distribute the remainder to the heirs, when the pecuniary legatees died before the death of the daughter, their legacies did not fall into the residue, but devolved as intestate estate of the testator, passing to testator's next of kin at the date of his death.

5. TRUSTS ⇨191(2)—POWERS—SELLING PROPERTY.

Where trustees under will were directed to distribute property to a number of persons, the power to sell enough of the property to equalize the division was implied if distribution could not otherwise be made.

Certified from Superior Court, Providence and Bristol Counties.

Suit by Charles T. Dorrance and others, as trustees pro tempore under the will of Samuel Larned, deceased, against W. Maxwell Greene, as administrator of Celia Larned Greene, deceased, and others. Case certified to the Supreme Court. Decree ordered submitted.

Elisha C. Mowry, of Providence, for complainants. Frank W. Hackett, of Washington, D. C., and Mendell W. Crane, of Providence, for Laura L. Sayles. Walter A. Edwards, Elliot G. Parkhurst, and Edwards & Angell, all of Providence, Richard W. Hale and George A. Moriarty, Jr., both of Boston, Mass., and Greenough, Easton & Cross and Frank T. Easton, all of Providence, for various respondents.

BAKER, J. This cause is a suit in equity, brought by the complainants in their capacity as trustees for the time being under the will of Samuel Larned, late of Providence, for instructions relating to the construction of said will. The complainants are also interested in the questions raised in their capacities as executors of the will of Katharine Cella (Larned) Greene, the testator's daughter, and as trustees under certain clauses of her will, and the complainant W. Maxwell Greene is also interested as administrator of the estate of Celia (Larned) Greene, the testator's widow, who remarried subsequent to his decease. Accordingly, in these capacities they have, with numerous other parties, been joined as defendants.

The case, being ready for hearing for final decree, has been certified to this court for final determination under General Laws 1909, c. 289, § 35, upon bill, answers and proof, the bill having been taken as confessed against such parties as failed to answer.

The important facts disclosed by the evidence may be thus summarized: Samuel Larned died in December, 1846, leaving him surviving his widow, Celia Greene Larned, and a daughter, Katharine Cella Larned. He was the son of William Larned, and had 16 (or perhaps 18) brothers and sisters, whose numerous descendants, so far as known, are among the parties respondent. His will, dated November 28, 1846, about a month before his death, was admitted to probate in the municipal court of the city of Providence on January 26, 1847. His first provision was for his wife, to whom he gave \$12,000 outright "in lieu of her dower or other interest in my real or personal estate." He also gave her two gifts not of a pecuniary nature. He then disposed of his household furnishings, made numerous small pecuniary gifts to relatives, friends, and servants, provided for several small annuities for relatives, and appointed

his wife guardian of his daughter. The rest and remainder of his estate, both real and personal, he directed to be sold, and the proceeds to be paid over to three trustees, to whom he gave and bequeathed said proceeds in trust. The trustees were given power to invest in Rhode Island real estate, real estate mortgages and bank stock, and to change investments from time to time in their discretion. They were directed to make payment from the trust funds (1) of the annuities thereinbefore bequeathed; (2) of various annual sums for the testator's daughter, Katharine Cella Larned, the amount thereof being gradually increased for a certain period until it reached a maximum of \$1,200 each year, said amount until her marriage to be paid annually to her guardian during her minority and to her upon reaching her majority; (3) to the Bishop of the Diocese of Rhode Island, for religious purposes, all surplus income not required for the foregoing payments until an aggregate sum of \$4,050 had been so paid; (4) thereafter to invest any surplus income for the purposes of the trust; and (5) to pay to the testator's said daughter from and after her marriage during her life the whole of the income of the trust fund remaining after the foregoing payments. Then appear the provisions of the will which have given rise to the questions now before the court, as follows:

"And from and after the decease of my said daughter should she leave a child or children, the said trustees shall appropriate so much of the income of the said trust funds as may be necessary for the support of such child or children until the youngest of them shall attain the age of twenty-one years, or otherwise become of age—at which time they shall terminate their said trust by conveying to the child or children of my said daughter their heirs and assigns in equal shares all the estate real and personal then holden by them in trust.

"But if my said daughter shall decease without leaving any child or children living at the time of her decease, I then direct that the said trustees shall thereafter pay to my wife for her own use, if she has remained unmarried the annual sum of five hundred dollars so long as she remains unmarried—And shall also immediately thereafter pay the following sums to the persons hereafter named that is to say:

"My mother Mrs. Sarah Larned two hundred dollars.

"My brother William G. Larned one hundred dollars.

"My brother George Larned one thousand dollars.

"My sister Sarah S. Larned two hundred dollars.

"My sisters Laura S. Hallett and Abby S. Brown two hundred dollars each.

"My nephew William Larned two hundred dollars.

"My nephew Russell M. Larned five hundred dollars.

"My nephew Edwin C. Larned one thousand dollars.

"My nephew Charles H. Larned or Larnard fifty dollars.

"My nephew William Henry Larned five hundred dollars.

"My nieces Elizabeth H. Coburn and Sarah Osgood each fifty dollars.

"My nephew Henry L. Hallett two hundred dollars.

"My niece Jane H. Sayles fifty dollars.

"My brother-in-law Benjamin F. Hallett fifty dollars.

"My brother-in-law William Brown fifty dollars.

"They shall also pay to some suitable person the sum of two thousand dollars as trustee for the sole use and benefit of my sister Sophia L. Clifford so that she shall receive the income thereof during her life, and so much of the principal from time to time as may be necessary for her support, with the right of disposing of the principal or what may remain of it at her decease.

"They shall also pay to each of my nieces Lucinda M. Larned, Mary Letitia Larned, Ellen G. Larned and Anne M. Larned the annual sum of thirty dollars so long as they respectively remain unmarried—and also to my nephew Samuel Larned the annual sum of thirty dollars for the term of ten years.

"And all the rest and residue of the said trust funds, remaining after the payment of the said sums, and reserving a sufficiency for the payment of the annuities provided for in this my will, they shall distribute to and among my heirs at law, in the proportions in which they would severally be entitled under the statute for the distribution of intestate estates.

"And whenever the payment of the said annuities shall cease so much of my said estate, as may have been reserved for their payment shall be then distributed in like manner."

The testator was survived by his wife, Celia Greene Larned, and his only child, Katharine Celia Larned, no other person at the date of his decease holding the capacity of his heir at law or next of kin. The testator's widow subsequently married Richard W. Greene, who predeceased her, and she died intestate in 1887, leaving her daughter Katharine Celia as her sole heir at law and next of kin. Said Katharine Celia Larned married the defendant W. Maxwell Greene in 1872, and died June 29, 1917, testate and without ever having had any issue. In her will she directed that all property of hers derived from the testator be kept separate and disposed of it in part for the benefit of certain charities and in part for the benefit of various members of the Larned family, including many of the parties to this suit.

All of the persons, including the legatees of the said 17 pecuniary legacies and said Sophia L. Clifford, for whom special provision was made by the testator in case his daughter Katharine should decease without leaving living children, survived the testator, but predeceased said Katharine, Sophia L. Clifford dying intestate and without ever having attempted to exercise the power of disposing of the fund which would have been available for her were she now living.

The various gifts made by said will prior to the creation of the trusts were paid by the executors, the persons to whom were bequeathed annuities upon the death of the testator survived the testator and predeceased his daughter, and said annuities were paid in full. The payments required to be made by the trustees to the Bishop of the Diocese of Rhode Island were made, and the

other provisions and directions of the will have been fully carried out, except those relating to the payments and distribution to be made after the decease of said Katharine Celia (Larned) Greene, leaving no living child or children. The trust estate, consisting principally of personal property, is now distributable.

The complainants seek instructions with respect to four questions as follows: (1) Whether or not the 17 pecuniary legacies bequeathed in and by said will in case the said Katharine Celia (Larned) Greene deceased without leaving any child or children living at the time of her decease have, by reason of the decease of the legatees during the lifetime of the said Katharine, lapsed; (2) whether the legacy in trust for the use and benefit of Sophia L. Clifford bequeathed in and by said will in case the said Katharine Celia (Larned) Greene deceased without leaving any child or children living at her decease and the said 17 pecuniary legacies, if they shall be deemed to have lapsed, have fallen into the residue of said trust estate; and, if they have not fallen into said residue, what disposition should be made of them; (3) whether the phrase "heirs at law" of said Samuel Larned in the provision in said will for the distribution of the trust estate in case the said Katharine Celia (Larned) Greene deceased without leaving any child or children living at the time of her decease has reference to the persons holding said capacity at the date of the death of the said Samuel Larned, or to the persons who would have held said capacity had the said Samuel Larned deceased immediately after the death of the said Katharine on the 29th day of June, 1917; and (4) whether or not, if the residue of said trust estate is distributable among two or more persons at the present time, the complainants, as such trustees, have for the purpose of making distribution of the same power to sell real estate not capable of being partitioned in kind, and power to sell such securities as remain after their holdings as such trustees in each security, so held by them, have, so far as possible, been distributed in kind in equal portions among the persons entitled to said residue.

[1] Question 3 is undoubtedly the most important one in the present case, and therefore it has been given the prominent position in the discussion by all of the parties in interest. The executors of the will of Katharine Celia Greene, the administrator of the estate of Celia (Larned) Greene, who is also one of said executors, and one other respondent claim that the words "heirs at law," as used in the will of Samuel Larned relative to the distribution of the rest and residue of his trust estate, refer to persons having that capacity at the date of his decease in 1846. All the other respondents, who have appeared by counsel, claim that the words refer to

persons having that capacity at the date of his daughter's decease in 1917. Broadly speaking, the controversy is between the representatives of the deceased daughter of the testator and the descendants of the testator's brothers and sisters. Under the well-established rules of construction the word "heirs" is held to refer to the living person or persons holding that relation at the time of the testator's death, in the absence of an intention to the contrary clearly evidenced in the will itself. The question presented, therefore, is, Does the will itself clearly reveal such contrary intention? To satisfactorily answer this inquiry it is desirable to consider the situation and circumstances as they are disclosed to us, in which the testator executed his will within a month of his death. At that time his infant daughter was not quite a year old. In case she survived him, she would be his sole heir, speaking with technical strictness, while she and her mother would be the only persons, in the event of his decease intestate, entitled to share in his estate under the statute of distributions. We think it may be assumed that he knew this. His other family relatives then living were his mother, brothers and sisters, and nephews and nieces. There is nothing in the will or otherwise to suggest that he then expected to have other children. His wife was a young woman, at the time not much more than half his age, and the will itself contains evidence that he deemed her marrying again after his death as not an improbable event. It is reasonably clear that the early death of his daughter was in his mind as a possibility, if not as a probability, the evidence of which is the giving upon her decease a pecuniary legacy to his mother. The testator was 58 years of age when his will was executed. Exhibit B, Table of Descendants of William Larned. Table I, attached to the bill of complaint, shows that he was the third child born of his mother. It is reasonable to infer that when the will was made she was upwards of 80 years old, with of necessity an expectation of life of very few years. The amount of property disposed of by the will is not definitely shown, but it seems fairly apparent that it was not a very large estate even for that period. Katharine Celia (Larned) Greene in her will attempts to dispose of the trust fund as a fund separate and apart from her estate derived from other sources. She gives from it in the form of specific legacies in all \$63,000, and in addition there is a residuary clause in favor of a person to whom she had given from this fund a pecuniary legacy as large as that given to any other person. This affords some indication of its present condition, and probably it is considerably larger now than originally, inasmuch as, apart from any possible increase by judicious management by the terms of the will the surplus income in excess of the provision for the sup-

port of his daughter before her marriage and the payment of a few small annuities, after the bequest to the Diocesan Convention was paid, was added to the principal until the daughter's marriage in 1872.

In these circumstances the testator made his will. He first gave to his wife \$12,000 "in lieu of dower or other interest in my real or personal estate." Then he created a trust estate, and provided that part of the income thereof should be used for the benefit of his daughter, and all of it after marriage during her life, and, in the event that she leave children surviving her, provided for their support from the income until the youngest of them attained the age of 21 years, and then terminated the trust by giving the entire trust fund to such children. But if the daughter died without leaving any living child, which has happened, he provided for the payment annually to his wife of \$500 "if she has remained unmarried," and "so long as she remains unmarried," provided also for the payment of 17 pecuniary legacies, amounting in all to \$4,600, and for a few small annuities, and then directed that:

"All the rest and residue of the said trust funds, remaining after the payment of said sums, and reserving a sufficiency for the payment of the annuities provided for in this my will, they shall distribute to and among my heirs at law, in the proportions in which they would severally be entitled under the statutes for the distribution of intestate estates."

In view of these provisions, did the testator intend, in the event that his daughter should die childless, that his widow, if she survived her, whether she remained unmarried or not, should receive the entire residue of the trust estate, or do these provisions indicate a clear intent to the contrary? In *Welch v. Howard*, 227 Mass. 242, 116 N. E. 492, a testator gave all the rest and residue of his property and estate to trustees, with directions to dispose of the net income "so long as my said wife shall live and remain my widow, or either of my four children hereinafter named shall live, as follows," namely, after paying stated amounts annually to a brother and a nephew during their respective lives to divide "the residue of said net income" among his said wife and his four children, "so long as my said wife shall live and remain my widow and all my said children shall live, equally, share and share alike." There are further provisions: First, that when his wife shall die or be married, her share of said income is to be divided among his said children, or the survivors of them, letting in the issue of a deceased child by right of representation; and, second, that if a child die leaving no issue surviving, his share of the income is to be paid "to my said wife, if living and unmarried" and the survivors of said children and the issue of a deceased child by representation, and "upon the decease or marriage of my said wife and the decease of the last survivor of my said

four children, my trustees shall divide and distribute all said trust property and estate among my heirs at law, according to the statutes which shall then be in force in said commonwealth, regulating the distribution of intestate estates," adding a clause saving the rights of said brother and nephew as annuitants. The court stated the question presented to be whether the heirs were to be taken as of the death of the testator in 1871, or as of the death of the survivor of the life tenants in 1918. A second question was in the event that heirs at the death of the testator were meant, whether they were to be ascertained by the statutes then in force or by the statutes in force in 1918. The court held that the words "statutes which shall then be in force" clearly indicated that the heirs were to be determined as of the death of the surviving life tenant, but added:

"If such interpretation be not required by the construction of the precise language of this will * * * ample and plain reason therefor arises from the fact that the expressed intent, that the interest of the widow in the estate should determine absolutely on remarriage, would be defeated if the remainder was construed to be vested in the heirs at law at the death of the testator, or in the heirs at law of the testator at the death of the testator as determined by the statute in force in 1918. * * * The provision relating to the disposition of the income upon the death or remarriage of the wife discloses a clear intention to exclude the widow from any interest in principal or income on the happening of either event."

In the present case the provision for the annual payment to his wife of \$500 from the rest and residue of the trust estate which was to come into effect after the daughter's death only if the wife had remained unmarried, and was to at once cease on her remarriage, when considered in connection with the original bequest to her as being "in lieu of her dower or other interest in my real or personal estate" evinces, we think, a clear intention that she is not to share in the distribution of "the rest and residue of the trust funds remaining after the payment of the" pecuniary legacies already mentioned, "and reserving a sufficiency for the payment of the annuities" of which hers was one if she did not remarry. And if the testator intended to exclude his wife as a distributee of his trust estate, it seems obvious that he did not mean, in directing the distribution to and among his heirs at law, that the law was to take its course, as is stated in a number of the cases cited in the brief of the executors of the will of Katharine Cella (Larned) Greene.

[2] With this situation in mind, namely, the death of his daughter without leaving a living child, and his wife excluded from sharing in the distribution of the residue of the trust estate, it seems reasonably plain that the testator, in providing as to this residue that the trustees "distribute" it "to and among my heirs at law in the proportions in which they would severally be entitled," is

directing his mind to the death of his daughter at some time in the future, near or remote as the case might be, and to such distribution among those who would then be his heirs, his mother, if the occasion be not far away, his brothers and sisters, and the descendants of those who may have died. Construing the will thus, the "heirs at law" are to be determined at the date of the death of the daughter.

The giving of the pecuniary legacies to some of the persons who would in all probability be distributees of the fund, if worthy of note, will perhaps be sufficiently explained if they are regarded simply as intended as personal gifts and tokens of personal regard.

It is not so easy to understand why he should direct the payment of \$2,000 "to some suitable person" in trust for the sole use and benefit of his sister Sophia L. Clifford when she would also be a distributee of the rest of the trust fund. It is at least conceivable that there was a reason satisfactory to the testator for the provision without its being inconsistent in any way with making her a beneficiary in her own right otherwise. The successive distributions of portions of the fund on the termination of the annuities would not necessitate the ascertainment of a new group of heirs, as the heirs would once be determined as of the date of the death of the daughter. Their right to a share of the fund retained to support the annuities would vest in ownership on the daughter's death, but not in possession until the annuities were at an end.

This case is readily distinguished from *Kenyon*, Petitioner, 17 R. I. 149, 20 Atl. 294, as the court in that case largely rests its decision on the use of the words "I give and bequeath" in the *Kenyon* will as importing "a benefit in point of right, to take effect upon the decease of the testator and the proof of his will." Those words are lacking in the present case. Comment on the several Rhode Island cases in which has been found clear evidence of an intent to give the word "heirs" a meaning different from its strict technical sense does not seem necessary, as they have been considered somewhat recently in the case of *Taber v. Talcott*, 40 R. I. 388, 101 Atl. 2.

The statute for the distribution of the personal estate of intestates was the same in 1846 as in 1917. After a specified part thereof is given to the widow, the statute provides that:

"The residue shall be distributed amongst the heirs of the intestate, in the same manner real estates descend and pass."

In other words, the same persons, who as heirs take real estate, take "the residue" of the personal estate as *persona designata*. *De Beauvoir v. De Beauvoir*, 8 H. L. Cas. 524, 550. In deciding that the widow is excluded from sharing in the distribution of the residue of the trust fund, we find that

the testator, in using the words "heirs at law" in like manner, intended to designate the persons who at the death of his daughter childless would in strictness then be his heirs.

[3] As to the 17 pecuniary legacies, all the legatees survived the testator, but died in the lifetime of his daughter. It appears that some of them died more than 50 years ago, that many of them died testate, and that, if these legacies were held to be transmissible, it would be difficult, if not impossible, at the present time to ascertain into how many parts they would be split up, and in whom they are now vested. While such a result would be full of difficulty, it would, however, be unavoidable, if under the will the intention to impart transmissibility to them is clearly apparent. We are of the opinion, however, that each legacy was given for the benefit solely of the person named. They are payable only in case his daughter died without leaving children surviving her, and then the trustees are directed to "immediately thereafter pay the following sums to the persons hereafter named." Thirteen of the legacies are sufficiently small as to suggest that the gift in each case was simply a personal remembrance, some of those 13 are so small as to make this positively clear, for example, the five gifts of \$50 each; and, inasmuch as they are all grouped together, it is not unreasonable to infer that all the gifts thus grouped should be regarded as purely personal. Some of them were made to brothers and sisters, who might be regarded as the heads of different branches of the Larned family, and at the same time gifts were specifically made to descendants of such heads of families. There are no words of limitation annexed to any of these legacies, as might be expected, if the testator intended them to be transmissible. We think the only intention clearly apparent is the intention to benefit personally each named legatee, should he or she survive to take the gift. And if it was necessary in the case of each legatee for him to survive the life tenant in order for the gift to him to be effective, then, as his own existence at some particular future time was to determine whether any interest was to take effect in him, the interest was contingent and non-transmissible. *Brown v. Williams*, 5 R. I. 309, 316; *Tingley v. Harris*, 20 R. I. 517, 519, 40 Atl. 346; *In re Watson's Trusts*, L. R. 10 Eq. 36; *Strode v. McCormick*, 158 Ill. 142, 41 N. E. 1091. While, therefore, these 17 legacies have not in strictness "lapsed," nevertheless, as already indicated, in reply to question 1 we decide that they were non-transmissible and have failed because of the decease of the legatees before the death of the life tenant. The power to dispose by will of "contingent, executory or other future interests," given by section 2 of chapter 254 of the General Laws of 1909, first appeared

in our statutes in 1896, and, of course, this statute is not applicable in the present case.

[4] Replying to question 2, we are of opinion that the bequest in trust for the use and benefit of Sophia L. Clifford and the 17 pecuniary legacies did not fall into the residue of the estate, that they are not disposed of by the will, but devolve as intestate estate of Samuel Larned. *Peckham v. Newton*, 15 R. I. 321, 324, 4 Atl. 761, is cited in support of the claim that they have fallen into the residue, when the court says:

"It is, however, well settled that lapsed and void specific or pecuniary legacies fall into the residue, in the absence of any indication to the contrary."

The residuary clause of the will before us is:

"And all the rest and residue of said trust funds, remaining after the payment of said sums, and reserving a sufficiency for the payment of the annuities provided for in this my will, they shall distribute to and among my heirs at law."

The "intention to the contrary" is found in the exclusion of the pecuniary legacies and the bequest in trust for Mrs. Clifford from the rest and residue which is to be distributed. In *Davis v. Davis*, 62 Ohio St. 411, 57 N. E. 317, 78 Am. St. Rep. 725, it appears that the testator directed the creation of a fund, from which he made some charitable bequests, and then provided that:

"The balance be divided between the children living at my death of the hereinafter named brothers and sisters of my late wife and myself, viz."

The charitable bequests were held to be void, and the question was as to what became of them.

It was held that the void legacies did not fall into the "balance" above mentioned; but passed as disposed-of property. The court says, on page 414 of 62 Ohio St., 57 N. E. 318, 78 Am. St. Rep. 725:

"The 'balance' that is given to the so-called residuary legatees is not the general residuum of all of the testator's estate, but only what remained of a particular fund derived from specified sources, after deducting therefrom the amount of the charitable legacies and certain other charges upon it. The gift of that balance necessarily excludes from the gift everything that the will provides shall be deducted from the fund in order to arrive at the balance."

On page 416 it says:

"In *King v. Woodhull*, 3 Edw. Ch. 79, 82, it laid down that 'to entitle a residuary legatee to the benefit of a lapsed or void bequest he must be a legatee of the residue generally, and not partially so; for, when it is manifest from the express words of the will that a gift of the residue is confined to the residue of a particular fund or description of property, or to some certain residuum, he will be restricted to what is thus particularly given, since the legatee cannot take more than is fairly within the scope of the gift.'"

See, also, *Power v. Hayne*, L. R. 8 Eq. 262; *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Kerr v. Dougherty*, 79 N. Y. 327, 347. In this case the next of kin of the testator at his death take the property devolving as intestate estate in accordance with the statute

of distributions then in force. *Voorhees v. Singer*, 73 N. J. Eq. 532, 534, 68 Atl. 217. See, also, section 7 of the act in relation to wills of real and personal estate in Public Laws of Rhode Island of 1844, which section remained in effect until 1896.

[5] We are of opinion that question 4 should be answered in the affirmative. Whether or not the power "to change investments from time to time as they may think necessary or expedient" has continued since the arrival of the time for distribution, it is not necessary to decide, inasmuch as the power to sell enough of the trust property to equalize its division is implied, when the trustee is directed to distribute it to and among different persons, and cannot make the division or distribution otherwise. *Ames v. Ames*, 15 R. I. 12, 22 Atl. 1117; *National Bank v. Smith*, 17 R. I. 244, 21 Atl. 959; *Pearce v. Rickard*, 18 R. I. 142, 26 Atl. 38, 19 L. R. A. 472, 49 Am. St. Rep. 755; *Smith v. Hall*, 20 R. I. 170, 37 Atl. 698.

A form of a decree in conformity with this opinion may be submitted for approval.

(41 R. I. 403)

SHEPARD et al. v. SPRINGFIELD FIRE & MARINE INS. CO. et al. (No. 419.)*
(Supreme Court of Rhode Island. July 1, 1918.)

1. INSURANCE — 574(5) — FIRE INSURANCE — AWARD—SETTING ASIDE.

Plaintiffs brought separate actions at law on three fire policies alleging, among other things, the invalidity of the award of appraisers. Thereafter they filed a bill in aid of such actions in the same court to set aside the award. Defendants severally pleaded the general issue in the three actions, but by agreement of counsel such plea was withdrawn, and special pleas of tender filed. Defendants paid into court the amount of the award together with interest and costs pursuant to Gen. Laws 1909, c. 288, § 6, providing that defendant in every action grounded upon express or implied contract shall have the right to make and plead a tender and leave to bring into court the money which he shall acknowledge to be due, and that plaintiff shall have a right to take the same in full or in part satisfaction of the demand made in such action, and section 7, providing that, if plaintiff shall receive the same in part satisfaction only, and shall proceed further in the same action, and it shall be determined that no more is due, plaintiff shall not recover costs. The payment was accompanied by said pleas, which amounted to a confession that plaintiffs were entitled to recover the amount paid into court and left open to further determination the question as to whether plaintiffs were entitled to recover any more. Plaintiffs received and retained the amount in part satisfaction. *Held*, that complainants were not bound by the award and precluded from seeking to have it set aside because before hearing or decision upon their actions at law, or their suit in equity, they withdrew and retained the amount paid into court.

2. INSURANCE — 574(7) — FIRE INSURANCE — AWARD—SETTING ASIDE—EVIDENCE.

In bill in aid of actions at law under fire policies to set aside award of appraisers, evidence *held* to warrant conclusion that award was unjust, inequitable, and grossly inadequate,

so that complainants were entitled to have it set aside.

3. ARBITRATION AND AWARD — 52—VALIDITY.

An award signed by only one of two appraisers appointed and by a third selected by them to settle matters of difference between the two was not valid on its face where it failed to show that any matters of difference had arisen between the appraisers.

Appeal from Superior Court, Providence and Bristol Counties; Chester W. Barrows, Judge.

Bill by William B. Shepard and another against the Springfield Fire & Marine Insurance Company and others. From final decree dismissing bill, complainants appeal. Reversed and remanded, with directions.

Wilson, Gardner & Churchill, of Providence, for appellants. Mumford, Huddy & Emerson, of Providence (E. Butler Moulton and Charles O. Mumford, both of Providence, of counsel), for appellees.

PARKHURST, C. J. This is an appeal from a final decree dismissing a bill in equity which was brought by William B. Shepard and Louis F. Bell in the superior court in Washington county against the Springfield Fire & Marine Insurance Company, of Springfield, Mass., the Northern Assurance Company, Limited, and the Phenix Assurance Company, Limited, both of London, England.

The bill was brought in aid of three certain actions at law which are being prosecuted against the same defendants severally by Shepard and Bell to recover the amount of a loss under certain fire insurance policies issued by the defendants. The object of this bill in equity is to set aside an award made by appraisers appointed under the policies to appraise the loss. The bill sets forth substantially that previous to November 15, 1916, William B. Shepard was the owner of and Louis F. Bell the mortgagee of a dwelling house, barn, and storehouse situated in Wickford, R. I., and insured in the above-mentioned companies in the following aggregate sums: \$11,000 on dwelling house; \$500 on barn; \$750 on storehouse. On November 15, 1916, a fire destroyed the barn and storehouse and partially destroyed the dwelling house.

Proofs of loss were duly submitted. The parties disagreed as to the amount of the loss, and the matter went to an appraisal. The companies appointed Michael J. Houllihan; the complainants appointed Vere W. Beck; these two selected Henry L. Evans as third appraiser or umpire. The two appraisers being unable to agree upon the amount of loss and damage to the dwelling house, Henry L. Evans, as umpire, and Michael J. Houllihan together signed an award. The entire controversy between the parties is in regard to the amount of loss suffered by the

* For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* For opinion on motion for leave to reargue, see 104 Atl. 635.

damage by fire to the dwelling house. Henry L. Evans and Michael J. Houlihan rendered an award, estimating the total loss at \$6,525, of which \$4,970 was estimated as the loss to the dwelling house. Vere W. Beck refused to sign the award.

The complainants charged that the dwelling house was damaged to the amount of \$9,000. This the defendant denied, and averred that the damage did not exceed \$4,970. Thereafter the complainants asked for a second appraisal on the ground that the pretended award by Houlihan and Evans was void on grounds set forth in the bill, and this demand was refused by the insurance companies. The complainants alleged, among other things, that the appraisers failed to take into consideration and failed to allow any amount for the loss occasioned to certain items of construction in the dwelling house, and that they were not impartial and disinterested.

The respondents admitted that the dwelling house was partially destroyed, that the loss was covered by the policies, that a second appraisal had been demanded and refused by them, but denied that the appraisers had either omitted any essential items in their appraisal, or that they were unfair or prejudiced in their action in making the award.

The three actions at law upon the three policies above referred to were brought in the superior court in Washington county, by writs dated March 21, 1917, and were duly entered on the return day, March 31, 1917, and therein allegations were made setting forth the plaintiffs' claims as to the invalidity of the award above mentioned. These suits were brought and entered within the time limited in the several policies for bringing suits at law. The bill in the case at bar in aid of these actions at law was filed in the same court April 4, 1917, and the joint and several answer of the respondents was filed in said court July 27, 1917. It appears that on or about this last date the defendants severally pleaded the general issue in the three actions at law, and that thereafter, in September, 1917, by agreement of counsel they withdrew these pleas of the general issue and filed certain special pleas of tender, more particularly set forth below. The facts with regard to the several pleas of tender and to the withdrawal by plaintiffs of sums of money paid into the law court by defendants in the actions at law are set forth by stipulation filed in this court as follows:

"Stipulation.

"In the above-entitled cause it is hereby stipulated that in addition to the facts set forth in the bill of complaint and in the answer of the respondents the following facts have been established since the filing of said bill of complaint:

"(1) On the 12th day of September, A. D. 1917, the respondents, each contributing its several proportion, paid into court under the

provisions of chapter 288, § 6, of the General Laws of Rhode Island 1909, the sum of, to wit, \$4,970, being the amount of the award referred to in said bill of complaint, together with interest and costs thereon to the date of payment into court, said payment being accompanied by a plea filed in behalf of each defendant in the several actions at law in aid of which the present bill in equity is brought, and which are referred to in said bill. Said pleas, except as to the names of the companies and the amounts stated, were in the following form:

"The ——— Company, comes and defends the wrong and injury when, etc., and as to all the supposed promises and undertakings in said declaration mentioned excepting the sum of \$——, parcel of the said several sums of money in said declaration mentioned, says that it did not undertake or promise in manner and form as the said plaintiffs have thereof complained against it, and of this it puts itself upon the country. "And as to the said sum of \$——, parcel of the said several sums of money in said declaration mentioned, the said defendant says that the said plaintiffs ought not further to have or maintain their aforesaid action against it to recover any more or greater damages than the said sum of \$—— because it says that it now is ready to pay the said plaintiffs the said sum of \$——, parcel of the said several sums of money in said declaration mentioned together with the plaintiff's lawful costs heretofore accrued, a total of \$——, and it now asks leave to bring the same into court, and now brings and pays the same into court, here ready to be paid to the said plaintiffs if they will accept the same, and this the defendant is ready to verify.

"Wherefore it prays judgment if the said plaintiffs ought further to have or maintain their said action against it to recover any more or greater damages than the said sum of \$——, parcel of the several sums of money in said declaration mentioned. By Its Attorneys."

"(2) On the 17th day of September, A. D. 1917, the complainants (plaintiffs in said actions at law) took and received said sum so paid into the registry of the court by the respondents (defendants in said actions at law), and said complainants gave, and the clerk of said court received, a receipt therefor in the following form: 'Received of W. Herbert Caswell, clerk of the superior court for Washington county, the amount of one thousand one hundred and eighty-nine and $\frac{58}{100}$ (\$1,189.58) dollars, being the amount paid into the registry of the said court by the Springfield Insurance Company in the case entitled William B. Shepard et al v. Springfield Insurance Company, under its plea of tender. Said amount is taken and received by us in part satisfaction only of the demand made by us in the above-entitled action, and without waiving any rights or remedies to recover the full amount due and owing us as alleged in the declaration.'

"(3) The complainants have not repaid or restored or offered to repay or restore to the respondents or to any of them the sum so received by the complainants or any part thereof, but have retained and still retain the same.

"(4) That on the 17th day of September, A. D. 1917, the complainants filed in the above actions at law pending in the superior court for Washington county, R. I., a replication in each of said cases which, except as to the names of the companies and the amounts, are as follows:

"Now come the plaintiffs, and for replication to the defendant's plea of tender filed in the above-entitled action say that they accepted the sum of two thousand six hundred and nineteen and $\frac{93}{100}$ (\$2,619.93) dollars paid into the registry of the court by the defendant in part satisfaction of the plaintiff's claim against said defendant, but say that at the time of the making of said tender in said plea alleged there

was, and still is, a larger sum than two thousand six hundred and nineteen and $\frac{93}{100}$ (\$2,619.93) dollars due and owing to the defendant as set forth in the plaintiffs' declaration against the defendant; and said plaintiffs further say that said sum of two thousand six hundred and nineteen and $\frac{93}{100}$ (\$2,619.93) dollars was not tendered to them before the commencement of this action, and of this they put themselves upon the country. By Their Attorneys.'

"(5) And it is hereby further stipulated that the court may consider the above facts and their bearing upon the liability of the respondents herein and the rights of the parties hereto in the same manner and with the same effect as though said facts had been set up by way of plea and supplemental bill filed and said pleas set down for hearing."

This cause came on to be heard before Mr. Justice Barrows upon bill, answer, replication, proofs, and the aforesaid stipulation. Issues of fact were framed and agreed upon by the parties, and the last or twelfth issue was abandoned by the complainants during the hearing.

The following constitute the issues of fact submitted to the trial court:

(1) Was the frame dwelling house described in the fifth paragraph of the bill of complaint damaged to the extent of \$9,000?

(2) Did the damage to the frame dwelling house exceed the sum of \$4,970?

(3) Did the defendants or any of them refuse to furnish the plaintiff, Shepard, with a copy of the award described in the bill of complaint?

(4) Were Appraiser Houlihan and Umpire Evans disinterested, and did they act with impartiality in making their appraisal?

(5) Did Appraiser Houlihan and Umpire Evans refuse to take into consideration certain items of damage to the frame dwelling house in making their appraisal of the loss sustained and in making their award?

(6) Did Appraiser Houlihan and Umpire Evans refuse to take into consideration loss and damage to that certain portion of the construction of the frame dwelling house known as double sheathing in making their appraisal and award?

(7) Did Appraiser Houlihan and Umpire Evans refuse to make any allowance for the loss arising from the damage to that portion of the construction of the dwelling house as set forth in issue 6 in making their appraisal and award?

(8) Did Appraiser Houlihan and Umpire Evans refuse to take into consideration in estimating the sound value of the dwelling house betterments which had been made to the dwelling house since the purchase thereof by the plaintiff Shepard?

(9) Was the amount of \$4,970 allowed by Appraiser Houlihan and Umpire Evans known by them to be insufficient to pay the loss sustained by the plaintiff from the damage to the dwelling house?

(10) Was the amount of \$4,970 fixed by the umpire, Henry L. Evans, and Appraiser Michael J. Houlihan arrived at in the exercise

of their honest and deliberate judgment and without prejudice or partiality?

(11) Did Appraiser Houlihan and Umpire Evans consider the cause and origin of the fire in reaching the amount of damage to the frame dwelling house?

A large amount of testimony was submitted by the complainants in support of these issues of fact. At the close of the proof offered by the complainants the respondents, having offered no testimony, except the award itself, which appears on file as their Exhibit A, moved to dismiss the bill of complaint upon the following grounds:

(1) That the facts established by the stipulation aforesaid show an election on the part of the insured to accept the award.

(2) That the proof offered by the complainants was not such as to warrant a decision in their favor upon any of the material issues of fact.

The motion to dismiss was granted; the trial court adopting as the reasons for so doing both of the grounds urged by the respondents. The present proceeding is the complainants' appeal from the decree dismissing the bill of complaint.

[1] The questions raised are two:

(1) Are the complainants bound by the award and precluded from seeking to have it set aside by reason of the fact that before hearing or decision upon their actions at law, or their suit in equity, they withdrew and have retained the amounts paid into court?

(2) Are the complainants entitled to have the award set aside upon the proof offered by them?

Upon careful consideration of both questions this court is of the opinion that the trial court erred in its determination of each of them.

As to the first question, it is to be noted that the pleas of tender in the three law cases were filed (after withdrawal of pleas or the general issue which they had at first filed) as special pleas to declarations which expressly allege the invalidity of the award upon several grounds substantially as set forth in the bill in equity filed and prosecuted in aid of the actions at law. Since this court had previously determined that under our practice, which has always preserved the distinction between actions at law and proceedings in equity, it was not possible to impeach an award under an insurance policy in an action at law on the policy (*Barly v. Providence & Washington Ins. Co.*, 31 R. I. 225, 76 Atl. 753, 140 Am. St. Rep. 750), and since this court had also determined that a bill in equity in aid of an action at law, filed after the action at law had been instituted on an insurance policy, is a proper proceeding for the purpose of setting aside an award under an insurance policy so as to enable the insured to recover in excess of the award (*Hirsch v. Home Ins. Co.*, 38 R. I. 189, 94 Atl. 722), the

procedure in the case at bar up to this point is in accordance with our decisions.

The pleas of tender in the three actions at law above referred to were filed under and pursuant to Gen. Laws R. I. c. 288, §§ 6, 7, which read as follows:

"Sec. 6. The defendant in every action grounded on an express or implied contract * * * that may be pending before any court shall have the right to make and plead a tender, or may have leave to bring into court the money which he shall acknowledge to be due on such contract, * * * together with the plaintiff's lawful costs up to the time of the tender made or pleaded, or the bringing of the money into court; and the plaintiff shall have a right to take the same in full or in part satisfaction of the demand made in such action.

"Sec. 7. If the plaintiff in either of the above cases shall receive the same in part satisfaction only and shall proceed further in the same action, and the court or jury who shall finally assess the damages in such case shall determine that no more was due on the demand made in such action than was tendered or brought into court, as aforesaid, at the time the same was tendered or brought in, the plaintiff shall not recover costs, but shall be obliged to pay the costs accruing after such tender or after the money was brought into court as aforesaid, as the case may be."

It may be noted, in passing, that these pleas of tender do not expressly claim to be made under and for the purpose of carrying out the award, since the award is not mentioned in them and the several sums brought into court do not together aggregate the amount of the award. Apparently, however, this point is waived by the terms of the stipulation, and the pleas are to be treated as if they expressly referred to the award. The defendants, with full knowledge of all these claims on the part of the plaintiffs in regard to the invalidity of the award, with notice given by allegations of invalidity both in the declarations at law and in the bill in equity, having seen fit to bring into court the amount of the award and to admit by their pleas that they are liable at least to that amount, by the very terms of their special pleas raise only the issue which is tendered in the final clause thereof. "Wherefore it prays judgment if the said plaintiffs ought further to have or maintain their said action against it to recover any more or greater damages than the said sum of \$——, parcel of the several sums of money in said declaration mentioned."

These pleas amount to a confession that the plaintiffs are entitled to recover the amount paid into court, and by their very terms leave open to further determination the question whether or not they are entitled to recover any more. The terms of section 6 and section 7 plainly authorize the plaintiffs to take what is paid into court in part satisfaction and to proceed further to determine whether or not they are entitled to recover more. We are of the opinion that the terms of the statute are quite applicable to the cases here under discussion and are too plain for argument, and that the contention of the defendants that the plaintiffs' actions at law are lost by the withdrawal of the money in part

satisfaction when in fact the plaintiffs have done only what the statute plainly authorized them to do is entirely without support. No cases are cited on either brief which have any application in support of this contention or any application to the construction and effect of this statute; we assume that, if there had been any such cases, counsel would have found them and submitted them to us.

Counsel for defendants argue that because there was an award, and because in the law suits it was impossible for the award to be set aside, the plaintiffs could only recover at law the amount of the award, and that the acceptance of the amounts paid into court was an acceptance of the award and conclusive of the rights of the plaintiffs to recover anything more. In this argument counsel ignore the very purpose of the whole procedure, which includes this bill in equity as an auxiliary proceeding to set aside the award as a necessary preliminary to further proceedings at law. It cannot be successfully argued that plaintiffs have accepted the award in view of the whole procedure which assails it and in view of the plain terms of the statute above quoted. Such a conclusion would nullify the statute.

[2] We come now to the second question, viz: Are the complainants entitled to have the award set aside upon the proof offered by them?

The only testimony offered on behalf of the respondents is the paper headed "Agreement for Submission to Appraisers," which we find on file marked "Respts'. Ex. A." In that agreement, dated November 17, 1916, which seems to be in the common printed form used by insurance companies and to be in substantial accord with the terms of the policies, it is agreed:

"That Vere W. Beck for assured and Michael J. Houlihan for the companies shall appraise and estimate the loss upon the property damaged and destroyed by the fire of November 15, 1916, as specified below: Provided, that in case of disagreement the said appraisers shall select a third, who shall act with them in matters of difference only. The award of said appraisers, or any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement.

"It is expressly understood that this agreement and appraisal is for the purpose of ascertaining and fixing the amount of sound value and loss and damage only to the property hereinafter described, and shall not determine, waive, or invalidate any other right or rights of either party to this agreement.

"The property on which the sound value and the loss or damage is to be determined is as follows, to wit: Dwelling, \$11,000 on — story frame building and additions while occupied only as a private dwelling, including plate and ornamental glass in doors and windows, decorations on walls and ceilings, chandeliers, electric and gas fixtures and fittings, piping and plumbing work and fixtures, apparatus and fixtures for heating and cooking," etc. (This appears to be in the same terms as the description of property insured in the policies).

Then follows this concluding paragraph:

"It is further expressly understood and agreed that in determining the sound value and the loss or damage upon the property hereinbefore

mentioned the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire; and in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction shall be made therefor."

The agreement was executed by W. B. Shepard and the agents of the three insurance companies November 17, 1916. On the back of the same sheet appears the engagement of the two appraisers Beck and Houlihan under oath:

"That we will act with strict impartiality in making an appraisal and estimate of the sound value and the loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just, and conscientious award," etc.

Following that is the "Selection of Third Appraiser," wherein the said Beck and Houlihan select and appoint Henry L. Evans "to act as the third appraiser to settle matters of difference that exist between us," etc.; then the "Qualification of Third Appraiser" under oath, wherein said Evans accepts the appointment as third appraiser, and swears that he "will act with strict impartiality in all matters of difference only," etc. Then follows the "Award of Appraisers," which reads as follows:

"To the Parties in Interest: We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment and have determined the sound value and the loss and damage to be as follows:

	Sound Value.	Loss.
1st Item. Main house and ell..	\$13,000 00	\$4,970 00
2d Item. Barn, etc.	1,373 00	824 00
3d Item. Garage	870 00	731 00

Total sound value and loss \$15,243 00 \$6,525 00
 "Witness our hands this 2d day of Dec., 1916.

"[Signed] Henry L. Evans, Umpire.
 "Michael J. Houlihan,
 "Appraisers."

We have been thus particular in reciting the terms of this submission and award because the respondents appear to claim that the award is valid upon its face and is entitled to the presumption that it is correct, and that it is not to be set aside except for very grave reasons and upon very strong testimony, and that respondent therefore need offer no testimony except the award itself.

[3] In our opinion the award is not valid upon its face. It is signed only by one appraiser and by the umpire. It does not disclose that any "matters of difference" had arisen between Beck and Houlihan which Evans the umpire was called upon "to settle." For all that appears upon the face of the award, Beck did not act at all as an appraiser with Houlihan. He might have been absent or dead or ill and unable or unwilling to act. So far as the face of the award shows, it is the act of Houlihan and Evans acting without Beck, and not at all in accordance with the duties of their ap-

pointment. It is only when we examine the testimony of Mr. Beck in this cause that we find that Beck and Houlihan did examine the property together and did make their figures regarding the loss and damage, and that they were unable to agree, and that Evans, acting as umpire did finally agree with Houlihan's figures, and thereafter signed the award with him, Beck refusing to sign because he deemed the award grossly inadequate and because certain items of loss were entirely omitted. Since, therefore, we find that the award is not valid upon its face because it does not show that the appraisers and the umpire acted strictly in accordance with their duties under and in the manner provided by the submission, and since we can only determine just what was done by the appraisers and the umpire from the testimony, we can give very little weight to the award as testimony, particularly in view of the fact that the award simply fixes certain total sums as the loss, but gives us no details or methods by which those sums were determined by them, does not state what items of loss were allowed to make up the sum of \$4,970, and furnishes no means of comparison with the testimony offered on the part of the complainants. The court is in the situation of having before it the testimony adduced by the complainants with practically no defense offered except the award itself, which amounts, as we have shown, to a mere statement that the amounts claimed by the complainants are greater than they should be.

After a careful examination of all the testimony offered by the complainants, we find that there is ample evidence to support several of the issues which have been heretofore set forth. Complainants examined Mr. Beck at length as to the details of the appraisal, and his testimony, given in great detail and with apparent frankness and sincerity, convinces us that the award of \$4,970 as the loss upon the dwelling house (being the only amount disputed) was grossly inadequate. He testified that the cost of replacing the dwelling house in as good condition as it was at the time of the fire would be about \$9,400, and was examined in great detail as to items of loss which went to make up that amount. He was a builder of long experience and undoubted and undisputed qualifications, and we do not find that his testimony was shaken or materially weakened upon a long and searching cross-examination. He also testified, in partial explanation of the discrepancy between his figures and those of the other appraisers, that they refused to make any allowance for certain important items of loss which undoubtedly occurred. It appears that there was upon the roof of the main portion of the dwelling house a balustrade extending all the way around the roof just back of or upon the jet, that the roof was badly burned, and that

about 125 feet of this balustrade was destroyed or so badly burned as to require replacement, and that the cost of replacement would be \$375, or \$3 per foot. Mr. Beck testified to all this, and also that the cost of replacing the portion of the jet destroyed would be \$2 per foot. Upon conference with Houlihan and Evans Mr. Beck found that they had allowed a loss of \$2 per foot on the jet and nothing in addition for the balustrade, Mr. Houlihan in effect saying, when questioned by Mr. Beck why no allowance was made for the balustrade, that he had allowed for the balustrade in allowing for the jet. It is obvious that the balustrade was no part of the jet; it was an architectural feature of ornament and possible utility, frequently placed upon large houses with flat roofs; and it is evident from the testimony that the claim that the cost of its restoration was included in the figures allowed for the restoration of the jet was a mere evasion, and that its omission from the items of loss was an arbitrary omission.

It also appears that the main body of the house was constructed with double sheathing i. e., that it had a sheathing of ordinary boards nailed onto the upright joists or framework of the house; that over this was paper, and over the paper a boarding consisting of tongued and grooved white pine which was painted, and again over this were clapboards for the outside finish. A very substantial portion of the outside walls of the house so constructed was destroyed or so damaged by the fire as to require reconstruction and replacement with new material, and it appeared from the testimony of Mr. Beck, and of the other contractors and builders who corroborated him, that the cost of replacing this double sheathing in as good condition as before the fire would be from \$400 to \$600, that the tongued and grooved material was of white pine, which was then very scarce in the market and very expensive, and that they did not allow for that, but for a less expensive pine, which could be easily procured and would answer the purpose. It further appears that Houlihan (with whom Evans appears to have agreed in all respects), when this item of double sheathing was called to his attention and he was asked why he made no allowance for it, said in substance, "that they were not building houses that way now," and gave no other reason for refusing to allow the item. It further appears from the testimony of Mr. Beck and the other corroborating witnesses that this method of construction, although not now or perhaps ever commonly used in building dwelling houses, was of substantial value to the owner, in that it made the outer walls tighter and stiffer, kept out the cold, and made the house more stable. It also appeared that if, in the restoration of the house, double sheathing was not used, it would be necessary to incur expense for additional "furring" upon

which to nail such single sheathing as might be used in order to bring the surface of the single sheathing out to the general line of the surface of the outer walls remaining, and not in need of reconstruction, so that the clapboards to be nailed upon the sheathing would come into alignment with the clapboards remaining upon the walls not destroyed; but it nowhere appears that any allowance was made for the expense of such additional "furring." Upon this point we think that the refusal to allow anything for the loss of double sheathing was an arbitrary refusal; this method of construction was proper, even if unusual; it added value to the house and was of substantial value to the owner; and the reason given "that they were not building houses that way now" furnished no basis for the refusal. Such a reason might be urged as to any method of construction used by owners of houses of large size, seeking stability and protection from the bitter winds of winter; many people during the past winter, with its bitter cold and the difficulty of obtaining adequate fuel, would have been thankful if their houses had been constructed with double sheathing so as to enable them to conserve the little heat they had and keep out the cold. As well might the appraisers say, in case of injury to hardwood floors, or to polished mahogany or black walnut wainscoting, hard-finished stucco walls and ceilings, in somewhat old-fashioned residences, that they would not allow for their loss and the cost of replacement because nowadays it is the custom to build houses with cheaper floors, or with white wood wainscoting painted, or with rough plaster walls and ceilings covered with cheap paper.

Besides the above-mentioned important items of exterior construction, the evidence shows that the plumbing work and heating apparatus within the house, which are expressly enumerated among the fixtures covered by the terms of the submission as above quoted, were very badly damaged. It appears that the fire broke out early in the morning, and that from about 6:30 to 11 a. m. two streams of salt water from an adjacent cove were being pumped into the house to put out the fire, and that the house was flooded with salt water from attic to cellar, that a water tank on the third floor, made of plank and lined with copper and worth about \$100, was totally destroyed, and that other serious damage was done to the plumbing system, and to the heating system, which was composed of a steam generator and of direct pipes to steam radiators, and also of indirect heating through a brick chamber and registers. The witness Beck estimated the damage done to the heating and plumbing apparatus as upwards of \$500. In this he was corroborated by the witness Hainsworth, an expert of over 30 years' experience in plumbing and heating apparatus, living in Wickford, R. I., who had from time to time for 15 years

before the fire done work on that apparatus in that house, and was thoroughly familiar therewith, and with its condition just prior to the fire. He testified that the apparatus was in good condition and good repair at that time. He examined it in detail just after the fire, and testified that it would cost, in his estimation, based upon what damage he actually saw, \$570 to put the plumbing and heating apparatus in as good condition as it was before the fire, and that it would cost in addition \$125 to \$150 to take down the furnace in order to be sure that it was put in proper condition before it would be safe to light a fire therein. When Mr. Beck consulted with Messrs. Houlihan and Evans just before they signed the award, he found that they had allowed nothing for plumbing damage, and only \$35 for heating damage, and after an extended argument with them, calling their attention to the matters above set forth, they finally agreed to allow \$100 for the loss of the tank, and \$75 for some other items apparently relating to the heating, but not clearly shown in the testimony. In the opinion of this court, here again was evidence of an arbitrary refusal to allow anything for substantial items of damage specifically brought to the attention of Messrs. Houlihan and Evans.

It is needless to prolong further the examination of the evidence in regard to the action of these appraisers. The witness Beck is fully corroborated by experts of apparent fairness and long experience as to his estimates in the matters specifically above referred to, as well as in his general estimate of the entire amount of loss and damage to the house. These corroborating witnesses made their estimates independently of Mr. Beck, and without conference with him; he did not know their figures, nor they his, till after the respective estimates were completed.

The evidence convinces us that many specific items of loss and damage above set forth which were of substantial pecuniary value to the assured and which were proper subjects of appraisal and award under the submission were specifically called to the attention of said appraisers, and were so obvious that said appraisers, if they properly appreciated their duty, should themselves have taken notice of them, and that said appraisers willfully refused to allow anything in several important instances; and these instances, coupled with the well-supported evidence as to gross inadequacy of the award in its total amount, lead us to the conclusion that the award as a whole was unjust, inequitable, and grossly inadequate.

It is our opinion that there is ample evidence in the record before us to warrant an affirmative answer to issues numbered 1, 2,

5, 6, 7, 9; that issue 3, in our view of the case, is immaterial; that as to issue 4 there is no evidence that they were interested in the result, but there is evidence that they did not act impartially; that as to issue 8 there is no evidence of sufficient clearness to warrant a finding; that issue 10 should be answered in the negative; that as to issue 11 there is no evidence sufficient to warrant a finding.

We think the case in its general aspects is within the scope of the decision in *Low Estate Co. v. Lederer Realty Co.*, 35 R. I. 352, 361, 86 Atl. 881, Ann. Cas. 1916A, 341, although some of the more important facts of that case which warranted the court in setting aside the award were different in character. The award in that case, however, was grossly inadequate by reason of the fact that the appraisers misconceived their duty. In the case at bar the complainants have cited certain cases in support of their contentions, which in their general principles are in point. *Buy's v. Eberhardt*, 3 Mich. 524; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405; *Chicago, etc., Co. v. Stewart (C. C.)* 19 Fed. 5, 8; *Adams v. N. Y. Bowery Fire Ins. Co.*, 85 Iowa, 6, 51 N. W. 1149; *Schmidt Bros. v. Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767; *Phoenix Ins. Co. v. Moore (Tex. Civ. App.)* 46 S. W. 1131; *American Fire Ins. Co. v. Bell*, 33 Tex. Civ. App. 11, 75 S. W. 819; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252; *Hong Sling v. Nat. Assur. Co.*, 7 Utah, 441, 27 Pac. 171; *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679; *Ross v. German Alliance Ins. Co.*, 86 Kan. 145, 119 Pac. 366, Ann. Cas. 1913B, 1045.

We find few cases cited upon defendants' brief and none which affect this case.

We are of the opinion that the trial judge failed to give due consideration to the weight of the testimony in this case, which was uncontradicted, and that he was in error upon both points, upon which he granted the motion to dismiss, and was in error in entering the decree appealed from dismissing the bill.

We do not intend by this opinion to be understood to have made any conclusive findings of fact as to any specific amounts of loss or damage above referred to. Such amounts will presumably be the subject of another inquiry before another tribunal. We have simply determined upon the uncontradicted testimony before us that the award is invalid for the reasons above set forth.

The appeal is allowed, the decree appealed from is reversed, and the cause is remanded to the superior court sitting in Washington county, with direction to enter its decree setting aside the award.

(11 Del. Ch. 423)

KINGSTON et al. v. HOME LIFE INS. CO. OF AMERICA et al.

(Supreme Court of Delaware. June 18, 1918.)

CORPORATIONS — 204—ACTION BY MINORITY STOCKHOLDERS—AVOIDANCE OF CONTRACT.

Where a contract between a private corporation and an insurance company whereby the corporation has a perpetual and exclusive option to purchase the stock of the insurance company operates prejudicially to the minority stockholders of the insurance company, they may bring a bill to have such contract terminated.

Appeal from Chancery Court, New Castle County.

Bill by Thomas Kingston and others against the Home Life Insurance Company of America and another. From a decree for respondents (101 Atl. 898), complainants appeal. Affirmed.

PENNEWILL, C. J., and BOYCE, CONRAD, and RICE, JJ., sitting.

Thomas Raeburn White, of Philadelphia, Pa., and Caleb S. Layton, of Wilmington, for appellants. John P. Connelly, of Philadelphia, Pa., and Charles F. Curley, of Wilmington, for appellees.

This was a bill by shareholders of the Home Life Insurance Company to annul contracts entered into by and between said company and the Home Protective Company. The statement of the case by the Chancellor, in 11 Del. Ch. —, 101 Atl. 898, is ample, and a restatement here is unnecessary.

PER CURIAM. After a careful consideration of this case the court are of the opinion that the decree of the Chancellor should be affirmed, but think it proper to say that while the arrangement under which the Protective Company advanced money to the Insurance Company may not have been illegal or unfair, and the stock option not invalid when entered into, yet if it now appears to work inequitably to the minority stockholders it should be terminated. The evidence, within the findings of the Chancellor, seems to disclose a situation with respect to the stock option which, if continued, might operate prejudicially to the minority stockholders of the Insurance Company; for it appears that the present value of the stock of the Insurance Company is very considerably in excess of the par value. If this be so, it would be the duty of the court to consider in a proper case whether it is sufficient to render the stock option at this time inequitable, and whether the Protective Company, after so long a lapse of time in which to exercise its option, and before the stock had increased so much in value, has any claim in equity for the continuance of the option.

The question suggested, viz. the termination of the option contract, was not before the Chancellor, and, perhaps, could not have been considered by him under the bill filed. But if minority stockholders of the Insurance Company are satisfied that said contract does

now operate prejudicially and inequitably to them, they may have the question determined by the court under a bill that fairly and clearly presents the question.

The decree of the Chancellor is affirmed.

(22 N. J. Law, 63)

BERRY v. O'NEILL et al.

(Supreme Court of New Jersey. June 19, 1918.)

(Syllabus by the Court.)

1. SUNDAY — 12—CONTRACT—VALIDITY.

The mere carrying on of negotiations on Sunday will not invalidate a contract completed on a secular day. The final consummation of the contract on Sunday is necessary to bring it within the prohibition of the Sunday statutes.

2. SUNDAY — 23—CONTRACT—EVIDENCE.

It is open to the trial judge, sitting without a jury, to determine that the plaintiff's contract of employment as an architect to make plans for a house and garage was not a Sunday contract, when the evidence tended to show that, though the parties on a Sunday discussed the probable cost of various kinds of houses and the architect's customary charges, yet the Sunday interview terminated to give the plaintiff a chance to "think it over," and the defendant an opportunity to purchase a lot on which to build and decide upon the character of house desired, and the parties later, on a week day, agreed upon the employment to make plans, not only for a house of a designated cost, but also for a garage.

Appeal from District Court of Atlantic City.

Action by Frank A. Berry against Robert J. O'Neill and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued February term, 1918, before SWAYZE, TRENCHARD, and MINTURN, JJ.

U. G. Styron, of Atlantic City, for appellants. Lee F. Washington, of Atlantic City, for appellee.

TRENCHARD, J. The plaintiff below brought this suit to recover for services rendered as architect in drawing plans and specifications and taking estimates from various contractors for a frame house and brick garage for the defendants. The trial judge, sitting without a jury, rendered judgment for the plaintiff, and the defendants appealed.

We are of the opinion that the judgment must be affirmed. At the trial it appeared that the services were rendered and that the claim therefor was unpaid. The defendants' sole contention on this appeal is that the evidence showed that the contract of employment, upon which the judgment rests, was made upon a Sunday, and was therefore void.

[1] In general, a contract made on Sunday is void. *Rosenblum v. Schachner*, 84 N. J. Law, 525, 87 Atl. 99, and cases there cited. But the mere carrying on of negotiations on Sunday will not invalidate a contract completed on a secular day. The final consum-

mation of a contract on Sunday is necessary to bring it within the prohibition of the Sunday statutes. *Burr v. Nivison*, 75 N. J. Eq. 241, 72 Atl. 72, 138 Am. St. Rep. 554, 20 Ann. Cas. 35.

[2] Tested by this rule, we think the contract of employment in the present case was not invalid. True, there was an interview on a Sunday between the parties at which the probable cost of various kinds of houses was discussed, and the plaintiff's customary charge for drawing plans and supervision was asked and stated. But the defendants had not yet acquired a lot upon which to build, nor decided upon the kind and cost of the house desired, and the Sunday interview terminated to give the plaintiff a chance to "think it over" and the defendants an opportunity to purchase a lot and decide upon the character of house required. Later the defendants acquired a lot, and determined to build, not only a house of a designated cost, but also a garage, and the interview at which the employment of the plaintiff to plan these was agreed upon was on a week day. Obviously, in this state of the proof, it cannot be said that the judgment in question rests upon a Sunday contract.

The judgment below will be affirmed, with costs.

SWANK v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. June 11, 1918.)

COMMERCIAL §8(6)—FEDERAL EMPLOYERS' LIABILITY ACT—ACTION FOR DEATH—PLAINTIFF—"PERSONAL REPRESENTATIVE."

Act March 27, 1917 (P. L. p. 531), supplemental of the Death Act, requiring action instituted under and by virtue thereof to be in the name of an administrator ad prosequendum, does not apply to action under federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8667-8669), declaring liability of carrier for death of employé to his personal representative, meaning his executor or general administrator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Representative.]

Action by Elizabeth Swank, administratrix, against the Pennsylvania Railroad Company. Heard on defendant's rule to show cause. Rule discharged.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Gaskill & Gaskill, of Camden, for the rule. James Mercer Davis, of Camden, opposed.

GUMMERE, C. J. This suit is brought by the plaintiff as the general administratrix of Herbert L. Swank, deceased. Mr. Swank, at the time of his death, was in the employ of the defendant company, and, according to the averment of the complaint, lost his life by accident while being employed by the defendant company in interstate commerce. The action is brought under the federal Employers' Liability Act. Upon being brought

into court the defendant moved at chambers to strike out the complaint and dismiss the action upon the ground that the suit was brought by the general administratrix of the decedent contrary to the provisions of chapter 180 of the laws passed by our Legislature, and approved by the Governor, in 1917. Pamph. Laws, p. 531. A rule to show cause why this application should not prevail was allowed, and the matter is before us for determination.

The statute appealed to by the defendant is a supplement of our "Death Act" (2 Comp. St. 1910, p. 1907, §§ 7-9), and provides that every action instituted under and by virtue of its provisions "shall be brought in the name of an administrator ad prosequendum." It is, of course, apparent that if this action was brought for the enforcement of a remedy given by our "Death Act" the procedure must be that provided by the statute and its supplements. The trouble with the defendant's case, however, is that the remedy sought to be enforced is not provided by our state statute, but is conferred by federal legislation; and in the enforcement of a remedy thus conferred the method of procedure provided by Congress must control. The language of the federal act is that the liability of the carrier in case of the death of the employé is "to his or her personal representative for the benefit of the surviving widow," etc.; and that language has been construed by the United States Supreme Court to mean the executor or general administrator. *American Railroad Co. v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879; *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *St. Louis & C. Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156.

The plaintiff, as general administratrix, being the only person who is entitled to maintain the present action, the rule to show cause will be discharged.

(91 N. J. Law, 713)

SAPER v. BAKER.

(Court of Errors and Appeals of New Jersey. July 2, 1918.)

1. TRIAL §295(10)—INSTRUCTIONS.

An excerpt from instruction, "I cannot recall any testimony in the case which shows that the deceased did anything which was careless or negligent, or contributed to the accident," was not erroneous, where in same instruction jury were told they could consider whether there was any contributory negligence.

2. MUNICIPAL CORPORATIONS §705(1)—COLLISION—LIGHTS.

A person in street with wheelbarrow need neither carry a light nor have one on wheelbarrow.

3. APPEAL AND ERROR §1066—HARMLESS ERROR—STATEMENTS TO JUROR.

Where court, on being asked by juror whether wheelbarrow was supposed to have a light, answered that a wheelbarrow was not obliged to

have a light, and, in addition, that man pushing it was not obliged to carry a light, the additional matter in the answer, although irrelevant, was harmless.

Appeal from Circuit Court, Passaic County.

Action by Fannie Saper, administratrix of Louis Saper, deceased, against John Baker. Judgment for plaintiff, and defendant appeals. Affirmed.

Kalisch & Kalisch, of Newark, for appellant. Ward & McGinnis, of Paterson, for appellee.

PER CURIAM. The defendant seeks to reverse a judgment of the Passaic circuit court in favor of the plaintiff. The action grew out of the death of Louis Saper, who in the early evening of November 1, 1916, was killed by an automobile driven by the daughter of defendant. The accident happened shortly before 6 o'clock on Jefferson street in the city of Passaic. The deceased, according to the testimony, was pushing a wheelbarrow along Jefferson street on the right-hand side in a westerly direction, and had not quite reached Hope avenue, which crossed Jefferson street. The automobile driven by the daughter of the defendant was going in the same direction and approached the deceased from behind, and without warning knocked him down and ran over him, inflicting fatal injuries. At the intersection of Jefferson street with Hope avenue was a lighted arc lamp, and there were stores on the corners, all lighted, although it was not completely dark at the time of the accident.

The defendant advances four grounds for reversal of judgment, viz.: (1) The court's refusal to nonsuit; (2) the court's refusal to direct a verdict; (3) a remark of the trial judge as to certain evidence he did not recall; (4) his answer to a request of one of the jurors as to whether the law required the deceased to have a light on his wheelbarrow.

1. The defendant was lawfully upon the highway at the time of the occurrence of the accident, and he was not required to carry a light himself or on the wheelbarrow which he was pushing. On the question of negligence a jury question was presented at the close of the plaintiff's case, and therefore the trial judge's refusal to nonsuit the plaintiff was correct.

2. At the close of the whole case the situation was not changed, and the trial judge likewise rightly refused to grant a motion for the direction of a verdict in favor of the defendant.

[1] 3. The defendant appellant states his third point as follows:

"Because the trial court erroneously and improperly charged the jury as follows: 'I cannot recall, myself, any testimony in the case which shows that the deceased did anything which was careless or negligent or contributed to the accident.'"

If this were all there was of the charge in that regard, we might be called upon to say whether or not it was erroneous, but, in point of fact, it was not all, but is an excerpt from the charge, severed from its context. What the trial judge said on this score was as follows:

"You may also consider, gentlemen, whether there was any contributory negligence on the part of the deceased. I cannot recall, myself, any testimony in the case which shows that the deceased did anything which was careless or negligent or contributed to the accident. Now if you find that the defendant was guilty of negligence then, of course, you come to the question of damages."

That is not all. The trial judge further charged as follows:

"So take the case gentlemen, and determine, first, was there negligence on the part of the defendant, acting through the driver of the car. If there was, and there was no contributory negligence, then you take up the question of damages."

There was no error in the charge as delivered upon the question of contributory negligence.

[2, 3] 4. The defendant-appellant states his fourth point as follows:

"Because the trial court, upon being asked by a juror, the following question, 'Whether a wheelbarrow is supposed to have a light on,' erroneously and improperly answered the question in the following manner: 'A wheelbarrow is not obliged by the law to have a light under the conditions here disclosed, and the man is not obliged to carry a light either.'"

This answer by the trial judge to the juror's question was not erroneous. It went further than the question in stating that the deceased was not obliged to carry a light. It was, however, correct as a proposition of law, although irrelevant in respect to the man himself. It was therefore harmless.

The judgment under review will be affirmed.

ALBRIGHT v. VAN VOORHIS et al. (No. 43/615.)

(Court of Chancery of New Jersey. June 12, 1918.)

1. WILLS §634(13)—CONSTRUCTION—VESTED REMAINDERS.

Under devise of homestead to wife for life, and at her death to children or their legal representatives, remainder vested in children at testator's death.

2. WILLS §634(15) — CONSTRUCTION — REMAINDERS.

Under a bequest of income from personalty to children, principal upon death of children to be divided among their legal representatives, legal representatives can only be determined when survivor dies.

3. WILLS §507—CONSTRUCTION—"HEIRS AT LAW."

Where testator gave child income of property, the principal at his death to go to child's heirs at law, if property at child's death was realty, or realty not notionally converted, "heirs at law" meant technical heirs (2 Comp. St. 1910, p. 1918); but if personalty, or realty notionally converted, heirs at law meant next of

kin, in the sense of distributees under statute of distributions (2 Gen. St. 1895, p. 2390).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs at Law.]

4. DESCENT AND DISTRIBUTION **⚡35—HEIRS—HALF BLOOD.**

Under Statute of Distributions (2 Gen. St. 1895, p. 2390), mother and half sister take equally with sisters.

5. CONVERSION **⚡15(1)—DIRECTIONS OF WILL—“SHALL” BE SOLD.**

Direction in will that land “shall be sold,” proceeds invested in bonds, etc., upon the occurring of a “favorable opportunity in the opinion of his executors,” amounted to imperative direction to convert.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shall.]

6. CONVERSION **⚡21(1) — EFFECT — VESTED RIGHTS.**

Where right of heir to land is once vested, fact that it has been changed into personality by executors does not alter such vested right.

7. WILLS **⚡524(2)—HEIRS AT LAW—TIME OF ASCERTAINMENT.**

Where personality on death of a certain person goes to heirs at law of such person, heirs at law must be ascertained by reference to the statute in force at death of such person.

Bill by James P. Albright against Fred Van Voorhis and others to construe the will of Frederick Springer, deceased.

On June 4, 1883, Frederick Springer died leaving the following will:

I, Frederick Springer of Madison, Morris county, New Jersey, being of sound, memory and understanding do hereby make, publish and declare this to be my last will and testament in manner following that is to say

First. It is my will that all my debts and funeral expenses be paid as soon as conveniently can be after my decease.

Second. The homestead property whereon I now reside comprising the three story house and about two acres of land lying between the railroad and the brook and adjoining the graveyard including the lot occupied by Charles Garrison and all my household furniture and housekeeping articles (except the piano forte which I have heretofore given to my daughter Pauline) I give and devise to my wife Louisa for and during the term of her natural life or for so long as she may remain my widow and at her death or remarriage I give and devise the same absolutely to the children I have had or may have by my said wife or their legal representatives.

Third. I do order and direct that my executors hereinafter named shall sell the cider mill and distillery building, steam engine, machinery, kettles and distilling apparatus at such time and in such manner as shall in their opinion produce the most money and shall use sufficient of the proceeds of said sale to alter and convert into a dwelling house, the large building standing next to the cider mill and known as the carpenter shop, according to the plans which I have caused to be made for said purpose and which will be found among my papers and the surplus of the proceeds of said sale, if any, shall be invested by my executors and form a part of the residue of my estate hereinafter mentioned and disposed of and I do further order and direct that the said building altered and converted into a dwelling house as aforesaid together with a suitable quantity of land therewith as a house lot for said house, shall be kept rented until a favorable opportunity, in the opinion of my executors, shall arrive for the sale thereof and then

it is my will that the same shall be sold and the proceeds of said sale together with the net amount of rents derived therefrom shall be invested and form a part of the residue of my estate hereinafter mentioned and disposed of.

In making any lease or sale of the house and lot in this clause of my will mentioned my executors will take care to provide for always keeping open a sufficient, convenient and suitable right of way from the public road in front thereof to my homestead premises above mentioned.

Fourth. It is my will that the premises owned by me and occupied by William Tuttle, also the house and lot occupied by Henry W. Harman. Also the property I purchased from the estate of Henry P. Green shall be kept rented until a favorable opportunity in the opinion of my executors shall arrive for the sale of the same or of any one or more of said pieces of property and then it is my will that the same or any one or more of said pieces of property of which sale can be made shall be sold and the proceeds of said sale together with the net amount of rents derived therefrom shall be invested and form a part of the residue of my estate hereinafter mentioned.

Fifth. I do order and direct that the stock of whisky or other liquors I may have on hand at the time of my death, also my horses, wagons, harness, sleighs, tools, farming implements and other goods and chattels not otherwise herein disposed of shall be sold in such manner, upon such terms and at such times as shall be most advantageous to my estate and the proceeds thereof shall be invested and form a part of the residue of my estate.

Sixth. I do order and direct that the tract of land containing twenty-one acres on the Green Village road opposite the Gibbons wash house shall be held for six years at least after my decease by my executors who shall use or rent the same to the best advantage until a favorable opportunity in their opinion shall arrive, after the expiration of said six years for the sale thereof and then it is my will that the same shall be sold and proceeds of such sale together with the net income which shall have accrued from said premises shall be added to the residue of my estate.

Seventh. All the rest and residue of my estate shall be divided into five equal shares for the benefit of my wife Louisa, my three children, Frederick, Pauline and Lilly and my granddaughter Catharine Laubacher and I do order and direct that each of said shares shall be well and safely invested upon bond and mortgage of unincumbered real estate and that the interest arising upon one of said shares shall be paid to my said wife Louisa semiannually during the term of her natural life or for so long as she may remain my widow and upon her death or remarriage, then to the children which have been or may be born to me by her share and share alike for and during the term of their natural lives and upon the death of all of said children the principal of said share shall be divided among the legal representatives of the children which have been or may be born to me by her.

II. The interest arising upon another of said original shares shall be put out at interest and all the interest arising upon said share and the interest upon said interest shall be retained in the hands of my executors during the minority of my granddaughter Catharine Laubacher and shall be paid to her in person when she shall arrive at the age of twenty-one years and thereafter the interest which shall arise upon her original share shall be paid to her semiannually in person for and during the term of her natural life and at her death the principal of her said share shall go to her heir or heirs at law but in no event shall her said share or any part thereof go to the father of said Catharine Laubacher.

III. The interest arising upon another of said

original shares shall be paid semiannually to the guardian of my son Frederick until he shall attain the age of twenty-one years and then to him in person for and during the term of his natural life and at his death the principal of his said share shall go to his heir or heirs at law absolutely.

IV. The interest arising upon another of said original shares shall be paid semiannually to the guardian of my daughter Pauline until she shall attain the age of twenty-one years and then to her in person for and during her natural life and at her death the principal of her said share shall go to her heir or heirs at law absolutely.

V. The interest arising upon the other of said shares of the residue of my estate shall be paid semiannually to the guardian of my daughter Lilly until she attains the age of twenty-one years and then to her in person for and during the term of her natural life and at her death the principal of her said share shall go to her heir or heirs at law absolutely.

Eighth. The devises and bequests in this will and testament in favor of my wife are to be in lieu of all her right of dower or other rights whatsoever either at common law or by statute in and to any of my estate. And I do hereby appoint my said wife to be the guardian of our children Frederick, Pauline and Lilly.

Ninth. I do hereby nominate, constitute and appoint my friends J. Preston Albright of Madison, New Jersey, and John H. Hornett of New York to be the executors of this my last will and testament.

In witness whereof, I, the said Frederick Springer, have hereto set my hand and seal on this thirteenth day of April in the year of our Lord one thousand eight hundred and seventy-five.

[Signed] Fr. Springer. [L. S.]

Testator left him surviving his wife Marie, three children, Frederick, Pauline and Lilly, and a granddaughter, Catherine, the child of his first wife. His widow Marie died intestate in 1907 and his daughter Pauline, who had married Edward Van Voorhis, died intestate in 1917 leaving her surviving three children Fred, Harold and Preston.

Charles A. Rathbun, of Morristown, for complainant. C. Franklin Wilson, of Morristown, for defendant Lilly Cook. Howard F. Barrett, of Madison, for defendants Fred Van Voorhis and others.

STEVENS, V. C. [1] Testator gives the homestead to his wife for life and at her death "to the children I have had or may have by my said wife or their legal representatives." The remainders vested in the children at testator's death (*Guild v. Newark*, 87 N. J. Eq. 38, 99 Atl. 120), and as her son Frederick was then living a one-third interest vested in him. When he subsequently died intestate this interest descended upon his heirs at law.

[2] Testator directs that the residue of his estate be divided into five shares, and that the interest of one of said shares be paid to his wife during her life, and at her death to her children during their lives, and "upon the death of all of said children the principal of said share shall be divided among the legal representatives of the children which have been or may be born to me by her." The testator's grandchild, Catherine,

the daughter of his first wife, is expressly excluded from participation in this share. Who the legal representatives of the children may be at the death of the survivors can only be determined when the survivor dies. *Smith v. Robinson*, 83 N. J. Eq. 384, 389, 90 Atl. 1063.

[3, 4] Frederick's share is given in the following terms:

"The interest arising upon another of said original shares shall be paid semiannually to the guardian of my son Frederick until he shall attain the age of twenty-one years and then to him in person for and during the term of his natural life and at his death the principal of his said share shall go to his heir or heirs at law absolutely."

Frederick survived testator four months and died intestate. At the time of his death testator's estate consisted partly of realty and partly of personalty. The question is, Who are his heirs? If any of testator's estate was at Frederick's death realty and realty not notionally converted, his heirs at law were his two sisters. *Comp. St. 1910, "Descent,"* p. 1918. As far as the estate was personalty, or realty notionally converted into personalty, it went to his next of kin, in the sense of distributees under the statute of distributions. *Meeker v. Forbes*, 84 N. J. Eq. 272, 93 Atl. 887; *Id.*, 86 N. J. Eq. 255, 98 Atl. 1086. The mother and half sister, represented by her daughter Catherine take equally with his other sisters under this statute. *Dickinson's Probate Court Practice*, 165 Gen. St. p. 2390. See *Smith v. McDonald*, 71 N. J. Eq. 261, 65 Atl. 840. And the only question is, What portion, if any, of the real estate is to be considered as having been at Frederick's death, notionally converted?

[5] I think the testator intended a conversion out and out of all his real estate except his homestead. It is his will that the property he particularly specifies "shall be sold" and that the proceeds "shall be invested" and form part of the residue. As to the residue he divides it into five shares and "orders and directs that each of said shares shall be well and safely invested upon bond and mortgage of unincumbered real estate"—a direction which, if it is to be complied with, necessitates a conversion of all the real estate included in the residue. *Lindley v. O'Reilly*, 50 N. J. Law, 646, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802; *Wright v. Keasbey*, 87 N. J. Eq. 52, 100 Atl. 172. He directs that the interest arising upon each of the shares shall be paid to the wife and children respectively, and that the principal of the several shares shall go, in the case of the wife's share, to the legal representatives of her children and in the case of the other shares to the heir or heirs at law of the children respectively. The direction to sell is throughout mandatory.

[6] It is true that the sale is not to take

place until the occurrence of "a favorable opportunity in the opinion of his executors," but this is no more than what is generally implied, for unless directed to sell within a specified time executors do not ordinarily sell until the "favorable opportunity" arises. In *Lewin on Trusts* (*947) it is said:

"A direction to trustees to sell 'as soon as they shall see necessary for the benefit of the cestui que trust or whenever it shall appear to their satisfaction that such sale will be for the benefit of the cestui que trust,' amounts to an imperative direction to convert," and the property is under such circumstances considered as converted from the death of the testator. In *re Raw*, 28 Ch. Div. 601; *Cook's Executors v. Cook's Administrators*, 20 N. J. Eq. 375.

I had occasion to consider one phase of this question in *Martin v. Kimball*, 86 N. J. Eq. 10, 96 Atl. 585; *Id.*, 86 N. J. Eq. 432, 99 Atl. 1070, but the question itself was different. It was whether testator intended the life tenants to have rent or an apportionment of the proceeds of sale. I came to the conclusion that he intended them to have only rents. I said, however, in the course of the opinion, that:

"It may be safely asserted that notional conversion will not be referred to a time anterior to the time when conversion is directed. If, in my will, I direct that my property shall not be sold until ten years after my death, it cannot be deemed converted as of the time of my death."

The reason is obvious. The testator intended it to retain its character of real estate for that length of time. In the case of the Green Village tract, mentioned in paragraph 6 of the will now under consideration, the testator directs that it should be held for six years at least. This was done. It was, so counsel states in his brief, subsequently sold. Its proceeds are now actually personalty. But at the time of Frederick's death it was real estate, actually and notionally. It therefore descended as such upon Frederick's heirs at law. The fact that it has since been changed into personalty cannot alter the right once vested. *Meeker v. Forbes*, 84 N. J. Eq. 272, 93 Atl. 887.

[7] Pauline Van Voorhis died intestate in 1917. The will gives the fifth share in which she had a life right to her heirs at law; but these, so called, in a gift of personalty, mean next of kin, not next of kin in the technical sense of nearest kinsman, but next of kin in the sense of distributees under the statute of distributions. *Meeker v. Forbes*, supra. Who answer this description cannot be known until the death of the person whose next of kin they are. *Williams on Executors*, *1008. As they are the statutory next of kin, they must be ascertained by reference to the statute then in force, for no other persons then answer that description. *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32. Consequently Pauline's next of kin must be ascertained by reference to the act of 1914 (P. L. 1914, p. 69).

(91 N. J. Law, 360)

NUGENT v. GRASSMAN et al.

(Supreme Court of New Jersey. June 6, 1918.)

1. ADVERSE POSSESSION §—44—CONTINUITY OF POSSESSION.

Occasional acts of trespass committed upon wild and uncultivated lands, although extending over a period of 20 years, will not give title, but if such acts occur with sufficient frequency, they amount to that continuity of possession which is an essential ingredient of title by adverse possession.

2. ADVERSE POSSESSION §—115(4)—CONTINUITY OF POSSESSION—QUESTION FOR JURY.

In ejectment, whether annual cutting of hay on wild land, and placing of corner posts, was sufficient possession to give title by adverse possession, *held*, under the evidence, for the jury.

3. APPEAL AND ERROR §—301—OBJECTIONS IN LOWER COURT—NEW TRIAL.

On rule to show cause why verdict should not be set aside, contentions that error in law appears in the charge of the trial court cannot be considered, where not presented by any of the reasons submitted as ground for setting aside the verdict.

Ejectment by James R. Nugent against Edward J. Grassman and others. On rule to show cause why verdict for defendants should not be set aside. Rule discharged.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

George Holmes, of Jersey City, and George W. Anderson, of Newark, for the rule. Arthur F. Egner, of Newark, opposed.

GUMMERE, C. J. This is an action of ejectment and involves title to a tract of land on the meadows adjacent to Newark Bay. It is conceded that the ownership of five-sixths of the tract is in the plaintiff. The controversy concerns the remaining one-sixth.

The proofs show that the paper title to this one-sixth is in the defendants. The case of the plaintiff is that originally the whole tract was held in common by several owners, and that in 1865 the owners of five-sixths interest executed a deed to one William F. Haines purporting to convey the absolute ownership of the whole tract; that Haines immediately entered into possession, and exercised acts of ownership over the land from that time on until 1901, which were so open, notorious, exclusive, continuous, and uninterrupted as to vest in him at the end of 20 years from his original entry, a title by adverse possession; and that this title has now devolved upon the plaintiff.

The trial of the case resulted in a verdict in favor of the defendants, and we are now asked to set it aside for three reasons:

(1) "Because the verdict of the jury was contrary to the weight of the evidence"; (2) "because the verdict of the jury was contrary to law"; (3) "because the verdict of the jury was contrary to the charge of the trial court."

The plaintiff's claim of adverse possession was rested largely upon the testimony of his grantor, Mr. Haines. He testified that immediately upon the conveyance to him in 1865

he mowed the grass on this tract, and that he continued to do this every year until 1901, when the construction of a railroad embankment prevented him from further continuing this practice; that after that he visited the land from time to time, and cleaned out the ditches around the tract. He further testified that some four or five years after taking possession of this land he put a stake at each corner of the tract; that those stakes were locust stakes; and that they remained in their original position up to the time of the trial. There was also proof that the present plaintiff had paid the taxes upon the premises for the past five or six years; in other words, ever since the conveyance to him by Haines.

On the other hand, there was testimony offered by the defendant tending to show that the stakes at the four corners of this tract are not locust, and that they very plainly have been there for only a comparatively short period of time, not over 10 or 15 years. The defendant's evidence also tended to contradict the story of Mr. Haines with relation to his having cut the salt hay on the tract annually during the period specified by him. This proof, however, was not, in our opinion, sufficient to justify the jury in disregarding Haines' testimony upon this point.

The principal question, therefore, would seem to be this: Does the fact that Mr. Haines, for a period of over 20 successive years, annually cut the salt hay upon the locus in quo, justify us in declaring that the finding of the jury was contrary to the weight of the evidence? In the case of *Foulke v. Bond*, 41 N. J. Law, 527, the principles on which the doctrine of title by adverse possession rests are thus stated by Mr. Justice Depue, speaking in the Court of Errors and Appeals:

"The possession must be actual and exclusive, adverse and hostile, visible or notorious, continued and uninterrupted. Notoriety of the adverse claim under which possession is held is a necessary constituent of title by adverse possession, and therefore the occupation or possession must be of that nature that the real owner is presumed to have known that there was a possession adverse to his title, under which it was intended to make title against him. * * * A party relying on title derived from such a source must prove possession in himself, or in those under whom he claims, of such a character as is calculated to inform the true owner of the nature and purpose of the possession to which the lands are subjected. The question whether possession has been held adversely continuously for the period of 20 years, with the requisite notoriety, is one of fact for the jury. * * * Occasional acts of trespass extending over the period of 20 years will not give title."

In the case of *Cornelius v. Giberson*, 25 N. J. Law, p. 1, in which the title to a tract of timber land was involved, the defendant set up title by adverse possession, and attempted to sustain his claim by proof of the cutting of timber from time to time, and the erection of woodchoppers' cabins on the tract. It was also shown that the defendant had paid the

taxes thereon. Chief Justice Green, speaking for this court, used the following language:

"Will an occasional entry upon wild and uncultivated lands for the purpose of cutting wood or making surveys, joined with the payment of taxes, by a party having no legal title, there being no actual residence upon any part of the land, no cultivation, no inclosure, no improvement, no actual occupancy for any purpose whatever, operate to bar the title of the rightful owner? Or may several distinct entries and acts of trespass, coupled with temporary actual occupancy for the purpose of cutting wood, be thus united, and constitute one continuous adverse possession? The question is certainly of great moment in this state, where there are extensive tracts of wild and uncultivated lands at all times exposed to trespass and encroachments without the knowledge of the true owners. There is no decision of this court to countenance the doctrine, and the decided weight of authority elsewhere, as well as sound principle, is opposed to it. * * * And in this view there is no distinction between a naked trespasser and one who enters under color of title. Both are alike trespassers. The title papers of the latter may serve to extend and define the limits of his occupancy, but it does not change its character. He is nevertheless a trespasser, and the moment his actual occupancy ceases, the rightful owner, without actual entry, is in possession by construction of law. The mere payment of taxes cannot prove possession. It may be evidence of a claim of title; it may serve to explain the character of the possession, and to extend it beyond the limits of actual occupancy; but the payment of taxes by a party not having the actual possession of any part of the premises cannot prove possession. It would give the owner of the land no right of action against the party paying taxes as a trespasser; and no act can show possession in a party doing it which will not afford to the owner of the land a remedy by action."

[1, 2] Two principles may be considered to have been established by the authorities referred to: (1) That occasional acts of trespass committed upon wild and uncultivated lands, although extending over a period of 20 years, will not give title; (2) if such acts occur with sufficient frequency they amount to that continuity of possession which is an essential ingredient of title by adverse possession. These are legal rules, but whether in a given case the acts of trespass relied upon to establish title are of sufficient frequency to amount to a continuity of possession is necessarily a question of fact to be determined by the jury under proper instructions from the court. In the present case the jury has determined that acts of trespass committed annually upon the property of the real owner do not amount to that continuity of possession which is necessary to be established in order to support a claim of title by adverse possession. We cannot say that they were not entirely justified in so determining, and the claim of the plaintiff that the verdict of the jury was contrary to the evidence must therefore fail.

The claim that the verdict of the jury was contrary to law is without merit. The law of the case was that laid down by the trial court in its charge to the jury.

So, too, the claim that the verdict was contrary to the charge of the trial judge is with-

out merit. An examination of the instruction to the jury shows that it was strictly regarded by that body in its finding.

[3] Some contention is made in the brief submitted on behalf of the plaintiff that error in law appears in the charge of the trial court. But, as such error, if it exists, is not presented by any of the reasons submitted by the plaintiff as ground for setting aside the verdict, we have not given it consideration.

The rule to show cause will be discharged.

(89 N. J. Eq. 1)

ROGERS v. ROGERS. (No. 43/413.)

(Court of Chancery of New Jersey. May 29, 1918.)

(Syllabus by the Court.)

1. DIVORCE \Leftrightarrow 127(4)—GROUNDS—ADULTERY—CORROBORATION.

The corroboration of petitioner's testimony, required by the law of this state in order that a decree of divorce may be granted, need not be the testimony of witnesses, although, when such testimony can be procured, it should be introduced. The required corroboration may be furnished by surrounding circumstances, adequately established.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corroboration.]

2. EXPLANATION OF SYLLABUS.

A misleading statement in the third syllabus in *Foot v. Foote*, 71 N. J. Eq. 273, 65 Atl. 205, pointed out.

Petition for divorce by Jeffrey J. Rogers against Julia Rogers. Decree for petitioner, advised by an advisory master, adopted as the conclusion of the court, and a decree nisi to be entered.

This matter was referred to Alonzo Church, Esq., as advisory master, who filed the following conclusions:

"This is a petition for divorce on the ground of adultery. The testimony of the petitioner is corroborated by the confession of the defendant, and by admissions made by her to a friend who testified to them before the special master. Were this all the evidence, I should be forced to the conclusion that the case was one coming under the rule laid down in *Garrett v. Garrett*, 86 N. J. Eq. 293, 98 Atl. 848, where the Chancellor held that testimony of the petitioner, corroborated only by the admissions or confession of the defendant, will not, without more, support a decree. There is another principle, however, of the law of evidence in divorce cases, which is sometimes overlooked, but which is highly important in the determination of these cases.

"The Chancellor, in *Garrett v. Garrett*, supra, held that a decree cannot be granted upon the uncorroborated testimony of the petitioner, nor upon the uncorroborated confession of the defendant, nor upon one plus the other. He adds, however, that both are admissible in evidence, but must be corroborated to amount to legal evidence. This brings us to a consideration of what is corroboration. It need not necessarily be the testimony of witnesses, although when such testimony can be procured, it is important that it be introduced. Corroboration may arise out of facts and circumstances.

"In *Orens v. Orens*, 102 Atl. 436, it was held inter alia: 'The corroboration of a petitioner's testimony, required by law, in order that a di-

vorice may be decreed, need not be testimony given by another or other witnesses to all of the same identical facts to the minutest particulars, but only their giving such facts in evidence as already testified to by petitioner, or such circumstances tending to establish them, as renders petitioner's testimony so much more probable as to be legally acceptable, and which serves to empower the judge to accept the truth of the petitioner's whole story.'

"The case of *Foot v. Foote* (Court of Errors and Appeals) 71 N. J. Eq. 273, 65 Atl. 205, is cited in the *Orens* Case as authority for the above proposition, as is also *Williams v. Williams*, 78 N. J. Eq. 13, 78 Atl. 698. In the *Foot* Case, 71 N. J. Eq. at page 280, 65 Atl. at page 208, the court says: 'If the circumstances of the case as shown by the expressions and conduct of the defendant, together with the letters of the parties, all corroborate the testimony of the complainant, the case is complete.' This case, of course, was decided upon its own particular facts, as indeed every case should be, and it might be thought, in the absence of corroboration by witnesses, that both conduct of the defendant and letters of the parties, or at least of the defendant, must necessarily be shown to afford corroboration. I do not so take it. In the case of *Robinson v. Robinson*, 83 N. J. Eq. 150, 90 Atl. 311, Vice Chancellor Leaming held that corroboration of the testimony of a petitioner need not be by other witnesses, but may be furnished by surrounding circumstances, and remarked, at page 152, that surrounding circumstances adequately established may be of a nature to fully supply the office of corroboration which the law requires in matrimonial cases. In other words, letters and conduct, or either, if established with sufficient clearness, form, as it were, the general atmosphere of the case, which, taken as a whole, will establish a proper basis for a decree, even though there are no corroborating witnesses to the acts alleged by the petitioner.

"Applying the above principles to the case under discussion we find, in addition to the evidence mentioned above, that there are in evidence letters, postcards, and pictures which were found in the defendant's valise. They were sent to her by several different men, some of whom are named as correspondents. When confronted with these, the defendant confessed, and they are evidence corroborating the confession. The petitioner's mother testifies that the defendant received a large amount of mail, which she refused to read except in private. When the husband desired to read a letter directed to her as 'Miss,' defendant snatched it out of his hand and ran upstairs with it; and these facts are corroborating circumstances.

"Upon considering the whole case, therefore, I conclude that there is sufficient corroboration of the petitioner's testimony from the defendant's confession, corroborated by the above circumstances, to justify a decree for the petitioner, which I shall accordingly advise."

Carl Weitz, of Union Hill, for petitioner.

WALKER, C. [1] A decree of divorce nisi will be made in conformity with the advice contained in the conclusions of Advisory Master Church, which are hereby adopted as the opinion of the court.

[2] As the case of *Foot v. Foote*, 71 N. J. Eq. 273, 65 Atl. 205, is cited in the opinion of the learned master, I desire to call attention to a misleading statement in syllabus 3. It is found in this expression: "Under a statute requiring corroborative evidence . . . to obtain a divorce," etc. There is no statement in the body of the opinion that corrobo-

ration of the petitioner's testimony in divorce cases is required by statute; and properly so, as there is no statutory requirement in that regard. It is part of the substantive law of divorce evolved by the court as a matter of sound public policy, and resides in numerous decisions.

I have examined the original opinion on file in the secretary of state's office and find that Judge Vroom, who wrote the deliverance for the Court of Errors and Appeals, did not preface it with any headnote whatever. The syllabus in the official report is copied from the report of the same case in 65 Atl. 205. The error, therefore, appears to have originated with the editor of the Atlantic Reporter, and to have been copied by the official equity reporter. The one with whom the mistake originated was doubtless misled by an assertion in the opinion (71 N. J. Eq. at page 280), where it is stated that it was insisted that the corroborative testimony offered did not extend to all the essential elements of the offense "defined by our statute." It is the elements of matrimonial offenses that are defined by our statute, and there is, as stated, no statutory requirement that there shall be corroborative testimony. That there must be corroboration, however, is established by a long line of cases.

(79 N. H. 7)

STATE v. DINAGAN.

(Supreme Court of New Hampshire. Cheshire. May 7, 1918.)

1. ARSON \Leftrightarrow 9—OWNERSHIP OF PROPERTY.

Under Pub. St. 1901, c. 277, §§ 1-3, providing that if any person shall willfully or maliciously burn a dwelling house or outbuilding, etc., he shall be imprisoned, it was immaterial whether the dwelling house was his own or that of another, though "arson," at common law, was the malicious and willful burning of the house or outhouse of another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Arson.]

2. ARSON \Leftrightarrow 25—INDICTMENT—PROOF OF OWNERSHIP—IMMATERIALITY.

If the allegation of the indictment that the dwelling house burned was the property of one other than defendant, which allegation was proved as laid, could be construed as alleging the occupancy of the house in the other, as claimed by defendant, the allegation would be immaterial.

3. INDICTMENT AND INFORMATION \Leftrightarrow 167—IMMATERIAL AVERMENT—PROOF.

An immaterial averment need not be proved.

4. CRIMINAL LAW \Leftrightarrow 722(3) — ARGUMENT OF ATTORNEY GENERAL.

In a prosecution for arson, the language of the Attorney General in argument, "Will you permit that woman who has looked into your eye and told her story in a way that wasn't possible for an unlettered woman to tell unless it was actually so, will you permit distinguished counsel to crucify such a witness in order that a villain and a criminal may go free?" was legitimate, the characterization of defendant being justified by the evidence; the word "crucify" being used in the sense of discredit.

5. CRIMINAL LAW \Leftrightarrow 725—ARGUMENT OF ATTORNEY GENERAL.

The Attorney General's argument, calling to the jury's attention their responsibility to the citizens of the county and to their God, not only in relation to the particular case, but also to future cases of like character, though forcible and rhetorical, was within the limits of legitimate advocacy.

6. CRIMINAL LAW \Leftrightarrow 725—ARGUMENT OF ATTORNEY GENERAL.

The portion of the Attorney General's argument, asking the jury to consider their oath and to find a true verdict between the state and the prisoner at the bar, was proper.

Transferred from Superior Court, Cheshire County; Kivel, Judge.

John W. Dinagan was convicted of arson, and he excepts. Exceptions overruled.

Indictment for arson. Trial by jury, and verdict of guilty. The indictment alleged that:

"John W. Dinagan, * * * with force and arms, a certain dwelling house, otherwise called a hotel situated in Chesterfield in said county of Cheshire, of the property of one Mary J. Dinagan, willfully, feloniously, and maliciously did set fire to, burn, and consume."

At the conclusion of the state's evidence the respondent moved to dismiss the indictment on the ground of variance between the allegations in the indictment and the evidence as offered by the state. This motion was denied, and the respondent excepted.

During his argument the Attorney General made the following statement:

"Will you permit that woman who has looked into your eye and told her story in a way that wasn't possible for an unlettered woman to tell unless it was actually so, will you permit distinguished counsel to crucify such a witness in order that a villain and a criminal may go free? If so, gentlemen, the responsibility towards citizens of Cheshire county and towards your God is with you, and if on some other occasion some other villain, some other firebrand, shall rise up that shall out-Dinagan Dinagan, and some humble dwelling house be lost, and some life go to its Maker because of the fire, the responsibility, gentlemen, will rest upon you."

At this point the respondent excepted. Whereupon the Attorney General continued:

"I call your attention to the situation, gentlemen, with all sincerity, and, gentlemen, when you measure up the facts in this case, consider the oath you have taken to find the true verdict between the state of New Hampshire and the prisoner at the bar."

To the above statements the respondent excepted.

James P. Tuttle, Atty. Gen., and Roy M. Pickard, Sol., of Keene, for the State. Richard J. Wolfe, of Keene, and Doyle & Lucier and A. J. Lucier, all of Nashua, for respondent.

PLUMMER, J. [1] Arson at common law "is the malicious and willful burning the house or outhouse of another man." 4 Blackstone, Comm. 219. Hence at common law the respondent could not have been convicted of arson in this case, because the evi-

dence disclosed that he was the habitant of the house burned, and not Mary J. Dinagan. In other words it would not have been the burning of a dwelling house of another. But the common law relative to arson is not in force in this state. In 1791 acts were passed making the burning of a dwelling house of another in the nighttime a more serious offense than the burning of it in the daytime, also including other kinds of property. Laws Ed. 1792, p. 245. In 1828 the laws relating to burning property were changed, and the distinction between burning in the night and day time disappeared. Session Laws, Nov. Sess. 1828, p. 362. When the Legislature of 1842 enacted the Revised Statutes, it adopted substantially the recommendations of the commissioners on revision, relating to the burning of property, in which the words "of another" were omitted. Com'rs Rep. 1842, c. 218, §§ 1-3; R. S. c. 215, §§ 1, 2, 4. These statutes, except as to punishment, are the same that are in force to-day. P. S. c. 277, §§ 1-3.

Section 1 of chapter 277 of the Public Statutes, under which the indictment in the present case was found, is as follows:

"If any person shall willfully and maliciously burn a dwelling house, or an outbuilding adjoining thereto, or any building whereby a dwelling house shall be burned, he shall be imprisoned not exceeding thirty years."

The title of this chapter is "Arson and Burning Property." And the marginal annotation opposite section 1 is "Arson, How Punished." It is said this indicates that common-law arson is intended. Doe, J., in *State v. Hurd*, 51 N. H. 176, discussed this question, and pointed out, that "the index at the head of [a] chapter cannot be wholly relied upon as an accurate designation of the subject-matter of legislation," and then said:

"A man may maliciously beat his own horse (*State v. Avery*, 44 N. H. 392), and he may maliciously burn his own dwelling. If he burns it for the purpose of destroying the home and lives of his wife and children, when they happen without his knowledge to be absent, the burning may be malicious; and there may be malice in other cases. The Legislature might well have intended to provide for such cases, and to remedy a defect of the common law, which has been cured by statute in England. The omission of the terms 'arson' and 'of the property of another,' in the body of the statute may well be taken as an intentional remedy of that defect, making section 1 to include not merely common-law arson, but something more. In a condensed enumeration of the contents of the chapter, the word 'arson' might well enough be used as an abbreviated expression to answer the practical purpose of conveying a general, though not a complete and precise, idea of the subject-matter of section 1."

If it can be found that the respondent willfully and maliciously burned a dwelling house, that is sufficient to warrant a conviction under our statute, and it is of no consequence whether the dwelling house was his own or that of another. The burning by the owner of his own dwelling house for the purpose of acquiring the insurance upon it would

be a willful and malicious burning of the house. It could be found from the evidence in this case that the dwelling house at the time of the fire was overinsured, and that it was burned by the respondent to defraud the insurers. The indictment alleging that the respondent willfully and maliciously burned a dwelling house is sufficient. And the proof warranted the verdict of the jury.

[2, 3] The indictment alleges the dwelling house was the property of Mary T. Dinagan, and the allegation was proved as laid. If the allegation could be construed as alleging the occupancy of the house in Mrs. Dinagan as claimed by the respondent the allegation would be an immaterial one. "The statement of ownership was necessary at common law because it was not arson for a man to set fire to his own house. But under the statute it is otherwise; and therefore the averment of ownership is an immaterial averment." *The Queen v. Newbould*, L. R. 1 Cr. Cas. Res. 344, 347. Here as in England the defect of the common law is cured by the statute. *State v. Hurd*, supra. An immaterial averment need not be proved. *State v. Langley*, 34 N. H. 529.

[4] The Attorney General, in his closing argument to which the respondent excepted, indulged in vigorous figures of speech. But we do not think that they were of a character to render the trial unfair and destroy the verdict. He said:

"Will you permit distinguished counsel to crucify such a witness (referring to the principal witness for the state) in order that a villain and a criminal may go free?"

[5] The Attorney General here used "crucify" in the sense of discredit, and by this term urged the jury that they should not permit counsel to discredit, and destroy the power of the state's evidence, and let a villain and criminal go free. This was legitimate, and the characterization of the respondent was justified by the evidence.

He then called to the jury's attention their responsibility to the citizens of Cheshire county, and to their God, not only in relation to this case, but also to future cases of like character. As to the present case the jury were legally and morally bound to find the respondent guilty if the evidence was sufficient to require it. It was this responsibility that the state's counsel was endeavoring to impress upon the jury in figurative speech. The statement that the responsibility for future crimes of this character would rest upon the jury had reference, of course, to their moral responsibility, and must have been so understood by them. The object of the punishment of crime not only includes the punishment of the criminal, and protection of society against his acts, but also the protection of society against all persons criminally disposed. There is no doubt that vigorous enforcement of the law lessens the commission of crimes. In this sense the jury were to some extent responsible for the future

commission of crimes in the county. The language used to impress this responsibility upon the jury was very forcible and rhetorical, but within the limits of legitimate advocacy.

[6] The exception of the respondent to that portion of the argument in which the jury were asked to consider the oath they had taken, and find a true verdict between the state of New Hampshire and the prisoner at the bar, is without merit. Following his previous remarks he was asking the jury to do nothing except what they had sworn to do, and there was no objection to calling their attention to the oath they had taken. The argument to which exceptions were taken in this case is similar to that in *State v. Small*, 102 Atl. 883. The exceptions in that case were overruled, and the same disposition is required of the exceptions here.

Exceptions overruled. All concurred.

(79 N. H. 23)

BOW v. PLUMMER, State Treasurer.

(Supreme Court of New Hampshire. Merrimack. June 4, 1918.)

1. STATES ⇌ 191(1)—ACTION AGAINST—CONSENT.

The state cannot be sued in the absence of a statute authorizing such suit or without its consent either expressly given or clearly implied.

2. STATES ⇌ 191(2)—ACTION AGAINST STATE OFFICIAL—UNENFORCEABLE JUDGMENT.

Under Const. art. 55, and Pub. St. 1901, c. 16, § 4, requiring warrants signed by the Governor for all payments out of state treasury, a judgment rendered in action against state treasurer in his official capacity directing him to pay a certain sum of money out of state treasury would be nonenforceable, and suit must be regarded as against state.

3. STATES ⇌ 191(1)—ACTION AGAINST OFFICIAL—APPEARANCE OF ATTORNEY GENERAL.

In an action against a state treasurer in his official capacity, the appearance of the Attorney General in behalf of such treasurer does not constitute consent on the part of the state to become a party to such action.

4. STATES ⇌ 191(2)—ACTION AGAINST STATE TREASURER—MONEY PAID UNDER PROTEST.

Where taxes are paid under protest and money deposited in state treasury, an action against state treasurer to recover part thereof on theory that money became trust fund with treasurer as trustee will not lie, because, if money became trust fund, the state, and not the treasurer, became trustee.

Transferred from Superior Court, Merrimack County; Chamberlin, Judge.

Action by one Bow against J. Wesley Plummer, individually and as State Treasurer. Action dismissed as against defendant individually. Motion to dismiss as against defendant as treasurer denied, and defendant excepts. Exceptions sustained.

Assumpsit to recover money paid by the plaintiff to the defendant as state treasurer for its share of the state tax for the year 1914 as claimed by the defendant. The plaintiff insisted that an error had been committed in making the assessment, and

that it was legally liable for a much smaller sum than the amount assessed against it, which it paid under protest.

Upon the motion of the plaintiff the court dismissed the action as against the defendant individually. The defendant then moved that it be dismissed as against him as treasurer. This motion was denied, and the defendant excepted. Transferred from the superior court.

Robert W. Upton, of Concord, for plaintiff. James P. Tuttle, Atty. Gen., and Joseph S. Matthews, Asst. Atty. Gen., for defendant.

WALKER, J. [1] As the suit has been dismissed as against the state treasurer in his individual capacity, the question is whether the state, so far as it is represented in this action by the treasurer in his official capacity, may be held liable to respond to the plaintiff's claim. That the state cannot be sued in our courts in the absence of a statute authorizing it, or without its consent, either expressly given or clearly implied, is a proposition requiring little discussion. In fact, it is axiomatic. *Cooley*, Const. Idms. 23, note; *Cunningham v. Railroad*, 109 U. S. 446, 451, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; *State v. Kinne*, 41 N. H. 238; *Opinion of the Justices*, 72 N. H. 601, 54 Atl. 950.

[2] No statute has been suggested in argument and none has been found authorizing an action at common law against the state for the recovery of money owed by it to an individual; nor has the Legislature authorized its treasurer to represent the state in litigation of that character, or to disburse its moneys in accordance with a judicial judgment upon the merits. The Constitution (article 55) provides that:

"No moneys shall be issued out of the treasury of this state and disposed of * * * but by warrant under the hand of the Governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state * * * agreeably to the acts and resolves of the general court."

Accordingly the Legislature has provided (P. S. c. 16, § 4) that:

The state treasurer "shall pay, out of any moneys not otherwise appropriated, all sums due by virtue of general or special appropriations of the Legislature, on warrants drawn by the executive, and the principal or interest of all loans which may at any time become due."

It thus appears that, if the defendant desired to pay out of the treasury the amount of the plaintiff's claim, he would be unable to do so of his own motion. He could only draw out the money under an executive warrant, which presumably would not be given except in accordance with a statute authorizing it. It would therefore be absurd for the court to give judgment against the defendant in his official capacity which it

would have no power to enforce and which the defendant could not perform. *Weston v. Dane*, 53 Me. 372. This result shows clearly that, while the cause of action is against the state, not the treasurer, the action must fail because the state is not a party.

"Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint." *Smith v. Reeves*, 178 U. S. 486, 488, 489, 20 Sup. Ct. 919, 920 (44 L. Ed. 1140.)

[3] But it is argued that the appearance of the Attorney General amounts to a consent on the part of the state to submit the cause to judicial investigation and judgment. One difficulty with this argument is that it is based on the erroneous assumption that the sovereign or the Legislature has authorized the Attorney General to bind the state by appearing for the defendant in a suit brought against the head of a governmental department. In other words, the attempt is thus made to bind the state as though it were in fact a party defendant in a suit against the treasurer, upon the ground that the cause of action is against the state and because the Attorney General has appeared. But his appearance cannot have that effect when the state has given him no authority to appear for it. The silence of the Legislature upon this subject is equivalent to a prohibition. As the agent of the state the Attorney General could not exceed the limits of his authorization, and bind the state by proceedings in a suit to which it is not a party and could not be made one.

The cases cited in argument by the plaintiff do not sustain the contention that the state has consented to be bound by the judgment or has waived its immunity from suit. When it is held that there has been such a waiver by the Attorney General or by a state official, the decision is based upon a statute having special reference to the subject-matter of the suit and conferring power upon the official to appear for and represent the state (*People v. Railway*, 157 Mich. 144, 121 N. W. 814; *McKeown v. Brown*, 167 Iowa, 489, 149 N. W. 593; *Gunter v. Railroad*, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. Ed. 477) or the state has voluntarily intervened and become a party (*Clark v. Barnard*, 108 U. S. 436, 446, 2 Sup. Ct. 878, 27 L. Ed. 780).

Whatever doubt may be entertained as to the right of the Attorney General of this state to enter his appearance for the state in suits to which the state is not a party (P. S. c. 17, § 4; Laws 1911, c. 180, § 1) and whatever legal effect such an appearance might have, if, as in this case, he only appeared for a state official, and not for the

state, he did not consent in its behalf that it should be bound by the result of the suit. There is no evidence that he understood he was waiving the rights of the state, and his mere appearance for the treasurer does not have that legal effect. The plaintiff's position practically is that it is entitled to recover from the state treasury the amount of its claim in a suit against a state official, because the law officer of the state has appeared for that official. As well might it be claimed that an attorney by appearing for one against whom no judgment could be rendered consented that it might be rendered against another one of his clients who appeared to be the rightful debtor. As already pointed out, the cause of action is against the state; while the suit is against the treasurer.

[4] But the argument is presented that, as the tax in question was paid to the treasurer under protest, a trust arose upon the money in his hands in favor of the plaintiff for the excessive or illegal payment, and as a consequence that the title to the money did not pass to the state, and that the action is not against the state, but against the treasurer as the custodian of the fund. The result of this theory would seem to be to make the treasurer individually liable as a trustee of the fund, notwithstanding the fact that upon the plaintiff's motion the court dismissed the suit against him as an individual. But his only relation to the action now is that of a state official. Moreover, it is clear that the money was not placed in his hands to be held for the plaintiff, but in the custody of the state through the treasurer as its agent. The plaintiff was dealing with the state, not with Mr. Plummer, and it understood that the money would be deposited in the treasury with other public money. If, under the circumstances, it or a part of it became a trust fund the state became the trustee, and since the state is not a party to the action, the court cannot declare the trust, even in an equitable proceeding. Nor can it authorize or direct the treasurer to pay the plaintiff's demand from the state's money. That is exclusively a legislative function.

Cases holding that, when a state officer does an act in his official capacity that may be prejudicial to the rights of a private person, and is in violation of the Constitution, he may be individually enjoined (*Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363) upon the ground that the state is not a necessary party (*Cunningham v. Railroad*, 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992), are not in point. The injury the plaintiff complains of is not some threatened invasion of his rights, but it results from the inability of the treasurer to withdraw the money from the control of the state where the plaintiff was willing to put it. The money, even if wrongfully

received by the defendant, was delivered to him as the agent of the state; it was in fact intrusted to the state (*Louisiana v. Jumel*, 107 U. S. 711, 722, 723, 2 Sup. Ct. 128, 27 L. Ed. 448); and what the plaintiff now seeks is a return of it, or a part of it, from the state, not from the defendant individually. If under such circumstances it has been held that a defendant, although a party only in his official capacity, was liable individually to repay the money (*Scottish Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548), the decision cannot be followed. The language of the court in *Smith v. Reeves*, supra (178 U. S. 430, 20 Sup. Ct. 920, 44 L. Ed. 1140), in holding under a somewhat similar state of facts that the cause of action was against the state, and that an order for judgment against the treasurer was error, is applicable to the case at bar:

"In the present case the action is not to recover specific moneys in the hands of the state treasurer nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the state, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment."

See generally *State v. Burke*, 83 La. Ann. 498; *Seltz v. Messerschmitt*, 117 App. Div. 401, 102 N. Y. Supp. 732, approved in 188 N. Y. 587, 81 N. E. 1175; *Ex parte Dunn*, 8 S. C. 207; *State v. Bank*, 8 Neb. 218; *Troy*, etc., *Railroad v. Commonwealth*, 127 Mass. 43.

The motion to dismiss the action should have been granted.

Exceptions sustained. All concurred.

(132 Md. 553)

COOK v. UNITED RYS. & ELECTRIC CO. OF BALTIMORE. (No. 53.)

(Court of Appeals of Maryland. April 4, 1918.)

1. STREET RAILROADS §91—COLLISION—ORDINANCE REGULATING TRAFFIC.

In an action by the owner of an auto ambulance for damages to it in a collision with defendant's street car, defendant's failure to observe an ordinance giving a right of way at street intersections to north and south bound travel could not be relied on as creating liability notwithstanding contributory negligence.

2. STREET RAILROADS §103(3)—COLLISIONS—"LAST CLEAR CHANCE" DOCTRINE.

Where an auto ambulance was injured in a collision with a street car because of the contributory negligence of the owner of the auto ambulance or his employes, the last clear chance doctrine is not applicable; such doctrine being applicable only when defendant's negligence is the last negligent act.

Appeal from Baltimore City Court; Chas. W. Henisler, Judge.

Action by Joseph E. Cook against the United Railways & Electric Company of Baltimore, a body corporate. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

C. R. Wattenscheidt and Laurie H. Riggs, both of Baltimore, for appellant. J. Pembroke Thom, of Baltimore (Walter V. Harrison and Joseph C. France, both of Baltimore, on the brief), for appellee.

STOCKBRIDGE, J. The plaintiff, appellant in this court, brought suit to recover damages from the United Railways & Electric Company of Baltimore for injury to an auto ambulance, occasioned by a collision between the machine while being operated by one of his employes and a street car owned by the defendant and operated by its employes. The ambulance in question was of Cadillac make, weighing something over two tons.

On the morning of January 21, 1916, the plaintiff had been notified from the University Hospital that there was some one at Union Station to be brought to that hospital, and at the time of the collision the ambulance was on its way to answer that call. It was proceeding north on Cathedral street at a rate variously estimated from 15 to 25 miles per hour, and at the intersection of Cathedral and Biddle streets came in contact with a car of the defendant of the Roland Park line. The morning was wet and the streets slippery, but the ambulance was not at the time equipped with chains to prevent sliding or skidding. The driver in charge of the ambulance saw the car proceeding slowly westward when he was at a distance of from 100 to 125 feet south of Biddle street, but contented himself with ringing a large gong upon the ambulance, without seeking to check his speed until he was within 25 feet of the car. He then applied both the foot and the emergency brakes, and attempted to cut across the path of the car into Brevard street. The effect of this action was to bring him in a line parallel with the car, and he would probably have avoided the collision had not the machine skidded on the wet and slippery street. The condition of the street, the change in direction of the machine, and the sudden application of the brakes acted in combination to produce the result that the rear wheel of the ambulance struck the car about in the center. The ambulance was severely damaged, the repairs to it costing \$692.68.

At the conclusion of the plaintiff's case the defendant offered three prayers; the first to the effect that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and that the verdict of the jury must be for the defendant. The third asked the court to instruct the jury that from the

uncontradicted evidence in the case the driver of the ambulance was guilty of negligence directly contributing to the happening of the accident, and that the verdict of the jury must be for the defendant. These two prayers were granted by the court, whereupon the defendant withdrew its second prayer. The ruling of the trial court upon these prayers constitutes the sole exception in the record.

Several questions were raised by counsel at the argument, though it will be sufficient for the disposition of this case to consider only two of them.

[1] The plaintiff urges as an act of negligence on the part of the defendant a failure to observe the ordinance then in force designed to regulate traffic in the streets of Baltimore city, and which gave a right of way at street intersections to north and south bound travel over that moving east and west. This provision, like all provisions of municipal regulation, must be given a reasonable construction. To extend it as far as the plaintiff now asks would be to place a prohibition upon all east and west bound traffic, a condition which cannot be supposed to have been intended by the framers of the ordinance, and it entirely ignored the further provision in the same ordinance that:

"Nothing contained herein or omitted herefrom shall be construed or held to relieve any person using or traveling, or being upon any street for any purpose whatever, from exercising all reasonable care to avoid or prevent injury, through collisions with all other persons and vehicles."

It is conceded that the speed of the ambulance was greater than that permitted by the ordinance, and that the car was moving slowly. It is also established by the evidence that the chauffeur of the ambulance saw the car when distant 100 to 125 feet from it, and had it in such full view that both ends of the car were visible, and that the car was proceeding slowly westwardly, within the speed limits prescribed by the ordinance.

The plaintiff attempted to show by the chauffeur that the motorman of the car was looking in a different direction, and therefore did not see the approaching machine. This last, however, was a mental deduction of the witness, rather than a statement of fact, and while the prayers which were granted necessarily concede the truth of the evidence of the plaintiff, that is an entirely different proposition from conceding inferences which may be drawn by a witness from matters which were observed by him.

Numerous cases decided by this court are referred to by the plaintiff in support of his contention of negligence on the part of the employé of the defendant, such as *United Railways v. Kolken*, 114 Md. 160, 78 Atl. 383, *Consolidated Ry. Co. v. Armstrong*, 92 Md. 554, 48 Atl. 1047, and *Cooke v. Balto. Traction Co.*, 80 Md. 551, 31 Atl. 327, but a close examination of each of those cases will disclose its inapplicability to a case like the

present. This was clearly indicated in *United Railways v. Durham*, 117 Md. 197, 83 Atl. 154, where it was said that:

"If the plaintiff was guilty of contributory negligence, the question of negligence vel non on the part of the defendant becomes immaterial, for, if there was no negligence on its part, there can be no recovery, and if there was, the same result would follow, because of the plaintiff's contributory negligence."

It was there said that the case should have been withdrawn from the consideration of the jury.

[2] The plaintiff in his argument endeavors to introduce the doctrine of the last clear chance, but that is not applicable in a state of facts such as those presented by this record, for, as was said in *McNab v. United Ry.*, 94 Md. 719, 51 Atl. 421, following the case of *R. R. v. Neubeur*, 62 Md. 401, that rule "is only applicable when defendant's negligence is the last negligent act, and not when plaintiff's contributory negligence is the final negligent act," and this same rule was applied in the case of *Westerman v. United Ry.*, 127 Md. 225, 96 Atl. 355.

In the present case the negligent acts which directly caused the collision and injury to the plaintiff's ambulance were those of either the plaintiff or the plaintiff's employé; such, for example, as driving the ambulance, at the time when the streets were slippery, without chains upon the wheels, at a speed which, whether in excess of that permitted by ordinance or not, was such as to constitute a menace to persons upon or crossing the streets, and making no attempt to slacken or check the speed of the ambulance after the car had come into full view, until a point was reached where the inevitable momentum of the machine made a collision practically certain.

In states other than Maryland the courts have been called upon to rule upon questions very similar to that now involved. In the case of *Ray v. Brannan*, 196 Ala. 118, 72 South. 16, decided in 1916, the court had under consideration an ordinance very similar to that which was designed to regulate traffic in the city of Baltimore, and in force when this accident occurred, and the Alabama Supreme Court, in an exceptionally strong opinion, uses the following language:

"The conditions of traffic on intersecting streets may reasonably require that such (referring to the ordinance) priority be given to one street over another. But the mere fact that one vehicle has the 'right of way' over others crossing its path does not release the vehicle thus favored from the duty of exercising due care not to injure the others at the place of crossing. On the contrary, the duty of due care to avoid collision remains reciprocal, and the driver of each vehicle may, within reasonable limits, rely upon the discharge of this duty by the other, including, among other things, the reasonable observance of those municipal regulations with respect to speed and position, which are designed not only to facilitate traffic and travel, but also to make it safe for the public as far as it is humanly possible. * * * But this right to expect the observance of specific legal duties by others does not excuse any one from observing

the specific duties imposed by law upon himself; and his failure to do so, if the proximate cause of his injury, would, as a matter of law, defeat his right of recovery."

In *Pilgrim v. Brown*, 168 Iowa, 177, 150 N. W. 1, which was in regard to the collision between two automobiles, and where suit had been brought for the recovery of the damage done to one of the machines, the Iowa court was construing the provisions of an ordinance of the town of Grinnell designed to regulate the speed of such vehicles, and said:

"The ordinance does not, and reasonably could not, charge a driver who is observing the laws of the road to discover at his peril the approach of one who is violating that law, and yields him the right of way."

Under the facts presented by the record in this case, and the rules of law applicable thereto, no error can be imputed to the trial court for the rulings made by it, and the judgment appealed from will be affirmed.

Judgment affirmed, with costs to the appellee.

(132 Md. 437)

MAYOR, ETC., OF BALTIMORE v. BASSETT. (No. 16.)

(Court of Appeals of Maryland. April 3, 1918.)

1. TRIAL §139(1)—DIRECTION OF VERDICT—WHEN PROPER.

If there is any evidence from which a rational conclusion may be drawn contrary to the theory of a prayer for directed verdict, the weight and value of such evidence should be left to the jury.

2. TRIAL §178 — DIRECTION OF VERDICT — HEARING.

On prayer for a directed verdict, the court must assume the truth of all the evidence tending to sustain the claim or defense against which the prayer is directed.

3. MUNICIPAL CORPORATIONS §755—DEFECTIVE STREETS—LIABILITY.

If a city negligently fails to keep streets in reasonably safe condition for public travel it is liable to persons acting without negligence who are injured thereby.

4. MUNICIPAL CORPORATIONS §791(2) — DEFECTIVE STREETS—NEGLIGENCE.

Where a depression in pavement two to four inches deep and five feet in diameter existed for several months, at a point established by ordinance for stopping cars, negligence of the city officials in failing to keep the street in a reasonably safe condition is shown.

5. MUNICIPAL CORPORATIONS §806(2) — STREETS—RIGHTS OF PEDESTRIANS.

Since pedestrians have rights in the streets equal to vehicles, they may assume that they will not be subjected to the nuisance of a depression in the street, though pedestrians cannot shut their eyes to obvious defects.

6. MUNICIPAL CORPORATIONS §821(25)—DEFECTIVE STREETS — CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Evidence held to present jury question as to pedestrian's negligence defeating recovery for injuries caused by falling in depression in street at point where she was about to board a car.

Appeal from Court of Common Pleas of Baltimore City; Morris A. Soper, Judge.

"To be officially reported."

Action by Elmira Bassett against the

Mayor and City Council of Baltimore. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, STOCK-BRIDGE, and CONSTABLE, JJ.

Edw. J. Colgan, Jr., Asst. City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellants. William H. Lawrence, of Baltimore, for appellee.

CONSTABLE, J. The appellee recovered a judgment against the appellant as a result of personal injuries suffered by her through the alleged negligence of the appellant in permitting one of its thoroughfares to be, and remain for a long time, in an unsafe and dangerous condition. At the trial below, the appellant offered three prayers, each seeking to withdraw the case from the consideration of the jury; two upon the ground that there was no legally sufficient evidence to entitle the plaintiff to recover, and one for the reason that the plaintiff was guilty of contributory negligence. It is only upon the theory that the court committed error in refusing one or all of these prayers that this appeal is prosecuted.

[1, 2] This court and others have so often and so consistently declared the rule of law as to when cases should be withdrawn from the consideration of the jury for want of legal evidence, that it is only necessary to repeat the rule: and that is, if there be any evidence from which a rational conclusion may be drawn as opposed to the theory of the prayer, the weight and value of such evidence should be left for the consideration of the jury, and, before such a prayer can be granted, the court must assume the truth of all the evidence before the jury, tending to sustain the claim or defense, as the case may be, and of all inferences of fact fairly deducible from it. *Jones v. Jones*, 45 Md. 144; *Balto. Elevator Co. v. Neal*, 65 Md. 459, 5 Atl. 338; *Moyer v. Justis*, 112 Md. 220, 76 Atl. 496; *Balto. v. Leonard*, 129 Md. 621, 99 Atl. 621.

[3] The duty of a municipality to keep its public streets and highways in a reasonably safe and proper condition for public travel is too well settled in this state, by numerous and recent decisions, to admit of any doubt; and if the municipality negligently fails to do so, and persons acting without negligence upon their part are injured, because of such negligence of the city, the municipality is liable in damages. *Balto. v. Marriott*, 9 Md. 160, 66 Am. Dec. 326; *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836, 64 L. R. A. 940, 86 Am. St. Rep. 437; *Keen v. Havre de Grace*, 93 Md. 34, 49 Atl. 444; *Magaha v. Hagerstown*, 95 Md. 70, 91 Atl. 832, 93 Am. St. Rep. 317; *Annapolis v. Stallings*, 125 Md. 346, 98 Atl. 974; *Delmar v. Venables*, 125 Md. 476, 94 Atl. 89; *Gutowaki v. Balto.*, 127 Md. 502,

96 Atl. 630; *Burke v. Balto.*, 127 Md. 560, 96 Atl. 693; *Hagerstown v. Crowl*, 128 Md. 556, 97 Atl. 544; *Biggs v. Balto.*, 129 Md. 684, 99 Atl. 860.

The testimony tends to show that the plaintiff, a woman of 75 years of age, attempted to board a street car at the southwest corner of North and Moreland avenues in Baltimore City, during the afternoon of March 5, 1917. She had been walking up Moreland avenue, and at the corner of that avenue and North avenue left the curb of the pavement and hailed a car. It had been raining the morning of, and the night before, the day of the accident. From the curb to the car line is a distance of 15 or 20 feet. And in a direct line from the corner to the entrance of a car standing to take on passengers, and about midway between the curb and the car, was a hole in the concrete or macadam street bed, described by the witnesses as of a bowl shape, and variously described by them as from 3 to 5 feet in diameter and hollowed out, at its greatest depth in the center from 2 to 4 inches. Several of the witnesses, in locating its position, testified that, in making the car, a person either had to jump over it or walk around it. And it was further testified that the hole had been there for at least a year. The plaintiff testified that after she left the curb, and while looking for automobiles both ways, she stepped into the hole and fell, breaking one of her arms in three places. She testified that she was not familiar with the point in question before the accident, and knew nothing of the hole in her path to the car until just as she was about to place her foot in it, and then she could not hold herself back; that, because of the rain, the earth in it was muddy and looked perfectly safe, like the rest of the street, and she did not know there was a hole there until she was falling.

[4] The chief contention of the appellant seems to be based upon the theory that the court below should not have allowed the case to go to the jury upon what it claims to have been no evidence of negligence whatsoever, when the only proof of such is based upon "the existence of such an insignificant defect." We cannot agree with this argument. If the authorities, charged with the duty of using reasonable care in keeping the streets and highways in safe condition for the traveling public, likewise using due care, choose to permit a defect, such as described by the testimony in this case, to continue for months, then there is strong proof that they have negligently failed to perform their legal duties. The fact that an ordinance requires all street cars to stop on the near side of a cross street for receiving and discharging passengers should have called to the attention of the authorities that holes, located as this one, were especial menaces to those compelled to avail themselves of the cars.

[5] We also are of the opinion that the question vel non of contributory negligence was one to be presented to the jury; for, since pedestrians have rights in the streets equal to vehicles, they are justified in assuming that they will not be subjected to the dangers of a nuisance, such as the testimony showed the city permitted to exist at a point where those about to take a car had to come into contact with it; but this presumption, of course, does not authorize one to shut his eyes to open and obvious dangers, and pay no attention, whatever, to the condition of the highway in which defects may, although they should not, exist. *Balto. Trust Co. v. Helms*, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; *Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; *Knight v. Balto. City*, 97 Md. 647, 55 Atl. 388.

[6] We think the testimony bearing upon this point is such as to cause reasonable men to differ, and therefore, under the rule, should have been submitted.

Finding no error in the rulings of the court, we will affirm the judgment.

Judgment affirmed, with costs to the appellee.

(132 Md. 397)

SHAWMUT MINING CO. v. PADGETT.
(No. 13.)

(Court of Appeals of Maryland. April 2, 1918.)

1. EVIDENCE \S 471(2) — CONCLUSIONS — DESIRE OF THIRD PERSON.

In action against alleged partnership, where one defendant denied relationship, testimony of the other defendant that there was no written partnership agreement, and that the other "did not want any writing," was properly stricken, on objection that witness did not say that the other partner did not state that he did not want a writing.

2. PARTNERSHIP \S 49 — EVIDENCE — ADMISSIBILITY.

General indefinite statement that it was the common talk in the city that one defendant was the partner of the other, not shown to have been brought to defendant's knowledge, was properly excluded.

3. APPEAL AND ERROR \S 1048(6) — HARMLESS ERROR — CROSS-EXAMINATION — SCOPE.

In action against alleged partnership, where one partner, testifying as to financial condition of the firm, was asked whether he took the firm money and left town and was afraid to return, and the court stated that he need not answer as to his private affairs not connected with the matter in controversy, and the witness then answered that he took some money and was not afraid to return, and had returned to town, there was no reversible error.

4. APPEAL AND ERROR \S 1048(6) — HARMLESS ERROR — CROSS-EXAMINATION OF WITNESSES.

Where witness was permitted without objection to give testimony more harmful as affecting his credibility than that objected to, there was no reversible error in admitting the testimony objected to.

5. APPEAL AND ERROR \S 1050(1) — HARMLESS ERROR — EVIDENCE.

Where witness had previously testified that a third person was not his attorney, admission of letter denying that such person was his attorney was harmless.

6. WITNESSES \Leftarrow 198(1)—PRIVILEGE—ATTORNEY AND CLIENT.

The privilege resulting from communications between attorney and client is designed to secure the client's confidence in the secrecy of his communication, but it assumes that the communications are made with the intention of confidentiality, and the moment confidence ceases, privilege ceases.

7. WITNESSES \Leftarrow 219(3)—PRIVILEGE—ATTORNEY AND CLIENT.

The privilege of communications to an attorney is for the protection of the client, and he may waive it expressly or by implication; and, if he discloses as much as he pleases, he cannot withhold the remainder.

Appeal from Baltimore City Court; Chas. W. Heulsler, Judge.

Action by the Shawmut Mining Company against Robert J. Padgett and others. From the judgment for defendant Padgett, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

George M. Brady, of Baltimore (William M. Maloy and William W. Tewes, both of Baltimore, on the brief), for appellant. Vernon Cook and Enos S. Stockbridge, both of Baltimore (France, McLanahan & Rouzer, of Baltimore, on the brief), for appellee.

PATTISON, J. This is an appeal from a judgment for the defendant, Robert J. Padgett, in an action brought by the appellant, the Shawmut Mining Company, against William J. Llewellyn and Robert J. Padgett, copartners trading as William J. Llewellyn & Co.

The suit or action was brought upon the common money counts; but an account was filed with the declaration, showing that the claim sued on was for bricks sold by the plaintiff to William J. Llewellyn & Co.

The defendant Padgett filed three pleas: (1) That he never was indebted as alleged; (2) that he did not promise as alleged; (3) that he was not copartner of William J. Llewellyn, trading as William J. Llewellyn & Co., as alleged in the declaration. The defendant William J. Llewellyn declined to plead, and later, in open court, confessed judgment in favor of the plaintiff, upon the claim filed.

In the course of the trial there were 35 exceptions taken to the rulings of the court upon the evidence, and one upon the prayers.

[1] William J. Llewellyn, being produced by the plaintiff, testified as to the copartnership agreement. In the course of his testimony he was asked, "Was there any writing between you?" and he answered, "None whatever; Padgett did not want any writing." The defendant asked the court to strike out this answer, unless "the witness means to say that Mr. Padgett said so." There was no explanation given as to his meaning, and the answer was stricken out.

This forms the first exception. In this ruling of the court we discover no error. The court's ruling on the second exception was also proper.

[2] The third exception was to Llewellyn's statement that it was the common talk of Baltimore that Bob Padgett was his partner. This general, indefinite statement, not shown to have been brought to the knowledge of the defendant, was properly excluded.

The fourth exception is to the admissibility of a ledger of William J. Llewellyn & Co., offered in evidence by the defendant. This evidence may not have been material, but in its admission we find no reversible error.

The witness Llewellyn was, at the time he testified, a manufacturer's agent, with his offices in the city of New York. He had the agency for the sale of the goods of the St. Mary's Sewer Pipe Company and the Shawmut Mining Company. These agencies he had held since he left Baltimore, in 1914. In his examination in chief he testified, as we have said, to the existence of an oral copartnership agreement between him and Robert J. Padgett, by which the firm of W. J. Llewellyn & Co., consisting of Robert J. Padgett and himself, was created. He further testified that the affairs of the firm were managed by the witness, and the profits were equally divided between him and Padgett; that Padgett's share of the profits was paid to him in cash. The firm was engaged in the sale of bricks, cement, etc., and was agent for the Shawmut Mining Company, and for the sale of the Alpha Portland Cement. The copartnership agreement was made, as he stated, in May, 1918, and shipment of goods to the firm started September, 1909, and ceased September, 1911. Thereafter, in January, 1912, a corporation was formed, known as the Contractors' Supply Company, with W. J. Llewellyn as president and general manager. The books of the company did not show Padgett's connection with the firm, or that he shared in the profits of the company. This, as witness said, was in accord with the wishes of Padgett. Upon cross-examination Llewellyn testified that Padgett would never receive a check for his profits. He always took to him the cash. There was no regular time at which these settlements were made. "The account would be on a piece of paper, so much cement sold to this party, so much brick sold to this party; that Padgett would look at the account, and, after receiving the money, would tear it up; that he took no receipts from Padgett and made no entries on the firm's books." The money for goods sold by the firm was collected by Llewellyn, and the deposits in the bank were made subject to withdrawal by him only. The witness was then asked, "Can you explain how you were so much behind?" He replied that the mon-

ey was used to further the political interest of Robert J. Padgett; that he himself gave to Padgett, in addition to his share of the profits, large sums of money, for such purposes. The witness was then asked, "When did you leave Baltimore?" "I went in 1913. * * * I have been living in New York now a little over two years." "When did you leave for good?" "I left in 1914, in the month of March." Question: "Did you leave Baltimore in December, 1913?" Answer: "Why, sure. I left several times. I left in December, 1913, with a \$4,000 check in my pocket, certified to the order of the St. Mary's Sewer Pipe Company, to pay a debt for which I was obligated." Question: "Did you leave rather suddenly?" Answer: "No." "You did not say goodbye to any of your friends, did you?" "I told William Corey." Question: "Anybody else?" "I told my wife." Question: "You got another check cashed just before you left?" To this question the plaintiff's counsel objected, saying, "What has that to do with the case?" As the record discloses, the witness voluntarily said: "It has to do with the Llewellyn Case, that is, the Contractors' Supply Company. I will acknowledge taking money there. I will acknowledge that." Then followed a discussion as to the question asked, participated in by the court, as well as the counsel for the respective parties. At its conclusion the court said, addressing the defendant's counsel, "If any of your questions broach upon his private affairs not connected with this matter, he has the right to refuse to answer." The counsel for the defendant, dropping the question to which objection had been made, asked the witness, "What do you mean by that acknowledgment?" This question was objected to by the plaintiff's counsel, and, the objections being overruled, the fifth exception was taken thereto.

It will be observed that this question was directed to the answer of the witness, voluntarily made, in which he said: "I will acknowledge taking money there. I will acknowledge that." The witness answered the question objected to, saying that, "On the same day that I had this \$4,000 check certified I also drew the pay roll of the Contractors' Supply Company, and also drew a check to my order, W. J. Llewellyn, for \$1,300." This answer, given in explanation of the earlier answer of the witness, which was uncertain in its meaning, was not objected to, and the witness was permitted, without objections, to state further that he put the money in his pocket and went to his home, and that night he went to New York, from which place he returned to Baltimore on the 20th of December, and, after remaining in Baltimore for about two days, again went to New York, and in the latter part of the year 1914 ceased to make his home in Baltimore. The plaintiff's counsel,

proceeding with the examination, asked "This \$1,300.00 you took"—here the witness interrupted him saying, "Was the stock—I will finish that for you—Was the stock of the Contractors' Supply Company which I was entitled to." Question: "Did you tell anybody you were going to take it?" Answer: "I resigned on that date." Question: "Then you took the money and went off with it?" Answer: "I took it and got the money, cash." "Well now, Mr. Llewellyn, isn't it a fact, for a long time afterward you were afraid to come back to Baltimore for fear you would be arrested?" "No; I was here all the time." He was back in the office the following Wednesday. He did not fear arrest. The witness was then asked, "Isn't it a fact, with regard to the \$1,300 check that you got that check signed in Baltimore by Mr. Corey, as secretary of the company, representing to him that it was to be used for pay roll, and that you then, instead of using it for pay roll, used it for your own personal benefit?" This question was objected to, and the court thereupon struck from the question the words, "And that you then, instead of using it for the pay roll, used it for your own personal benefit"; and the question, as amended, was propounded to the witness. The plaintiff again objected, and the court overruled his objection. This forms the sixth exception. He replied, in substance, saying there were two or three checks, drawn in blank, signed by William H. Corey, an officer of the corporation, authorized to sign checks. He could not recall whether he had demanded his check of \$1,300 or not; that he asked Miss Thompson, an employé in the office, to fill in a check to the St. Mary's Sewer Pipe Company, but she refused, saying, "They (meaning others interested in the company) did not want her to." He then filled in the check himself, for the sum of \$4,000 to St. Mary's Sewer Pipe Company, and also filled in another to himself, W. J. Llewellyn, for \$1,300; that the representations made to Corey to have him sign the checks were those ordinarily made; that is, that he wanted so many checks. He was not told for what he wanted them.

[3] We have gone very fully into the evidence leading up to the fifth and sixth exceptions, in order that it may be seen whether the answers to the questions objected to, when considered in connection with the evidence admitted without objections, injuriously affected the plaintiff, even though it should be held that the defendant pursued this line of questioning beyond what he should have done. In view of the evidence preceding the question involved in the fifth exception, and the doubtful character of the answer of the witness, voluntarily given, to which the question was directed to ascertain its meaning, and the statement of the court that the witness was not required to answer the ques-

tion if it involved his private affairs, not connected with the matter in controversy, the court, in our opinion, committed no reversible error in permitting the question to be asked.

[4] As we have already said, no objection was made to the answer involved in the fifth exception, and the witness was permitted thereafter to state facts that, without explanation, were more harmful to the character of the witness, as affecting his credibility, and more injurious to the plaintiff's case, by reason thereof, than the answer to the question objected to in the sixth exception; and, consequently, we can find no reversible error in the court's ruling upon the sixth exception.

The ruling of the court upon the seventh exception was entirely proper upon cross-examination.

The eighth exception was to the admissibility of a letter from Hecht to the witness Yates. It was offered and admitted to refresh the memory of Yates as to a meeting with Hecht at the Caswell Hotel on January 14, 1917. We find nothing in its contents to injure the plaintiff.

[5] The ninth exception is to the admissibility of another letter of March 21, 1914, from Yates, manager of the Shawmut Mining Company, to Hecht, in which he denied having employed Hecht as his attorney. He had previously stated in his testimony that Hecht was not his attorney, and consequently this admission of the letter could not have injured the plaintiff.

We discover no error in the court's rulings in the tenth, eleventh, twelfth, and thirteenth exceptions.

The fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second exceptions are to conversations had by the witness Hecht with Yates, which are claimed by the plaintiff to be privileged communications, because of the alleged relation of attorney and client existing between Hecht and Yates. Yates was the agent of the Shawmut Mining Company, and it was with him that Llewellyn did all of his dealings in connection with the purchase of the goods mentioned in the account, filed with the declaration, upon which this suit is instituted. Yates, produced on the part of the plaintiff, had already testified as to the existence of a copartnership between Padgett and Llewellyn, and had been asked concerning conversations with Hecht, which, as claimed by the defendant, were inconsistent with any knowledge, on his part, of any such copartnership. There were no objections interposed thereto, or any claim made at the time, that said conversations were privileged communications, because of the relation of attorney and client, existing between them; but Yates, on the contrary, denied that Hecht was at the time of such conversations, his attorney. He said of Hecht that he never regarded him as of any consequence whatever,

beyond that of an office boy for Mr. Padgett, that he did not place any great stock in Mr. Hecht, and concluded by saying that Hecht "never was a recognized attorney of mine."

[6, 7] The privilege resulting from communications between attorney and client is designed to secure the client's confidence in the secrecy of his communication, but it assumes, of course, that the communications are made with the intention of confidentiality. The moment confidence ceases privilege ceases. *Wigmore on Evidence*, § 2311. If Yates did not recognize Hecht as his attorney, the communications were not made to him as his attorney, and consequently such circumstances were without that confidentiality that is requisite, under the rule, to make it a privileged communication. It may also be said that while the privilege is for the protection of the client, he may waive the privilege, and this may be done by implication; for instance, he cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. In view of the testimony of Yates, the evidence admitted under these exceptions was properly admitted.

We find no error in the court's ruling in the exclusion of evidence offered in the twenty-third, twenty-fourth, and twenty-fifth exceptions.

The court's rulings in admitting the evidence in the twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth, and its excluding the evidence offered under the thirtieth and thirty-first exceptions, were proper.

The thirty-second and thirty-third exceptions were to the exclusion of evidence offered in rebuttal, which evidence was properly excluded, and the same may be said of the thirty-fourth and thirty-fifth exceptions.

The thirty-sixth exception goes to the ruling of the court upon the defendant's first and second prayers that were granted, and the plaintiff's second prayer that was refused. The defendant's first prayer relates to the burden of proof, and we are unable to find any error committed by the court in granting that instruction; nor do we find any defect in the defendant's second prayer, to which the appellant, in its brief, makes no allusion.

Both the granted and rejected prayers of the plaintiff appear to have been drawn upon the theory that there was a plea of limitations in the case, but there was none. It is, however, only to the second or rejected prayer that our attention need be given; and this prayer was properly rejected.

There is a motion in this case to dismiss the appeal, involving not only the construction of chapter 625 of the Acts of 1916, but the validity of that act. These questions will be disposed of in an opinion hereafter to be delivered in a case now pending before us; and, as it is our opinion that the judgment below in this case should be affirmed regardless of our views of the questions rais-

ed by the motion to dismiss, it is not necessary to discuss the motion.

Having found no error in the rulings of the court below, the judgment of that court will be affirmed.

Judgment affirmed, with costs to the appellees.

(132 Md. 497)

NORTHERN CENTRAL RY. CO. et al. v.
MAYOR, ETC., OF BALTIMORE.
(No. 37.)

(Court of Appeals of Maryland. April 3, 1918.)

TAXATION \Leftrightarrow 391—VALUATION OF RAILROAD'S LAND.

Under Code Pub. Civ. Laws, art. 23, § 313, and article 81, § 193, providing for assessing and taxing a railroad's property in the same manner as that of individuals, special utility, for railroad purposes, of a railroad's land, is to be considered in determining value.

Appeal from Baltimore City Court; Carroll T. Bond, Judge.

Tax proceedings by the Mayor and City Council of Baltimore against the Northern Central Railway Company and another. The court affirmed the assessment, and the Railroad Companies appeal. Affirmed.

Argued before BOYD, O. J., and BRISCOE, THOMAS, PATTISON, /URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Shirley Carter, of Baltimore (Bernard Carter & Sons, of Baltimore, on the brief), for appellants. R. Contee Rose, Asst. City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellee.

PATTISON, J. The Northern Central Railway Company, of which the Pennsylvania Railroad Company is lessee, is the owner of a number of lots or parcels of land in the city of Baltimore, lying and being in Jones Falls valley. In the year 1916 these parcels of land were assessed by the appeal tax court of Baltimore city for municipal taxation at amounts largely in excess of the assessment upon which the taxes had been previously paid. The Northern Central Railway Company and its lessee, being dissatisfied with the assessment, appealed to the state tax commission. The tax commission heard testimony, offered by each of the parties to the proceedings, as to the value of the real estate mentioned, and the city, as well as the railroad company, submitted to the commission propositions of law by which they respectively contended the taxing authorities should be governed in their valuation and assessment of the properties for the purpose of taxation. The only proposition submitted by the railroad company was that:

"The tax authorities of the city of Baltimore were and are required to assess the real property of the appellant railroad company in the same manner as of like property of individuals."

This submission, being in the form of a prayer, was granted by the commission.

Several propositions of law were submitted by the city, but the only one we think necessary to discuss, in view of the real contention of the parties, is the instruction asked for, and granted by the commission:

"That the utility of the property in this appeal for railroad purposes is a proper element of value to be considered in arriving at the value of said property for the purpose of taxation for the year 1917."

The tax commission affirmed the action of the appeal tax court in the assessment made by it, and the railroad company appealed therefrom to the Baltimore city court. That court, to which the case was submitted for trial without the intervention of a jury, upon the evidence produced before the tax commission, affirmed the assessment, and this appeal is from the action of the court in affirming the rulings of the commission upon the propositions of law submitted to it.

The sole question before us upon this appeal is whether the taxing authorities, in making the assessment complained of, followed the provisions of the statute. Section 193 of article 81, and section 313 of article 23, of the Code of Public General Laws of 1912. The language of these sections, having relation to the questions before us, is the same, and is as follows:

"The property, real and personal, of each and every railroad company in this state, working their roads by steam, shall be assessed and taxed for county and municipal purposes in the same manner as the property of individuals is now assessed and taxed; and the authorities of the several counties and the city of Baltimore are hereby authorized and directed to proceed to assess and collect taxes on said property in the same manner as upon like property of individuals now assessed and taxed or liable to assessment and taxation by the laws of this state."

The requirement of the statute is that the aforesaid property of the appellant shall be assessed and taxed for municipal purposes in the same manner as the property of individuals is now assessed and taxed, and that the city is authorized and directed to proceed to assess and collect taxes on the same in the same manner as upon like property of individuals. The appellants interpret or construe this language as prohibiting the taxing authorities from considering the utility of the property for railroad purposes in ascertaining its value for municipal taxation. The correctness of this contention it would seem, depends upon the question whether, under the law of this state, the taxing authorities, in valuing and assessing like property of individuals for municipal taxation, are authorized to consider its utility for railroad purposes.

The question, therefore, to be decided, is: How and in what manner are lands owned by individuals valued and assessed, under the laws of this state, for municipal taxation? In assessing real estate of individuals

for the purpose of taxation, its full cash value is to be ascertained (chapter 120 of the Acts of 1896) without looking to a forced sale; and in ascertaining its value all utilities of which the property is capable, and which have the effect of enhancing its value, are elements to be considered. *Brack v. Baltimore*, 125 Md. 382, 93 Atl. 994, Ann. Cas. 1916E, 880; *Bonaparte v. Baltimore*, 131 Md. 80, 101 Atl. 594, and cases therein cited. If the lots of land in question, which are shown to possess special utility for railroad purposes by all the witnesses who testified before the commission were owned by individuals, there could be no doubt as to the authority of the taxing powers to consider that utility in ascertaining their value for taxable purposes; or if there are other lots owned by individuals, similarly located in Jones Falls valley, possessing special utility for railroad purposes, the taxing powers of the city have the undoubted authority to consider that utility in ascertaining the value of such lots for taxable purposes.

It is not, as suggested by the appellants' counsel, the increased value of the lots of land, resulting from the fact that they are parts or units of the railroad system, which the commission has said may be considered in ascertaining their value; but it is the utility they possess for railroad purposes, without regard to the fact that said lots of land are parts or units of the railroad system. The natural depression in which the lands are situated or located, running through the city, affords great advantages for the construction and operation of a railroad leading into the very heart of the city. It is this high, special utility for railroad purposes that we have said may be considered in ascertaining the value of the land in question, and such utility exists whether the lands are owned by the railroad company or by individuals; and, as such utility may be considered in ascertaining the value of lands owned by individuals, it, under the statute, may in the same manner be considered in assessing the lands of the railroad company.

There were other propositions of law submitted to and passed upon by the state tax commission, but we find no error in the commission's rulings thereon, which were affirmed by the court below, or, if so, no error by which the appellants were injured.

There is a motion in the record to dismiss the appeal, but, owing to the importance of the question presented, we have thought it best to decide it, and in so doing it is necessary for us to pass upon the motion to dismiss the appeal, as we will affirm the ruling of the lower court.

Ruling of the court below affirmed, with costs to the appellees.

(132 Md. 476)

BOGGS v. DUNDALK REALTY CO., Inc (No. 29.)

(Court of Appeals of Maryland. April 3, 1918.)

1. APPEAL AND ERROR §718(1)—RECORD.

Where the order appealed from, dismissing the petition, gave no leave to amend the bill, an amended bill in the record will not be considered.

2. ACCOUNT §17(1)—PETITION—FRAUD.

Option holder's petition for accounting, etc., setting up fraud, but no facts to show a sufficient basis for charge of fraud, is demurrable.

3. EQUITY §71(2) — LACHES — LENGTH OF TIME.

What constitutes laches is not a hard and fast rule of a specific length of time, as in the case of limitations; but it is dependent in each case upon the facts of the particular case.

4. EQUITY §71(3)—LACHES—DELAY.

Where plaintiff, after three years, charged that transaction relating to land option contract was fraudulent, but made no explanation for the delay, a clear case of laches was apparent.

5. SPECIFIC PERFORMANCE §28(1) — CONTRACTS ENFORCEABLE—DEFINITENESS.

Specific performance can be granted only where the contract is definite and certain in all its parts.

6. SPECIFIC PERFORMANCE §114(2) — PLEADING.

Bill alleging that certain definite agreements were to be set aside for the purpose of entering into a new agreement, which failed to indicate the terms of the new agreement, did not entitle plaintiff to specific performance, which can be granted only where the contract is definite and certain in all its parts.

Appeal from Circuit Court, Baltimore County; Allan McLane, Judge.

Bill by A. Graham Boggs, Jr., against the Dundalk Realty Company, Incorporated. Judgment dismissing the complaint, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Edgar Allan Poe, of Baltimore, for appellant. Robert H. Carr, of Baltimore (T. Scott Offutt, of Towson, on the brief), for appellee.

STOCKBRIDGE, J. This case was begun by the filing of a petition in the nature of a bill of complaint, to which a demurrer was interposed. The demurrer was sustained, and petition dismissed, in the circuit court for Baltimore county, sitting in equity.

[1, 2] The sustaining of the demurrer and the dismissal of the petition was on the 9th of July, 1917. On the 7th of September, 1917, and thus after the order had become enrolled, upon the petition of the complainant, the order of July 9th was revoked, and leave granted to file an amended bill of complaint, and on the day following, according to the docket entries, an appeal was taken to this court from the decree previously entered in Baltimore county. At the time when the appeal was so taken, there was nothing from which the petitioner could appeal. On September 20th the order passed on the 7th of

the month was rescinded, the effect of which was to leave the case in the condition it was prior to the order of the 7th of September. The case will accordingly be considered as though the order of September 7th had never been passed.

[3] There appears in the record an amended bill, but the order of July 9th gave no leave to amend the bill, but dismissed the petition, and the amended petition bears this indorsement, "This paper was filed by the clerk without leave of court being first had and obtained," signed by Judge McLane. For the purposes of the case, therefore, this so-called "amended petition" will not be considered.

The original petition was drawn with no attempt at compliance with the general equity rules. It alleges in substance that on the 1st of August, 1913, the appellee gave to the appellant an option or right of purchase for a parcel of ground in Baltimore county, of approximately 29 acres, situate at Dundalk, for which the petitioner was to pay \$500 an acre, and make certain payments on account of the purchase price of the land in accordance with the agreement. Exhibit A, filed with the petition, purports to be a copy of that agreement. When that is examined, it appears to be an agreement between the Dundalk Realty Company and the Branch Real Estate Company, per A. S. J. Jakeman, and in which the name of the petitioner nowhere appears. The agreement specifically provides that the option given by it is not to run over six months, and that, in order to keep it alive, \$100 is to be paid on September 1, 1913, \$200 to be paid on October 1, 1913, \$300 on November 1, 1913, and that any money paid on account of the option is to be credited on the purchase price of the land, if a sale is effected under the option.

The petition further sets forth that \$100 was paid on September 1, 1913, an offer made to pay the Realty Company \$200 on the 1st of October, according to the terms of the option, but that the Dundalk Company declined to receive the same, and that several attempts were subsequently made to induce the Dundalk Company to accept the \$200, but were declined, and that thereafter the company endeavored to cancel its contract, on the ground that the petitioner had not made the payments as agreed. On the 24th of October, 1913, an agreement was entered into between the Dundalk Company and Albert S. J. Jakeman, trading as the Branch Real Estate Company, reciting the agreement of August 1st, and that Jakeman had failed to comply with the terms thereof, so that it had become null and void, and that the payment of \$100 had become forfeited to the Realty Company by reason of the noncompliance with the conditions named in the agreement of August 1st.

This paper, filed as Plaintiff's Exhibit B, gives an option to Jakeman to purchase the

29 acres referred to in the agreement of August 1st for the sum of \$22,000, and contains provisions by which Jakeman should have the right to sell off the land in small lots, in accordance with a survey and division of the lands which had been made at the instance of Jakeman, and from the purchase money paid for such lots sold \$650 was to be paid to secure the surrender by the tenant then in possession, certain amounts to the Dundalk Realty Company, which was thereupon to secure, as to the lots so sold and paid for, releases of two mortgages which were upon the land, and the entire purchase price of \$22,000 was to be paid before July 1, 1914. The party of the second part to this agreement, Jakeman, trading as the Branch Real Estate Company, was to lay out and grade streets in 20 ¹⁸/₁₀₀ acres of the land, and to cause to be laid cement sidewalks upon said streets. This agreement was not to be assignable without the written consent of the Dundalk Company. The agreement was signed by the Dundalk Realty Company, by its president, and Albert S. J. Jakeman, trading as "Branch Real Estate Company."

A month and a day later, namely, November 25, 1913, this agreement was indorsed, "Canceled. A. Graham Boggs, Jr., Albert S. J. Jakeman." This is the first time that Mr. Boggs appears in the transaction. What his interest was is nowhere set out. On the same day, November 25th, Messrs. Jakeman and Boggs, for themselves and the Branch Real Estate Company, signed a release, declaring both of the agreements, that of August 1st and October 24th, null and void, and releasing the Dundalk Realty Company from any and all claims arising out of said agreements, and on the day following another release was executed by Jakeman and Boggs, reciting the failure of the Branch Real Estate Company to comply with the terms of the agreement, declaring the agreements null and void, and releasing any claim that they might have against the Dundalk Realty Company. The petition further recites that these releases were given upon an agreement to execute a new contract later in the day than the time when the releases were signed, but that such contract had never been executed, and apparently not even prepared.

There is no allegation or suggestion as to what the terms of the new contract were to be, nor anything from which an inference could be drawn with regard to the terms or conditions to be included in it. The petition further sets out that the Dundalk Realty Company has collected large sums of money on account of sales of the land made by the petitioner through its agent, which sums the petitioner believes would be more than sufficient to pay any balance due on the purchase price, and that the petitioner has made frequent demands for an accounting and been refused, and it concludes with the following prayers:

"(1) That an order may be passed by this court requiring the said Dundalk Realty Company to give to your petitioner an accounting of the moneys received on account of the purchase price of the said land as set forth in the above petition.

"(2) That the said Dundalk Realty Company be enjoined from disposing of the said land in disregard of your petitioner's rights.

"(3) That the said Dundalk Realty Company be ordered to convey the said land to your petitioner by a good and merchantable title.

"(4) And that your petitioner may have such other and further relief as his case may require."

[4] The petition in the case was filed on the 18th of December, 1916, more than three years after the release given by Boggs and Jakeman to the Dundalk Company. The argument is that these releases were procured by fraud, and the allegation in the petition is that the Dundalk Company endeavored to commit a fraud upon the petitioner; but there are no facts set forth in the petition, and the exhibits filed with it, to show a sufficient basis for any charge of fraud, and the petition was clearly demurrable. *American Surety Co. v. Spice*, 119 Md. 1, 85 Atl. 1031.

[5, 6] Nor is there any attempt to explain away the long lapse of time between the execution of the releases and the institution of this suit. What constitutes laches is not a hard and fast rule of a specific length of time, as in the case of limitations, but it is dependent in each case upon the facts of the particular case. *Warburton v. Davis*, 123 Md. 231, 91 Atl. 163. A lapse of several years may in some cases be free from objection on this ground; in others a much shorter time, as in *Whiteford v. Yellott*, 104 Md. 191, 64 Atl. 936, where a delay of two years was held to bar the plaintiff from recovery, and there are cases where an interval of days has been held to constitute laches. In the present case the plaintiff alleges that he was deceived and defrauded, yet he permits more than three years to pass before he attempts to enforce his rights, if he had any. No explanation is offered for the delay, and, in the absence of any attempt to account for the inaction during this period, a clear case of laches is apparent on the face of the petition.

[7] If this could be regarded as a bill for specific performance, it would be on that ground also open to demurrer. That relief can be granted only for the enforcement of a definite agreement, certain in all its parts. The allegations of the bill in this case are that the agreements of August and October, 1913, were both to be set aside for the purpose of entering into a new agreement; but the terms of such new agreement are not indicated in any particular. To a case of this character the language of *Alvey, O. J.*, in *Coleman v. Applegarth*, 93 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417, is entirely applicable:

"The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time and for a given price. It was unilateral, and binding upon one party only. There was no mutuality in it, and it was binding upon A. only for the time stipulated for the exercise of the option. After the lapse of the time given there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. * * * When the time limited expired, the contract was at an end and the right of option gone, if that right had not been extended by some valid binding agreement, that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself."

See, to the same effect, *Maughlin v. Perry*, 35 Md. 352.

No error can be imputed to the court below for its ruling in this case, and the order appealed from will therefore be affirmed.

Order affirmed, with costs to the appellee.

(132 Md. 571)

NEUDECKER v. LEISTER. (No. 54.)

(Court of Appeals of Maryland. April 4, 1918.)

1. EXECUTORS AND ADMINISTRATORS §221(2) — CLAIMS AGAINST ESTATE—PERSONAL SERVICES—PRESUMPTIONS.

Where a niece agrees with her aunt to board and lodge the aunt for the remainder of her life and to render her personal services, such services are not presumptively gratuitous; the kinship not being sufficiently close to create of itself the presumption.

2. EXECUTORS AND ADMINISTRATORS §206(3) — CLAIMS AGAINST ESTATE—PERSONAL SERVICES.

In an action by a decedent's niece against the executrix to recover for services rendered decedent under a promise to provide for plaintiff in the will together with other nieces, that decedent left all her property to the niece with whom she last lived did not affect plaintiff's right to recover the fair value of services performed by her.

3. EXECUTORS AND ADMINISTRATORS §206(3) — ACTIONS AGAINST EXECUTOR — PERSONAL SERVICES—CONTRACT TO MAKE WILL.

Where decedent had promised to provide for her niece by will in consideration of personal services, plaintiff could sue the executrix for the value of such services, although no recovery could be had on the contract to make a will; that being in parol.

4. HUSBAND AND WIFE §208 — RIGHT OF WIFE TO SUE.

Under Code Pub. Civ. Laws, art. 45, § 5, empowering married women to engage in any business and to contract and sue as if unmarried, a married woman may in her own name instead of that of her husband maintain a suit against an executrix to recover for personal services rendered decedent, with her husband's consent, for a consideration passing to her personally.

Appeal from Circuit Court, Carroll County; Robert Moss, Judge.

"To be officially reported."

Suit by Cora V. Neudecker against Sarah A. Leister, executrix of the last will of Sarah A. Noll, deceased. From a verdict

directed for defendant, plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Guy W. Steele, of Westminster, for appellant. Francis Neal Parke, of Westminster (Ivan L. Hoff and James A. C. Bond, both of Westminster, on the brief), for appellee.

URNER, J. The appellant, Cora V. Neudecker, brought this suit against the appellee, as the executrix of the will of Sarah A. Noll, deceased, to recover \$407.10 for board and lodging furnished, and personal services rendered, to the decedent in her lifetime, during the period of three months in the year 1912, and about one year and ten months from September 7, 1913, to July 26, 1915, at the rate of \$18 per month. It is stated in the declaration, and in the open account therewith filed, that the accommodations and attentions sued for were provided in pursuance of an agreement that the plaintiff should be compensated therefor by the defendant's testatrix in her will, but that she died without making such compensation by will or in any other manner. The case was withdrawn from the jury on the ground that there was no legally sufficient evidence to sustain the plaintiff's claim. The only exception in the record questions the propriety of that ruling.

There is no dispute in the evidence that the board, lodging, and services for which the plaintiff is suing were actually furnished and rendered to the extent and value claimed, but recovery was successfully resisted on the theory that these provisions for the support and comfort of the decedent were in fact made gratuitously, and that her failure to make an expected disposition in the plaintiff's favor by will is not an adequate legal basis upon which the present suit may be maintained.

The record shows that the decedent, Sarah A. Noll, was a widow without children, and had four nieces, one of whom was Mrs. Neudecker, the plaintiff, and there is evidence to the effect that prior to the first of the periods to which the account in suit refers she told the plaintiff that she would divide her estate among the nieces if they would keep her during her life. There were subsequent statements by Mrs. Noll to the plaintiff that she could not pay at the time for what was being done for her, but that she would give the plaintiff something by her will. The other nieces were Mrs. Leister, Mrs. Basler, and Mrs. Close. Each of the four nieces was substantially remembered by a will executed by Mrs. Noll in 1911. From that time until her death in November, 1915, she lived alternately with Mrs. Basler, Mrs. Neudecker, and Mrs. Leister. In 1913 she made a will giving her estate to those three nieces, but by her last will dated

July 31, 1915, she gave her property wholly to Mrs. Leister, with whom she was then living. The proof is that during the periods of Mrs. Noll's sojourn in Mrs. Neudecker's home she was "treated as one of the family," but she "never helped around the house or did any kind of work," except that "occasionally she might have made up her bed." She was about 80 years of age when she went to the home of Mrs. Neudecker in 1912. While she remained there, during both of the periods mentioned, she received, in addition to her board and lodging, the benefit of the services of Mrs. Neudecker and other members of the family in doing her laundry work, sweeping her room, waiting on her, and giving her whatever attention she needed.

[1] It does not seem to us that the services thus rendered should be regarded as presumptively gratuitous. The kinship of Mrs. Neudecker to her aunt was not sufficiently close to create of itself such a presumption. This was expressly decided in the case of *Bonic v. Maught*, 76 Md. 440, 25 Atl. 423, where a niece was suing for personal care and attention bestowed upon her invalid aunt, who was a boarder in the home of the plaintiff's mother, and where it was said, in the opinion by Chief Judge Alvey:

"It is not to be inferred, simply from the relation that existed in this case between the parties, that the services were intended to be gratuitous, and were rendered with no view of compensation."

It is true that even in the case of a more remote kinship, or as between persons not related in blood or by marriage, the inference that particular services were intended to be gratuitous may arise when the domestic associations of the parties involve the usual incidents of family relationship. *Pearre v. Smith*, 110 Md. 531, 73 Atl. 141; *Harper v. Davis*, 115 Md. 349, 80 Atl. 1012, 35 L. R. A. (N. S.) 1026, Ann. Cas. 1913A, 861; *Elosser v. Fletcher*, 126 Md. 244, 94 Atl. 776. But, except where the natural or actual relations of persons as members of the same family are such as to raise the presumption that their services were designed or understood to be gratuitous, "the law implies a promise to pay for services rendered and accepted, and the burden is on the party resisting the payment to show that no charge was to be made, if the rendition and acceptance of the services are proven." *Marx v. Marx*, 127 Md. 373, 96 Atl. 544; *Harper v. Davis*, supra; *Wallace v. Schaub*, 81 Md. 598, 32 Atl. 324; *Gill v. Staylor*, 93 Md. 472, 49 Atl. 650; *Bixler v. Sellman*, 77 Md. 496, 27 Atl. 137.

[2] In this case it appears that an aged aunt, after proposing that she would divide her estate among her four nieces if they would keep her during the remainder of her life, was received and cared for alternately by the plaintiff and two of the other nieces until the time of her death. The circumstances of her admission to the plaintiff's

home, and the conditions under which she lived during the periods which she selected for her sojourn there, were not such, in our opinion, as to justify a conclusion, as a matter of law, that the care and attention thus received by the aunt were to be provided without compensation. There was a distinct promise in advance by the aunt to the definite effect that she would bequeath a due proportion of her estate to the plaintiff in consideration of the services and accommodations which the latter in fact subsequently rendered and furnished as required. The position accorded the aunt in the plaintiff's home was thoroughly consistent with the theory that both expected compensation to be made in the manner and to the extent which the aunt had proposed. The mere fact that the aunt failed to make the promised division of her estate among the nieces who kept her in accordance with her request, but left all her property to the niece with whom she was living at the time of her death, does not affect the plaintiff's right to recover the fair value of the services performed and accepted under the circumstances described.

[3] In *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 700, an uncle had agreed by parol to give his nephew by will a portion of his estate equal to that of any of his children, if the nephew would render certain services as requested during the remainder of the uncle's life. The nephew performed the desired services, but the uncle died without making the promised provision for the nephew by will or otherwise. In an action at law brought by the nephew to recover a portion of the uncle's estate according to the terms of the agreement referred to, it was held that while no recovery could be allowed on parole contract, because it was within the operation of the statute of frauds, yet the plaintiff was entitled to sue for the value of his services rendered in pursuance of the uncle's proposal. This just principle is appropriate to the facts of the present case.

[4] It has been argued that, if a right of recovery be assumed, it can only be asserted by the plaintiff's husband. This contention is based upon the theory that the husband is entitled to the benefit of his wife's services, and that she cannot recover for them without proving that they were rendered by her as an independent person on her own account in accordance with an understanding between herself and her husband to that effect. In support of this view, the appellee cites the cases of *Neale v. Hermanns*, 65 Md. 474, 5 Atl. 424; *Poffenberger v. Poffenberger*, 72 Md. 321, 19 Atl. 1043; *Baker v. Hedrich*, 85 Md. 661, 37 Atl. 363; and *Herman v. Oehrl*, 116 Md. 512, 82 Atl. 161. Those cases were quite different in their facts from the case now being considered. In none of the cases just cited were the services of the wife rendered with her husband's consent for a

promised consideration which it was expressly proposed and mutually understood that she should separately receive. Such an understanding is one of the distinctive features of the case at bar. In our judgment the wife should be permitted to maintain the suit, under the circumstances proven, and in view of the provision of article 45, § 5, of the Code, that:

"Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried."

Judgment reversed, and new trial awarded.

(123 Md. 433)

THOMPSON v. THOMAS & THOMPSON
CO. OF BALTIMORE CITY et al.
(No. 34.)

(Court of Appeals of Maryland. April 3, 1918.)

1. TENANCY IN COMMON ~~§49~~—RIGHTS OF COTENANT.

A tenant in common has no right to bind the interest of his cotenant by a lease of the premises.

2. TENANCY IN COMMON ~~§49~~—RIGHTS OF COTENANT—LEASES—RATIFICATION.

Where a cotenant accepted rent money under a lease executed by the other cotenant without authority, she ratified the lease, since ratification may occur by acts as well as agreement.

3. EXECUTORS AND ADMINISTRATORS ~~§150~~—POWERS—LEASE OF LAND.

Will empowering executrix, for purpose of changing investments or making division, "to sell and lease any part or all of the property, subject to the approval of the court," did not require court approval for a lease made without purpose of changing investment or dividing the estate.

4. SPECIFIC PERFORMANCE ~~§25~~—CONTRACT ENFORCEABLE—LEASE BY COTENANTS.

Lessee of premises owned by cotenants, one of whom was an executrix with limited powers, who ratified the lease made by cotenant by receiving the rent money, the lease providing for 10-year renewal, held entitled to specific performance of a renewal lease.

5. PLEADING ~~§261~~—ANSWER—AMENDMENT.

Where landlord's answer admitted the validity of a lease, by admitting receipt of the rent money during the initial 5-year period, the lease having provided for a renewal for 10 years, the landlord was properly refused permission to amend by reciting fraud, making the lease void ab initio.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

Bill by the Thomas & Thompson Company of Baltimore City and another against Kate Thompson. Decree for complainants, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOOK-BRIDGE, JJ.

J. Cookman Boyd, of Baltimore, for appellant. Frank Gosnell and William Pepper Constable, both of Baltimore (Marbury, Gosnell & Williams, of Baltimore, on the brief), for appellees.

STOCKBRIDGE, J. The questions of law involved in this appeal are not difficult, and have been settled as far as this state is concerned by the cases of *Falck v. Barlow*, 110 Md. 159, 72 Atl. 878, 17 Ann. Cas. 538, *King v. Kaiser*, 126 Md. 213, 94 Atl. 780, and *Read v. Nattans*, 129 Md. 67, 98 Atl. 158, and 130 Md. 470, 100 Atl. 736. The bill of complaint is one for specific performance. It will suffice to refer very briefly to certain prominent facts appearing from the exhibits and evidence, to make entirely plain the proper application of the legal principles as set out in the cases already mentioned.

Plaintiff's Exhibit No. 1 purports to be an agreement to lease certain premises, known as No. 103 East Baltimore street, by John B. Thomas and Kate Thompson, trustee, to the Thomas & Thompson Company. It is dated May 10, 1910, and appears to have been intended as a lease of the cellar and first floor of 103 East Baltimore street, for a term of 5 years, at a rental of \$3,600 per annum, for the half interest of the appellant herein, and further to be a lease for 10 years, commencing at the expiration of the 5 years, at an annual rental of \$4,000, for the same half interest. This agreement was not acknowledged by either John B. Thomas or the Thomas & Thompson Company until the 21st day of March, 1917, and was never acknowledged at any time by Mrs. Kate Thompson, as trustee. The appellant claims that the paper referred to is not a valid lease, because not in accordance with section 1 of article 21 of the Code. There is no allegation that the rent stipulated is inadequate, or that any of the conditions embodied are unjust or unfair to the appellant.

It is unnecessary to consider whether the paper was a valid lease for the original 5-year term, from June 1, 1910, to June 1, 1915, for the reason that that term has fully expired, the rent been paid and accepted, and that question would at this time be purely academic. All that this case can properly deal with, therefore, is as to the effect of Plaintiff's Exhibit No. 1 as creating a lease, or an agreement to lease, for the ten-year period beginning June 1, 1915. That it does not comply with the provisions of the Code, *supra*, necessary to constitute it a valid lease, is perfectly plain. At the same time, if the paper is adequate in other respects, it may constitute a perfectly good agreement to enter into a lease in accordance with the terms set forth, an agreement such as a court of equity will specifically enforce.

[1, 2] Mention has already been made of the fact that this agreement, though signed by Mrs. Thompson, was never acknowledged by her. Mr. Thomas and Mrs. Thompson, as life tenant and trustee under the will of her husband, were tenants in common of the property. As such, Mr. Thomas, of course, had no right to bind the interest of his cotenant by any lease of the premises. This

situation might have been made a ground of defense by the appellant, but no stress was laid upon it, either in the argument before the court or in the brief filed by her counsel. If there had been, it would have been a sufficient answer to say that the appellant, by receiving the rental of \$4,000 per annum down to the time of the bringing of this suit, had ratified the agreement, for a ratification may be established by acts as well as by parol or by written agreement. See 7 R. O. L. 877, *Pellow v. Arctic Iron Co.*, 164 Mich. 87, 128 N. W. 918, 47 L. R. A. (N. S.) 573, and elaborate note appended thereto, Ann. Cas. 1912B, 827, and *McDonald v. Finseth*, 32 N. D. 400, 155 N. W. 863, L. R. A. 1916D, 149, in which a very able opinion was filed by Bruce, J., reviewing nearly all of the authorities.

What actually took place in this case was a notice, dated December 2, 1916, from Kate Thompson, trustee, to the Thomas & Thompson Company, to vacate the premises on the 31st of May, 1917. This notice referred to the agreement, Plaintiff's Exhibit No. 1, already mentioned, and by inference ratified that agreement as a lease for 5 years, and then seeks to treat the appellee company as being a tenant holding over, and therefore a tenant from year to year. The communication of Mr. Boyd, which accompanied the notice, speaks of the agreement as a "supposed lease," for a period of 15 years. The instrument to which this refers makes no mention of a term of 15 years; that duration can only be arrived at by combining the two terms named therein, and for which terms the amount of rental payable was not the same. This notice having been served, the appellee, on the 30th of April, 1917, filed the bill in this case, by the prayers of which the following relief was asked: An injunction against the appellant to restrain any proceedings at law for the recovery of the premises, and a decree for a specific performance or execution of a lease, "in conformity with the terms of Plaintiff's Exhibit No. 1. The answer, after admitting a number of the allegations contained in the bill, relies mainly upon two grounds: First, that under the terms of the will of her husband, Albert E. Thompson, she was without power to enter into such an agreement as that proposed; and the second ground of defense was as to the proper rule of law applicable to such cases.

[3] The will of Mr. Thompson, in so far as it places a limitation on the power of his executrix and trustee to deal with the property, is as follows:

"I hereby confer upon my executrix, or her successor in charge of my estate, full power and authority for the purpose of changing the investments of my estate so left, or for the purpose of making division thereof, to sell and lease any part or all of the property so held, subject, however, to the approval of the court."

The defendant claims that, no authority of the court having been given, such an agreement of lease as that now involved would be an ultra vires act. This, however, is a misconception of the plain intent of the testator. The approval of the court was evidently intended to apply only to the sale of property for the purpose of reinvestment, or a partition of the estate. The proposed agreement is neither; it looks only to obtaining a proper and adequate return from the estate, as it had been held by the testator, without any reference to a change of investment or partition.

[4] The legal requirements for the maintenance of a bill for specific performance have been so frequently repeated in this court that it would be a work of supererogation to again recite them. They were tersely stated in *King v. Kaiser*, supra, when it was said:

"To maintain a bill for specific performance it is requisite * * * that the agreement, which the court is asked to require to be performed, must be fair, just, reasonable, bona fide, certain in all its parts, and made upon a good and valuable consideration."

Tested by these requirements, and the evidence given at the trial of this case, there is not an element lacking upon which to base a refusal of a decree such as that asked for.

[5] Much of the contention at the trial of this case below grew out of an application for leave to amend the answer of Mrs. Thompson, as trustee, and the amendment desired was the insertion in that answer of the following language:

"And that at and before the time of the signing of the alleged lease she asked the said John B. Thomas if it was all right to sign the said paper, and he said, 'Kate, you know I would not ask you to do anything that was not right, and this paper is all right to sign,' and that in reliance upon the aforementioned intimate relationship between the said Thomas and herself, and ignorant of the contents of said paper, and because of said statement from Thomas to her, she was fraudulently induced to sign the same."

The application for leave to amend was refused by the court, and the correctness of that ruling has been sought to be raised in this court. In the case of *McKim v. Thompson*, 1 Bland, 162, the learned Chancellor said:

"It is with great difficulty permitted to a defendant to make any alteration in his answer, even upon a mistake, and there is no instance of its having been allowed for the purpose of retracting a clear and well-understood admission. It should appear due to general justice to permit the issue to be altered."

The case is referred to by Mr. Miller in his work on Equity, in section 189, and that author adds:

"A special case must be shown to allow the amendment. Before the court will permit the issue to be changed in this way, the defendant must show that it is due to justice that the amendment should be made."

The same doctrine was announced in *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418. Between these cases and the case of *Calvert v.*

Carter, 18 Md. 108, there had been a modification in the phraseology of the section relating to amendments, and it was claimed in that case that the effect of the amendment had been to relax somewhat the strictness of the rule governing amendments to answers. That decision, however, sustained the prior rule, and went even further, holding in effect that the propriety of a proposed amendment lay in the discretion of the court to which the application for leave to amend was made, and that no appeal lay from its action in regard thereto. This case was later followed in *Glenn v. Clark*, 53 Md. 602.

Without passing at this time upon the question of the right of appeal from an order refusing an amendment, there is another consideration which is necessarily controlling in this case. It is said by Miller (section 94) that:

"A bill must be consistent with itself and must not contain averments which are repugnant to each other."

Manifestly that which is true of a bill of complaint in this respect applies with equal force to an answer. What, then, would have been the effect of permitting the amendment asked to be made? It would have placed the defendant in one part of her answer in the position of affirming an agreement, under which she had received the benefits, and in another of repudiating it as null and void ab initio, because of fraud in procuring her assent thereto. It is difficult to conceive of any more diametrically inconsistent positions than a granting of the application to amend would have permitted the defendant to occupy. Nor is this all. This application was made to the court after the defendant Mrs. Thompson had testified. In her evidence she was asked and answered as follows:

"Q. What, if anything, was said to you by him about the signing of that paper immediately prior thereto? A. Nothing was said to me about the signing of the lease at all."

If the application for leave to amend had been granted, there would have been a direct conflict between the allegations of the answer and that to which the defendant had then testified. It follows that, if it be assumed, though the question is not now decided, a refusal to amend an answer may be made a ground of reversal in this court, nevertheless the facts as shown by the record fully sustain the action of the trial court, and the decree appealed from should be affirmed.

Specific objection has been made by the appellant to having imposed upon her the cost of the insertion in the record of certain exhibits, and under the rule of this court (12a) the position is well taken. The cost of the insertion of the following exhibits will therefore be chargeable against the appellees: Plaintiff's Exhibits A, B, C, D, E, F, and I.

Decree affirmed, costs to be paid by the appellant, except the costs of insertion in

the record of Plaintiff's Exhibits A, B, C, D, E, F, and I; the same to be ascertained and taxed by the clerk of this court.

(132 Md. 406)

McCOMAS et al. v. WILEY et al. (No. 15.)

(Court of Appeals of Maryland. April 2, 1918.)

1. COURTS \S 202(2) — PROBATE COURT — PLEADING.

Although formal pleadings are not required in the orphans' court, a petition that is vague, indefinite, and ambiguous is subject to demurrer.

2. PLEADING \S 18—PETITION—UNCERTAINTY.

A petition filed in the orphans' court against administrators by the heirs of the wife of the deceased, stating that deceased and his wife died on same day without stating which survived the other, and asking for proceeds of insurance policy without specifying who is assured on the policy or whether it was a regular policy on life benefit certificate, held vague and indefinite.

3. COURTS \S 200½ — PROBATE — ORPHANS' COURT—JURISDICTION—REAL ESTATE.

The orphans' court has no jurisdiction to hear and determine an action involving title to real estate.

4. COURTS \S 201—ORPHANS' COURT—JURISDICTION—DETERMINING HEIRSHIP.

The orphans' court, having authority to supervise the accounts of an executor or administrator of deceased person, has the authority, incident thereto, of determining who are deceased's next of kin.

Appeal from Orphans' Court, Harford County.

Action by Charles H. McComas and others against Thomas H. Wiley and others, administrators of Charles L. Wiley, deceased. From a ruling sustaining defendants' demurrer to the petition, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Wm. Pinkney Whyte, Jr., of Baltimore, for appellants. S. A. Williams, of Bel Air (Philip H. Close, of Bel Air, on the brief), for appellees.

STOCKBRIDGE, J. This appeal is from the orphans' court of Harford county, sustaining the demurrer to a petition filed by Charles H. McComas and others against the administrators c. t. a. of Charles L. Wiley, deceased. The allegations of the petition may be briefly stated as follows: That on June 28, 1917, the orphans' court of Harford county appointed Thomas H. Wiley and others administrators c. t. a. of the estate of Charles L. Wiley; that the testator by his will gave to his wife, Mary Edith Wiley, all of his estate, both real and personal; that Mary Edith Wiley died on the same day as the testator, leaving no child, children, or descendants of any child, but only her five brothers, as her heirs at law and distributees, and no child or children of any deceased brother or sister; that the petitioners have become entitled to recover all of the personal estate of the said

Charles L. Wiley, and are now the legal owners of the farm in Harford county, consisting of about 119 acres of land, on which the testator resided, and of which he died seised; that the petitioners are desirous of being possessed of said farm as soon as they reasonably can, without in any way interfering with the gathering of the crops growing at the time the petition was filed; and, lastly, that the personal estate of the testator consisted of various chattels used in farming, the crops, and a certain life insurance policy, the amount of which was unknown to them. No copy of Mr. Wiley's will was filed with the petition. It was to this petition that the administrators c. t. a. of Charles L. Wiley filed a demurrer, assigning eight grounds of alleged defect, as follows:

"(1) Because this court has not jurisdiction to determine the title to personal property; (2) because this court has not jurisdiction to determine the title to real estate; (3) because the petitioner does not set forth sufficient facts to enable this court to determine the validity or effect of the said will of Charles L. Wiley, deceased; (4) Because the petitioner does not set forth sufficient facts with reference to the deaths of the said Charles L. Wiley and of his wife, Mary Edith Wiley, nor the order in which the same occurred to enable this court to determine whether or not said will was revoked by the death of the said Mary Edith Wiley; (5) because it does not appear from said petition who are the heirs at law or distributees of said Charles L. Wiley; (6) because it does not appear that the said petitioner and his said brothers were the heirs at law and distributees of the said Mary Edith Wiley at the instant of her said death, nor how they became such; (7) because this court has no power to adjudicate questions of title dependent upon the operation and effect of a will; (8) because the said petition lacks necessary parties, to wit, the heirs at law of the said Charles L. Wiley, who are the said defendants Thomas H. Wiley, Richard H. Wiley, Harry F. Wiley, and Robert L. Wiley, in their individual capacities, and Elizabeth A. Slade, the wife of Asbury Slade and Caroline B. Anderson, widow, their sisters."

After hearing the orphans' court of Harford county sustained the demurrer, and dismissed the petition on the ground of lack of jurisdiction. This action of the orphans' court must be affirmed.

At the argument in this court facts were alleged and conceded which do not appear in the record, but to which it seems necessary to make some reference, in order that this opinion may be properly understood.

In June, 1917, Mr. and Mrs. Wiley, with their only child, Ruth, were crossing the tracks of the Northern Central Railway, when the automobile in which they were riding was struck by an express train, and all three killed, apparently instantaneously.

[1] The statement of the petition in regard to Mrs. Wiley that she "departed this life intestate on the same day as the testator, leaving no child or children or descendant of any child," is by no means a full disclosure of the facts, such as the petitioners now concede them to have been. It is not stated or

alleged whether Mrs. Wiley survived or predeceased her husband, or whether she died before or after her daughter. A reading of the petition by one not acquainted with the facts would produce an entirely different impression from the events as admitted by counsel to have taken place. Although formal pleadings are not required in proceedings in the orphans' court, the practice in them bears a close analogy to that in courts of equity. No principle is more firmly established there than that if a matter is set out in vague, indefinite, and ambiguous terms, the bill or petition is subject to demurrer. *Miller's Equity*, § 92, and cases there cited.

The petition makes reference to real estate, chattels, and proceeds of insurance, and different rules may obtain with regard to the final disposition of each of these three species of property.

[2] It is not stated with regard to the insurance whether the assured was Mr. Wiley himself, or his wife. In the one case he would have the power of disposition of it by will, or it would have passed to the distributees of his estate; in the other, if it was a regular policy, there would have been a vested interest in the assured which could not be divested, so that it formed no part of his estate, and which would pass, in the event that the assured was not living, to the next of kin of such assured; or, in case the insurance was of the character known as membership in a beneficial organization, which provided for a change of beneficiary, there was no vested interest until such time as the life of the insured was terminated, when the right would become vested. The petition was therefore vague and defective in this allegation also.

[3] As regards the real estate, the situation is briefly this: The demurrer, which was sworn to, sets out specifically a lack of necessary parties, and who the additional parties needed are. If Mr. Wiley had executed a will prior to his death, in the terms alleged in the petition, to which the provisions contained in section 326 of article 93 were applicable; then under the allegations of the petition the real estate would have passed to his devisee and her heirs at law; on the other hand, if the will could not so operate, then the real estate upon his death would pass to and vest directly in his heirs at law. Under these circumstances it is plain that all parties who could be entitled to the property, in either event, were necessary and proper parties to the proceedings. In this condition, so far at least as the real estate is concerned, a question of title was involved in the proceeding, and was beyond the jurisdiction of the orphans' court to hear and determine.

[4] As to the personal property, while in one sense a question of title might be involved, nevertheless, under the authority given

to the orphans' courts to supervise and pass administration accounts presented by executors and administrators, that power has been held to include in it the power of determining who are the next of kin (*Blackburn v. Craufurd*, 22 Md. 447; *Redwood v. Howison*, 129 Md. 592, 99 Atl. 868); and if the ultimate distribution of this property is also controlled by section 326 of article 93, it is clear that the disposition of it was within the jurisdiction of the orphans' court.

It is an interesting fact that there have been but few cases in this state arising out of conditions similar to those which obtain in the present appeal. The case most nearly approaching it is the case of *Cowman v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550. There have been many cases in the English and American courts of a similar nature, and a full collection of them will be found in the note to *In re Maria H. Willbor*, 51 L. R. A. 863. Courts have been most frequently called upon in such cases to deal with a question of survivorship upon a claim presented by representatives of one or another of the members of the family which had so perished. The cases have then turned largely upon the question of the burden of proof.

The prayer of the petition, in the present case, is that the orphans' court shall fix a day certain when possession of the farm shall be delivered to the petitioners. It thus sets up, inferentially at least, the question of title, and there is nothing now presented by the record in such definite form as to justify this court in making any positive ruling, either with regard to the title or possession of the premises.

It follows that the order appealed from will therefore be affirmed, but without prejudice to the parties, or any of them, to establish a valid claim to the whole or any part of the estate of Mr. Wiley in an appropriate proceeding; the costs to be paid out of the estate.

(260 Pa. 587)

COMMONWEALTH v. PRINCIPATTI.

(Supreme Court of Pennsylvania. March 18, 1918.)

1. HOMICIDE §190(1)—EVIDENCE—THREATS BY DECEASED.

In a trial for murder, where defendant pleads self-defense, he has a right to present evidence of alleged threats made by deceased and as to their effect upon defendant's state of mind.

2. HOMICIDE §190(1)—EVIDENCE—THREATS BY DECEASED — DEFENDANT'S STATE OF MIND.

In a trial for murder, defended on the ground of self-defense, the exclusion of defendant's evidence that deceased had conversed with him about nine days before the killing and had told defendant that he was a member of the "Black Hand gang," and had been sent to murder defendant because defendant had previously killed a member of the gang, and that, if defendant did not pay over \$200, deceased

would kill him, that defendant promised to pay such amount knowing that deceased was a member of the "Black Hand gang," a society which extorted money under threats of murder, and believing that if he did not give deceased the money the latter would kill him, and that such threats had frightened him, and that he was scared when he fired second shot, as bearing upon the distinction between justifiable homicide and voluntary manslaughter, was error.

3. HOMICIDE §187—EVIDENCE—THREATS BY DECEASED—OPPORTUNITY TO DO HARM.

Where the district attorney objected to defendant's offer to prove that he was afraid of deceased on the ground that the two men were eating and sleeping in the same house from the date of the threat to the time of the killing, defendant was entitled to show that, notwithstanding their common abode, the shooting took place on the first chance that deceased had to do defendant harm.

4. HOMICIDE §194 — EVIDENCE — THREATS — ATTEMPT TO OBTAIN PROTECTION.

Where the district attorney stated to the jury that, if threats were made against defendant, instead of undertaking to secure his own safety, he should have gone to a proper officer of the law for protection, defendant had the right to show that he had endeavored to do so, though by mistake he had applied to the wrong officer.

5. HOMICIDE §190(5) — THREATS — REMOTENESS.

In such case the fact that the alleged threats of deceased to kill defendant were made at least nine days before the killing did not under the circumstances of the case, such as the occurrence of the difficulty on the first opportunity after the threats were made, destroy their relevancy on the ground of remoteness.

6. HOMICIDE §89, 116(4) — SELF-DEFENSE AND VOLUNTARY "MANSLAUGHTER" — DISTINCTION—"EXCUSABLE HOMICIDE."

The dividing line between self-defense and voluntary manslaughter resulting from the influence of the passion of fear lies in the existence as the moving force of a reasonably founded belief of either imminent peril to life or great bodily harm as distinguished from the influence of uncontrollable fear or terror conceivable as existing, but not reasonably justified by the immediate circumstances, and if the circumstances are both adequate to raise and sufficient to justify a belief in the necessity of taking life to save one's self from such a danger, where the belief exists and is acted upon, the homicide is excusable on the theory of self-defense; while, if the act is committed under the influence of an uncontrollable fear of death or great bodily harm caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excusable Homicide; Manslaughter.]

7. HOMICIDE §39, 116(4) — SELF-DEFENSE — "PROVOCATION"—MANSLAUGHTER.

The fact that defendant when he came out of the kitchen of the house where they both lived saw deceased draw a revolver from his overcoat pocket would not be sufficient to show a "provocation" justifying the killing in self-defense, or even such a passion of fear as to reduce the alleged crime to manslaughter; yet in view of prior threats by deceased to kill defendant and the decedent's bad character and his connection with the "Black Hand gang," it might justify defendant in acting on a hostile demonstration

much less pronounced than if such threats had not been made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provocation.]

8. WITNESSES §37(4) — COMPETENCY — KNOWLEDGE—REPUTATION.

It is not necessary that witnesses should know one personally in order to have sufficient acquaintance with his reputation to testify that his reputation was that of a dangerous man.

9. HOMICIDE §142(8)—ISSUES—REPUTATION OF DECEASED.

In a trial for murder, wherein defendant set up self-defense and claimed that because of threats made against his life by deceased and that his knowledge of deceased's reputation as a "Black Hand" and a dangerous man raised a fear in defendant's mind influencing him to shoot at once for his own protection after he saw a pistol in deceased's hand, the reputation of the deceased was in issue.

10. CRIMINAL LAW §339 — CHARACTER EVIDENCE—IDENTIFICATION.

It is always essential that one whose character is in issue shall be properly identified by those called to testify concerning him so that the court may be satisfied that there is no mistake as to identity, but when identity is shown the proof of reputation is subject to the same rules of evidence as prevail in establishing the character of a defendant or any one else.

11. CRIMINAL LAW §635 — TRIAL — EXCLUSION FROM COURTROOM.

In a trial for murder, where an Italian witness was produced by defendant and an offer made to show that the witness had been told by deceased, shown to be a member of the "Black Hand gang," that he had been sent to kill defendant and would do so at his first opportunity, and that witness had communicated such facts to defendant, the court on the refusal of the witness to testify unless all other Italians were removed from the room, on the ground that he was afraid of vengeance if they heard his testimony, had the right to grant the application.

12. CRIMINAL LAW §719(1) — REMARKS OF DISTRICT ATTORNEY.

In a trial for murder, wherein certain character witnesses had admitted on cross-examination that two or three years before they had heard defendant accused of killing another man, and the district attorney admitted that the grand jury had found no bill against defendant, his argument that defendant had in cold blood killed a man, and that the jury had disregarded the bill, and that unfortunately the district attorney was a party thereto, was improper, where there was no testimony that defendant had "in cold blood killed a man," or that the bill had been ignored at the instance of the district attorney.

13. HOMICIDE §300(1) — ISSUES — INSTRUCTIONS.

In a trial for homicide, where the defendant's evidence raised issues as to threats of deceased to kill defendant and as to their effect upon defendant's mind and as to the dangerous character of deceased, the court should specifically refer to such matters in the body of the charge.

14. CRIMINAL LAW §791 — INSTRUCTIONS — SUFFICIENCY.

The trial judge should be careful not only to state all appropriate rules of law, but to point out their relevancy with sufficient explicitness to enable the jury intelligently to apply the law to the facts.

15. HOMICIDE §300(2) — INSTRUCTIONS — SELF-DEFENSE.

In a trial for murder, the trial court should not overlook the relevant rules of law and dis-

tinctions to be kept in mind when considering the case from the aspects of self-defense and manslaughter.

16. CRIMINAL LAW §673(5)—INSTRUCTIONS—RELEVANCY OF EVIDENCE.

In a trial for murder, if the fact that defendant had been accused of killing another man is brought out by the district attorney, the jury should be instructed as to the relevancy of the testimony thereon, and that the inquiry is limited to ascertaining the opportunities and extent of the knowledge of the respective witnesses as to the defendant's general reputation, and not to show that he was probably guilty of that offense.

17. HOMICIDE §164 — EVIDENCE — RELEVANCY.

In a trial for murder, where it appeared that defendant's face was badly scarred on both sides, and that such blemishes were plainly visible, the refusal of the offer of his counsel to show that the blemishes came about through no fault of defendant was not error.

18. HOMICIDE §190(5) — EVIDENCE — BLACK HAND LETTER.

In trial for murder wherein defendant claimed that deceased was a member of a "Black Hand gang," and had threatened to kill him unless he paid over a certain amount, the exclusion of an anonymous letter received by defendant about a year before the killing which he claimed was a "Black Hand" communication, considering its remoteness and the lack of any evidence to connect deceased therewith, was not error.

19. CRIMINAL LAW §413(1) — EVIDENCE — SELF-SERVING DECLARATIONS.

Where the fact that defendant had surrendered himself and given up his pistol to an officer of the law within an hour after the shooting was in evidence, the trial court did not err in refusing to allow defendant to be interrogated or in declining to admit other evidence as to his self-serving declarations at that time.

20. HOMICIDE §334—HARMLESS ERROR—REVERSAL.

In a trial for murder, where certain matters, standing alone, do not show reversible error, but several matters do and together present a clear case of mistrial, the court will reverse.

21. CRIMINAL LAW §1144(13)—DEMONSTRATIVE EVIDENCE—REVIEW.

Where witnesses by the action of their hands or otherwise undertook to indicate time, space, distance, etc., counsel eliciting such evidence should have an intelligible explanation placed on the record so that such testimony may be understood on review; otherwise the court must give them the interpretation supporting the verdict.

Appeal from Court of Oyer and Terminer, Beaver County.

Dominic Principatti was convicted of murder in the first degree, and sentenced to be electrocuted, and he appeals. Reversed, with a venire facias de novo.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

John B. McClure, Charles R. May, and Harold F. Reed, all of Beaver, for appellant. Louis E. Graham, Dist. Atty., and Frank H. Laird, both of Beaver, for the Commonwealth.

MOSCHZISKER, J. The defendant, Dominic Principatti, appeals from a judgment

sentencing him to be electrocuted for committing murder of the first degree. The evidence presents, inter alia, the following facts: Principatti and the deceased, one Tony Amodeo had for about eight months lived in the same boarding house. On Sunday evening, February 18, 1917, the defendant and several others were assembled in the dining room of this abode, when, a little after 7 o'clock, Amodeo walked in and remarked to one Joe Spitaro, "I want to say something to you," at the same time beckoning him to follow. The two walked out into the yard and stopped eight feet from the kitchen door. They had been standing thus about two minutes, the noise from a passing train rendering conversation impossible, when Principatti appeared, and, without uttering a word, shot Amodeo. Then, in quick order, a second shot was fired, both bullets entering the head of the victim, who died at once. Shortly after this, when the body of the deceased was examined, a stiletto was found fastened to a belt hook under his clothes, three loaded cartridges were discovered in his trouser pockets, a razor in an inside coat pocket, and a pistol was handed to the man who was engaged in making the examination by an unknown onlooker who apparently picked it up near the spot where the dead body lay. Immediately following the shooting, Principatti returned to the house and said to his sister, who was the landlady, "I killed him, I am going to surrender to the officers and the court, because he wanted to kill me;" and on the same evening defendant gave himself up to a constable, to whom he handed over his gun. There is no conflict of testimony on the above facts.

Spitaro, the only eyewitness to the alleged crime, said that before the shooting took place Amodeo had his hands in his overcoat pockets; but, when asked the question, "Did you see anything in his hands?" he replied, "No, sir; it was too dark." When Principatti took the stand in his own defense, he stated that, four or five minutes after Amodeo had departed with Spitaro he, the defendant, left the room for the purpose of going to the toilet in the back yard; that as soon as the kitchen door closed behind him he saw Spitaro and Amodeo standing together, the latter with both hands in his overcoat pockets; that, "when he [Amodeo] seen me, he pulled his hand up this way [indicating], and I seen his revolver." Then the witness immediately added, "When I seen that [Amodeo's revolver], I pulled my revolver out and shot." In answer to the next question accused said he was "so scared" when he fired the first shot that "a minute or two minutes afterwards" he fired a second.

The foregoing references to the testimony and brief review of the material facts are sufficient to enable one to understand clearly the several matters before us for determination.

We gather from offers of proof, requests for charge, and other such matter upon the record that the defense the accused endeavored to stand upon, but which, owing to a series of adverse rulings, was not fully developed, is as follows: That Amodeo had conversed with defendant on Friday, February 9, 1917, nine days prior to the killing, and on that occasion the deceased said "he was a member of the 'Black Hand gang' sent over to New Galilee to murder the defendant," for the reason that the latter previously had killed a member of that organization; that he (Amodeo), however, "could fix the matter up, and prevent the defendant from being killed, if he would pay him the sum of \$200, and that if he did not pay the deceased the sum of \$200, he would kill the defendant"; that, thereupon defendant became frightened, and promised to give Amodeo the \$200 on the next pay day, which occurred six days before the date of the killing; that defendant "had knowledge, at the time of the shooting and prior thereto, deceased was a member of the 'Black Hand gang,' and that defendant knew and believed the 'Black Hand gang' was a society of men who extort money from people under threat of killing"; further, that defendant believed if he did not give Amodeo the \$200 which he demanded the latter would kill him; that four days prior to the shooting defendant, being in fear, went to see a constable in the neighborhood, and told the latter of the threat to kill, for the purpose of obtaining lawful protection. In short, the defense was that, while at the moment of the shooting Principatti intended to kill Amodeo, yet such intention was instantaneously impelled by the former's belief that he was in imminent danger of death, or it was the result of a passion of fear, influenced by Amodeo's previous threats, but immediately caused by the sight of the pistol in the hands of the deceased.

Fragments of this defense were permitted in evidence; but, in the main, accused was not given an opportunity properly to present his side of the case. His counsel repeatedly endeavored, by formal offers and specific questioning, to introduce the fact that Principatti was "afraid" of Amodeo, "frightened" and "scared" because of the latter's threat to kill him, together with the detailed circumstances attending this threat. He also offered to prove Amodeo's connection with the so-called "Black Hand society" and what that body was thought by the accused to be, its wicked objects, etc. Furthermore, he tendered evidence that the night of the killing was the first and only opportunity that "deceased had to do defendant harm," proposing to give details as to the latter's whereabouts from the time of the threat to the date of the alleged crime, in order to corroborate this last offer. Finally, counsel for defendant proffered testimony concerning the action of his client three or four days prior to the date of the alleged crime in going to a local constable to ask for protection, this latter offer

being made "for the purpose of showing that defendant attempted to pursue his legal remedy in reference to the threats, likewise for the further purpose of showing that he feared the deceased and was afraid he would carry out his threat to kill him." The accused should have been given a fair opportunity to substantiate all of these offers by evidence.

[1] As to the right to present evidence concerning the alleged threats by the deceased and their effect upon defendant, see Wharton on Homicide (2d Ed.) §§ 610-611; Henry on Pennsylvania Trial Evidence, p. 33; 21 Cyc. 893, par. "e"; Underhill on Criminal Evidence, § 326; Com. v. Garanchoskie, 251 Pa. 247, 253, 96 Atl. 513; Com. v. Curcio, 216 Pa. 380, 65 Atl. 792; and Com. v. Keller, 191 Pa. 122, 132, 43 Atl. 198. On the defendant's right to prove his state of mind, either by his own or other competent testimony, see Com. v. Wooley, 259 Pa. 249, 251, 102 Atl. 947; 21 Cyc. 889, par. "b"; and opinion by Rice, P. J., in Com. v. Hazlett, 14 Pa. Super. Ct. 352, 369.

[2-5] So far as defendant's offers relating to the "Black Hand society" and Amodeo's connection therewith are concerned, in Com. v. Varano, 258 Pa. 442, 446, 102 Atl. 131, we recently said that, when sufficient reason exists therefor, an inquiry such as here attempted is permissible; and in Commonwealth v. Curcio, 216 Pa. 380, 65 Atl. 792, a case somewhat like the one at bar, we granted a new trial because a defense of the same general character as the one now before us was not given due or proper judicial consideration at the trial there under review.

Since the district attorney, apparently in the hearing of the jury, repeatedly objected to defendant's offers to prove that he was afraid of the deceased, placing his objections upon the express ground that the two men were sleeping and eating in the same house from the time of the alleged threat to the date of the killing, the accused was entitled to an opportunity to show that, notwithstanding he had a common abode with Amodeo, the night the shooting took place was, in fact, the first chance the latter had to do him harm. See 21 Cyc. 954, par. "d."

When we come to consider defendant's endeavor, whether honest or otherwise, to secure the protection of the law, it appears that during the course of the trial the district attorney more than once stated, apparently in the hearing of the jury, that, if threats were made against the accused, instead of undertaking to secure his own safety, he should have gone to a proper officer of the law for protection; therefore the prisoner had the right to show that he had endeavored to do that very thing, and this even though, by mistake, he applied to the wrong official.

Finally, in connection with the several matters under immediate consideration, albeit the alleged threats by Amodeo against

the defendant were made at least nine days before the killing, that fact, under the circumstances of this case, does not destroy their relevancy on the ground of remoteness. *Com. v. Salyards*, 158 Pa. 501, 27 Atl. 993; 21 Cyc. 892, par. V.

[8] Perhaps some of the rulings assigned as error were partly cured by the subsequent admission of testimony originally refused; but the result of these rulings was unduly and prejudicially to hamper the presentation of the defense; and, so far as we are able to see, this was due to a failure fully to keep in mind certain applicable rules of law, particularly those dealing with the subject of previous threats and their possible controlling effect upon the mind of the person against whom directed, and those relevant to the legal and psychological distinctions between justifiable homicide and voluntary manslaughter. In the latter connection we recently said:

"The dividing line between self-defense and this character of manslaughter (voluntary, brought about through the influence of a passion of fear) seems to be the existence, as the moving force, of a reasonably founded belief of either imminent peril to life or great bodily harm, as distinguished from the influence of an uncontrollable fear or terror, conceivable as existing, but not reasonably justified by the immediate circumstances. If the circumstances are both adequate to raise and sufficient to justify a belief in the necessity to take life in order to save one's self from such danger, where the belief exists and is acted upon, the homicide is excusable upon the theory of self-defense; * * * while, if the act is committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter." *Com. v. Colandro*, 231 Pa. 343, 352, 80 Atl. 571, 574.

[7] In the case at bar, the trial judge, when ruling upon offers of evidence, seems to have entirely overlooked the fact that these offers ex necessitate brought into the case the element of manslaughter through fear. Apparently the trial was conducted upon the theory that the deceased was not accused by the defendant of any actual menacing action at the time of or immediately before the killing; hence the latter's alleged fear rested upon no sufficient foundation; but this ignored the testimony of defendant that, when he came out of the kitchen door, just before the shooting, Amodeo turned toward him, at the same moment drawing a revolver which he, the prisoner, saw in the hands of the deceased. This fact, by itself, would not be sufficient to show a provocation which would justify killing in self-defense, or even such a passion of fear as to reduce the alleged crime to manslaughter; but keeping in mind the rule of law that in a case involving prior threats one is "justified in acting on a hostile demonstration of much less pronounced character than if such threats had not preceded" the killing (21 Cyc. 893), it is quite conceivable that, if the competent testimony as to other relevant

facts offered by defendant (i. e., concerning prior threats and the wicked character of the man who made them, the latter's connection with the "Black Hand society," the nature of that society, and the resulting fear which pursued the defendant) had been given an opportunity to be heard and considered, the jury might have drawn conclusions therefrom favorable to the defendant, which would have affected the verdict.

[8-10] As a witness for himself the defendant testified he knew the reputation of Amodeo to be that of a dangerous man, and at the time of and prior to the killing he feared the latter because he believed such reputation to reflect his real character. When certain other persons were called by defendant to prove the character of Amodeo, the trial judge refused their testimony on the ground that these particular witnesses had no personal acquaintance with the deceased. This was error. It is not necessary to know one personally in order to have sufficient acquaintance with his reputation to give testimony concerning it; and this is so whenever one's character or reputation is properly at issue. Here the reputation of the man killed by defendant was in question, for Principatti claimed that, because of the threats against his life made by Amodeo when, immediately before the killing, he saw the pistol in the latter's hand, this, coupled with his knowledge of the reputation of the deceased as a "Black Hand" and dangerous man, raised a fear in defendant's mind which influenced him to shoot at once for his own protection. 21 Cyc. 889, par. "c," and page 956, par. II; *Underhill on Criminal Evidence*, p. 386, § 324. Of course, it is always essential that one whose character is at issue shall be properly identified by those called to testify concerning it, so that the court may be satisfied no mistake occurs regarding the identity of the person, but, after this is made sure, then the proof of reputation is subject to the same rules of evidence as prevail when establishing the character of a defendant or any one else. *Underhill on Criminal Evidence*, § 325. Before leaving this branch of the case, it is but fair to state that, so far as the assignments show, the witnesses in question were asked concerning the reputation of Amodeo only as "a bad and dangerous man." Strictly this might be objectionable, because the word "violent," or its equivalent, is not used; but the ground upon which the testimony was excluded, i. e., lack of personal acquaintanceship with deceased, was clearly wrong.

[11] An Italian was produced by the defendant, and the offer made to show that this witness had been told by Amodeo that he, the latter, had been sent to kill Principatti and would do it at his first opportunity; further, that the witness had communicated these facts to the defendant. This

man, however, refused to testify unless all other Italians were removed from the room, claiming he was afraid vengeance would be visited upon him if his testimony were heard by them. Upon objection from the district attorney the trial judge said:

"The court is of opinion that it does not have the power to grant the application; therefore the objection to so doing is sustained."

'A' request of this character is within the discretion of the trial judge, and had the court below, in the exercise of its discretion, refused the one at bar, we would be loath to characterize such a ruling as reversible error; but clearly in the present instance the judge was wrong in ruling that he had no power to grant the application. Archbold's Criminal Practice & Pleading (8th Ed.) vol. 1, p. 539, n. 1; Bishop's New Criminal Procedure, vol. 1. §§ 1183-1190; 12 Cyc. 546.

[12] During the course of the trial certain character witnesses admitted on cross-examination that two or three years prior thereto they had heard Principatti accused of killing another man; but in that connection the district attorney admitted that "the grand jury ignored the bill against the defendant." It is alleged the representative of the commonwealth, in summing up, said to the jury:

That "three years before the defendant, Dominic Principatti, had in cold blood killed a man, that it is true the grand jury disregarded the bill, and that unfortunately the district attorney was a party thereto."

If made, these remarks were highly improper; there being no testimony in the case that defendant had "in cold blood killed a man," or that the bill relating to the alleged crime had been ignored at the instance of the district attorney. We take it for granted, however, that no such mistake will occur at the next trial; hence it is unnecessary further to discuss the matter.

[13, 14] Several of the assignments criticize the charge upon the ground that it either omits all reference to or contains no sufficient instructions upon the various important matters which came before the jury at trial. We shall briefly refer to such of these as we deem material. The trial judge said nothing about the threats which Amodeo is alleged to have made against the defendant, or their possible effect upon the mind of the latter; further, he did not, in his general charge, sufficiently refer to or discuss the evidence as to the dangerous character of the deceased, nor did he point out its bearing upon the defense set up by the accused. Although these omissions are possibly corrected by the affirmation of certain of the latter's requests, at the next trial all such material matters should be specifically referred to in the body of the charge. Moreover, at that time the trial judge should be careful not only to state all appropriate rules of law, but to point out their relevancy with sufficient explicitness to enable the jury intelligently to apply the law to the facts

as it may find the latter to be. *Com. v. Smith*, 221 Pa. 552, 553, 70 Atl. 850; *Meyers v. Com.*, 83 Pa. 131, 143, Paxson, J.; *Com. v. Colandro*, 231 Pa. 343, 356, 80 Atl. 571.

[15, 16] In this connection it is particularly important that the learned court below should not overlook the relevant rules of law and distinctions to be kept in mind when considering the case from the aspects of self-defense and manslaughter, respectively, as pointed out in *Com. v. Colandro*, supra; and, if the fact that the defendant had been accused of killing another man is again brought forward in the same way as at the last trial, the jury should be instructed as to the relevancy of the testimony upon that subject, and that inquiry concerning the matter is permitted only for the limited purpose of "ascertaining the opportunities, sources, and extent of the knowledge of the respective witnesses on the point of the general reputation of the defendant, and not to show that defendant was probably guilty of the other offenses." *Com. v. Colandro*, supra, 231 Pa. at page 355, 80 Atl. at page 575.

[17] It appears that Principatti's face is badly scarred on both sides, and that these ugly blemishes are plainly visible. Counsel for defendant, fearing that, through a misunderstanding as to the source of his client's disfigurement, the jury might become prejudiced against the latter, offered to show that this came about through no fault of his own. To enter upon such an investigation might lead to collateral issues that would seriously confuse a trial; hence we cannot say error was committed in the refusal of the present offer.

[18] The accused tendered in evidence an anonymous letter received by him on May 1, 1916, almost a year before the killing, which he claimed to be a "Black Hand" communication. We have read the epistle in question, and, considering its remoteness from the day of the crime and the lack of any evidence to connect the deceased therewith, we cannot say that its exclusion was error.

[19] The fact that Principatti surrendered himself and gave up his pistol to an officer of the law within an hour after the shooting, was put in evidence; but the trial judge did not err in refusing to permit the defendant to be interrogated, or in declining to let in other evidence concerning his self-serving declarations at that time.

[20] There are 20 assignments, covering more than 30 printed pages. We do not deem it necessary specifically to refer to each of these, but have sufficiently reviewed those of importance. Many of them, standing alone, do not show reversible error; but several do, and together they present a clear case of mistrial. Were the matters of complaint all of a minor character, we would be disinclined, considering the evidence against the accused, to set aside the present judgment; but so much harmful error is called to our attention that, if the right to due and lawful trial is to be maintained, we must reverse.

The defendant may not be able to substantiate his various offers of proof, or the jurors may disbelieve the testimony with reference thereto, if produced, or, if believed, they may not draw the inferences or conclusions therefrom that he contends for, in fact, they may entirely discredit his version of Amodeo's actions immediately before the shooting, as possibly the jurors did at the last trial; but nevertheless the defendant is entitled to have his testimony as to what took place on that occasion, together with the relevant evidence covered by the various offers which we have discussed, received and properly submitted to a jury for its deliberate consideration, particularly on the issue as to whether at the time of the killing he acted with malicious deliberation or under other mental influences which might operate either to relieve him from the charge of murder or reduce the offense to voluntary manslaughter.

[21] Finally, since this case must be tried again, it may not be amiss to suggest that, when witnesses, by the action of their hands or otherwise, undertake to indicate time, space, distance, or anything else, as several appear to have done at the last trial, counsel eliciting the evidence in question should be careful to have an intelligible explanation placed upon the record, so that the testimony may be understood on review; otherwise, whenever the notes are not clear, we must give them the interpretation which supports the verdict. *Donnelly v. Lehigh Nav. Elec. Co.*, 258 Pa. 580, 588, 589, 102 Atl. 219, and other authorities there cited.

All assignments that show rulings or instructions conflicting with the views here expressed, together with the twenty-ninth, which complains of the sentence, are sustained. The judgment is reversed, with a venire facias de novo.

(261 Pa. 35)

WINTER v. JOHN F. BETZ & SON, Limited
(Supreme Court of Pennsylvania. March 25, 1918.)

MORTGAGES §284—ASSUMPTION OF MORTGAGE—FAILURE TO INFORM AS TO JUDGMENT ON MORTGAGE—CAUSE OF ACTION.

Plaintiff purchased a saloon property and business, and, as part consideration, assumed the payment of the seller's indebtedness to defendant, secured by mortgages. There was no evidence that defendant, though it assisted in procuring a transfer of the license to safeguard its interests, undertook to examine the title for plaintiff to insure him against incumbrances, and plaintiff's attorney was present and had a report showing that the first mortgage had been reduced to judgment. Three years thereafter the property, on default in interest, was sold on a scire facias issued upon such judgment. *Held*, the defendant was not liable in damages for failure to inform plaintiff that the first mortgage had been reduced to judgment.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Rudolph Winter against John F. Betz & Son, Limited, for failure to in-

form plaintiff that a first mortgage on premises purchased from a third party had been reduced to judgment. Verdict for plaintiff for \$2,600, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Frank H. Warner, of Philadelphia, for appellant. Owen J. Roberts and Howard E. Heckler, both of Philadelphia, for appellee.

POTTER, J. In the month of June, 1912, the plaintiff, Rudolph Winter, purchased from C. J. Donnelly, Jr., a piece of real estate situated at Eighteenth and Courtland streets, Philadelphia. He purchased also, the saloon business conducted at that place by Mr. Donnelly, and secured a transfer of the license. As part of the consideration paid for the saloon, he assumed payment of an indebtedness of \$3,000 due from Donnelly to John F. Betz & Son, Limited, the defendant. Actuated, no doubt, by a desire to safeguard its own interest in the matter, the defendant firm, in consequence of an inquiry from plaintiff, placed him in communication with Donnelly, and assisted in procuring a transfer of the license, and in arranging for the conveyance of the real estate. The plaintiff complains that the representative of the defendant firm, in explaining to him the terms upon which the purchase could be made, informed him that the premises were subject to two mortgages, one of \$4,000 and another of \$2,000 but did not tell him that proceedings had been instituted upon the first mortgage by which it had been reduced to judgment. It is upon what plaintiff regards as defendant's failure to discharge a duty it owed to him in this respect that he bases his claim to recover damages in this case.

We can find in the record no evidence that defendant undertook to examine the title to the premises for the plaintiff, or to insure him against incumbrances other than those specifically mentioned. And, even if it had undertaken to do so, it is by no means clear that defendant would be entitled to any greater degree of accuracy than was admittedly expressed in the statement with respect to the incumbrances upon the property. The lien of a mortgage is not merged in that of a judgment upon a scire facias issued thereon. *Helmhold v. Man*, 4 Whart. 410. The lien of the first mortgage here in question was no greater and no less in amount after the judgment had been entered upon the scire facias than it was before. The actual amount of the indebtedness was truly reported to plaintiff by defendant. True it is that, after the judgment upon the scire facias, an execution might promptly have been issued, but that was not done in this case, and upon that score plaintiff has no reason to complain. The record shows that

the real estate was conveyed to plaintiff by Donnelly, in a deed dated June 10, 1912, in which there was a recital that the conveyance was made subject to the payment of two mortgages, one for \$4,000, and one for \$2,000. The first mortgage was due, according to its terms, in about six months from that date, or upon November 22, 1912. But, as stated above, presumably for failure to pay interest, a writ of *scire facias* had been issued and prosecuted to judgment. It appeared, however, that when Winter took title to the real estate, all costs and overdue interest had been paid upon the judgment, leaving the even sum of \$4,000 due thereon. The final settlement of the transaction was made at the office of defendant's attorney at a meeting at which were present the vendor, the purchaser, the attorney for the building association which held the second mortgage, and the attorney for the defendant. The deed was prepared by the attorney for the building association, who also procured searches showing the incumbrances upon the title. He had the report with him which showed that the first mortgage had been reduced to judgment. In the course of the settlement Mr. Winter paid this attorney for his services in preparing the deed, and for having it recorded, and for the cost of the searches. There would seem to have been no reasonable excuse for failure upon the part of Winter to understand at that time that the searches showed the first mortgage had been reduced to judgment. The attorney representing him in the settlement could readily have made the fact plain had Winter shown any lack of understanding. The responsibility for that cannot be justly placed upon the defendant. But, aside from any question as to the accuracy of the statements made to Winter with respect to the first mortgage, it is apparent that any loss which plaintiff may have suffered was due entirely to his own neglect to pay the interest upon the indebtedness which he assumed. After meeting his obligation in this respect during a period of two years, he defaulted in payment of the interest in December, 1914, and the owner of the mortgage then called for the payment of the principal. Even then an extension of six months' time was given him, and it was not until the following June that the property was sold at sheriff's sale upon a writ of *levari facias* issued upon the judgment. We have then the fact that when plaintiff bought the property he assumed payment of a mortgage which he knew he might be required to pay in full at any time after November 22, 1912; but, instead of making prompt payment of the interest due in December, 1914, and gaining thereby a continued indefinite extension of time for the payment of the principal, he defaulted and brought upon himself the foreclosure.

It is idle to discuss the question raised by

counsel for appellee as to whether or not the reducing of the mortgage to judgment rendered it more difficult to sell. Plaintiff did not own the mortgage, nor was it under his control. It was not at his disposal. His obligation required him to discharge the indebtedness which he had assumed. If he lacked the funds to do this, the obvious proceeding was to obtain a new loan from some other source. It does not appear that he applied to defendant for any assistance in any such effort; and, if he had done so, defendant was under no obligation to grant it. In no aspect in which the plaintiff's case may properly be viewed are we able to discern any merit.

The first and second assignments of error are sustained, and the judgment is reversed, and is here entered for the defendant.

(261 Pa. 1)

FLETCHER v. WILMINGTON STEAM-BOAT CO.

(Supreme Court of Pennsylvania. March 18, 1918.)

1. SHIPPING ⚡166(1)—NAVIGATION—FOG—CAUTION.

Unusual caution is required of those in charge of vessels passing through a fog.

2. SHIPPING ⚡166(5)—INJURY TO PASSENGER—STEAMBOAT COLLISION—QUESTION FOR JURY.

In an action by a passenger upon defendant's steamboat for personal injury resulting from a collision between it and a ferryboat in a dense fog, where there was testimony that the master of defendant's steamboat failed to observe the navigation rules established for boats passing in a river, *held*, that defendant's negligence was for the jury.

3. DAMAGES ⚡167—PERSONAL INJURY—EVIDENCE.

In an action for personal injury, the admission of evidence as to the present value of money for different periods of expectancy based upon total disability was not erroneous, where there was evidence of plaintiff's earning power before the injury and that she was totally disabled by the injury.

4. DAMAGES ⚡100—PERSONAL INJURY—CONSTRUCTION.

In such case, if plaintiff was not totally incapacitated for work, but was able to do light work, the jury would consider compensation for diminution of earning power instead of contemplating a total loss of earning power.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for damages for personal injury by Charity Fletcher against the Wilmington Steamboat Company. Verdict for plaintiff for \$2,500 and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKE, FRAZER, and WALLING, JJ.

Francis S. Laws, of Philadelphia, for appellant. Victor Frey and Augustus Trask Ashton, both of Philadelphia, for appellee.

BROWN, C. J. On the morning of August 27, 1916, the appellee was a passenger on a steamboat belonging to the defendant company, which started from Philadelphia for Wilmington, Del. Shortly after it left the wharf, when it reached a point in the Delaware river at or near Mifflin street, it collided with a ferryboat which was neither owned nor operated by the defendant. At the time of the collision the appellee was sitting on a camp stool on one of the decks of the boat. The collision threw her over or across the chair or stool on which she was sitting, and this action was brought for the recovery of damages for the injuries she sustained. From the judgment on the verdict in her favor the defendant has appealed.

[1, 2] The question of the defendant's negligence as the cause of the collision was submitted to the jury in a charge of which no complaint is made in any of the assignments of error. The defendant offered no testimony. At the close of plaintiff's case it asked that a verdict be directed in its favor, on the ground that nothing disclosed in the evidence submitted by the plaintiff showed negligence on its part. The refusal of this request and the overruling of the motion for judgment non obstante veredicto constitute one of the two complaints of the appellant. In support of this complaint it is urged that the rules for the government of the movement of vessels when approaching each other, which were offered in evidence by the plaintiff, were being strictly observed by the defendant at the time of the collision, and it was not, therefore, guilty of negligence in colliding with the ferryboat. This overlooks the testimony of the captain of that boat, and it was upon his testimony that the case went to the jury. He testified as to the movements of his boat coming up the Delaware from Gloucester, and stated that, when he reached a point opposite Mifflin street, he entered a bank of fog; that he ran his boat at about 4 miles an hour, blowing his foghorn; that he heard the foghorn of a boat coming towards him in the fog; that he was running close to the Pennsylvania shore, because of some obstructions in the river which he wished to avoid; that after he had got into the fog he saw ahead of him, and coming in his immediate direction, the steamboat of the defendant, between 400 and 500 feet up the river from him; that he immediately blew two whistles, which meant that the steamboat was to pass him on the left side. According to his testimony, the rule of the river as to the passing of one boat by another is the same as the rule of the road, and ordinarily boats keep to the right in passing. There is, however, an exception to this, according to rule 1, article XVIII, of the pilot rules. That rule, after stating the

general regulation requiring each passing boat to keep to the right, provides:

"But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other. The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision."

The captain of the ferryboat further testified that his boat was in the position covered by this rule; that he gave the signals provided for by it; that he received no answer; that he then stopped his engines and gave the danger signal and started his boat backward; and that there was sufficient navigable water on the right side of his boat for the steamboat to pass him. Instead of passing him on the right or starboard side, as the signal from the ferryboat indicated to it that it should, it did not vary its course, and struck the ferryboat on the port side with great force.

Unusual caution is required of those in charge of vessels passing through a fog (*The Bailey Gatzert* [D. C.] 170 Fed. 101; *The Virginia* [D. C.] 203 Fed. 851); and in view of the testimony of the captain of the ferryboat the question of the negligence of those in charge of the steamboat could not have been taken from the jury. It was submitted to them under the following correct instruction:

"Did he [the captain of the ferryboat] give these signals as he testifies, and did the City of Chester negligently, under its high measure of duty to its passengers, fail to observe them, thereby violating the rule of navigation, and as a consequence by its negligence bring about the collision? The first point submitted by counsel for the defendant states the defendant's position here so accurately as to the law that I will incorporate it in my general charge, and instruct you at this point that, if you believe that the steamer City of Chester was proceeding down the Delaware river on the 27th day of August, 1916, upon her proper course and in a proper manner, that she was in charge of competent and skillful navigators, and was being operated and navigated in a careful, competent, and skillful manner, and that without fault on her part or those in charge of her she was run into by another boat over which neither the defendant nor its employees had any control, then the defendant was not responsible for any injury resulting to the plaintiff, and your verdict must be for the defendant. That is correct, gentlemen of the jury, and I so instruct you. If, however, the employees of the defendant company were at all negligent, if they failed to recognize the signals of the captain of the Dauntless, if you believe that he actually did give them, if by the exercise of the high degree of care imposed upon them as common carriers they could have stopped the City of Chester or have done anything else to have avoided the collision, then it was their duty to have done so, and if they failed in that duty, then they were negligent, and their negligence would impose liability upon the defendant company for any injuries suffered by the plaintiff as a result of their negligence."

The sixth and seventh assignments of error are dismissed.

[3, 4] The first, second, third, fourth, and fifth assignments complain of the court's admission of evidence of the present value of money for different periods of expectancy based upon total disability. It appeared from the testimony that before the plaintiff was injured she had an earning capacity of from \$6 to \$7 per week, and if there was evidence from which the jury could fairly find that she was totally disabled by the injuries she sustained, the first five assignments of error are without merit. The jury could fairly have found from the testimony of the plaintiff herself, and from that of two of the three physicians called, that her injuries were permanent, totally depriving her of earning capacity. From the amount of the verdict returned, in view of the expectancy of the plaintiff's life, the jury manifestly did not find that she was totally disabled. In submitting the question of her total disability to the jury, the learned trial judge correctly charged as follows:

"If, however, you do not believe that she is totally incapacitated for work, but find as a fact, as her one physician tells you, that she is now able to do light work, then you will consider compensation to her, instead of contemplating total loss of earning power, simply a diminution or lessening of earning power."

The first five assignments of error are also dismissed, and the judgment is affirmed.

(280 Pa. 477)

SOMERVILLE v. HILL.

Appeal of MILLER.

(Supreme Court of Pennsylvania. March 11, 1918.)

1. EXECUTION §—247—SHERIFF'S SALE—RULE TO SET ASIDE—DISCHARGE.

On a rule to show cause why a sheriff's sale of realty should not be set aside, it appeared that petitioner was the holder of the legal title, subject to the control of trustees; that previous to the sale the trustees petitioned for a stay of the writ, and, before being advised of the discharge of the rule the sheriff announced that the property would not be sold; and that when subsequently notified of the court's action, and on request of counsel for the parties in execution, he sold the property, the attorney representing the trustees in the petition to stay the sale bidding on the property, though not for the trustees, and making no protest against the sale, and that petitioner did not complain in their behalf, but on his own behalf, as the real and registered owner, though he did not offer to bid or secure a purchaser at a higher price. *Held*, that the rule was properly discharged.

2. EXECUTION §—249—SHERIFF'S SALE—DESCRIPTION OF PROPERTY.

That the description of property advertised by a sheriff for sale contained a technical misstatement of the street numbers was not such an irregularity as would justify the setting aside of the sale, where the premises were otherwise properly described.

3. APPEAL AND ERROR §—983(3) — SETTING ASIDE SHERIFF'S SALE — DISCRETION OF COURT.

The setting aside or refusing to set aside a sheriff's sale on execution is in the sound discretion of the court below, and its decree will

not be reversed, without a clear abuse of discretion.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Anna M. Somerville against Thomas D. Hill. From an order discharging a rule to show cause why a sheriff's sale of real estate should not be set aside, Gerald F. Miller appeals. Affirmed.

Argued before POTTER, STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Graham C. Woodward, of Philadelphia, for appellant. Francis V. Godfrey, of Philadelphia, for appellee.

FRAZER, J. [1] Gerald F. Miller, as petitioner, appeals from the action of the court below in discharging a rule to show cause why he should not be permitted to intervene as a party defendant, and why a sheriff's sale of real property should not be set aside because of the misdescription of the premises in the sheriff's advertisement, and the misleading announcement at the sale, alleged to have resulted in an inadequate price being received for the property.

Appellant averred he was the real and registered owner of the premises in question. That he was the registered owner is admitted in the answer; it is denied, however, he was the real owner, and the evidence shows he was merely the holder of the legal title on behalf of his father, who was one of the executors and trustees under the will of Peter J. Tieman, to whom the property had been devised in trust. A mortgage covering the premises at the death of Tieman had previously been foreclosed, and the property bought by Hill, the defendant, who executed a new mortgage to plaintiff, upon which the present proceedings were begun to enforce payment. After title was taken, and the mortgage executed by Hill, the property was, for some reason not made clear, transferred to appellant, to hold, as stated by his counsel, "upon the trusts contained in Peter J. Tieman's will," for which estate appellant's father, David J. Miller, was a trustee.

From the foregoing statement of facts it seems the interest of appellant in the property was as holder of the legal title, subject to the direction and control of the trustees, one of them his father. Previous to the sale the trustees presented a petition to the court below, asking that the writ be stayed pending the determination of certain litigation in the orphans' court, which petition the court dismissed on the morning of the sale. The sheriff, having received notice of the application to stay the sale, immediately before beginning the sales of the various properties, and before being advised of the discharge of the rule by the court, announced the property in question would

not at that time be offered for sale. Before the premises were reached on the list, however, the sheriff was notified of the court's action, and, counsel for plaintiff and for defendant in the execution joining in a request that the sale be proceeded with, he then offered the property for sale. Evidence was produced to show that in the meantime persons intending to bid on the property had left the room and were not present when the sale took place. The attorney who represented the trustees in the petition to stay the sale was in the courtroom and bid on the property, stating, however, he did so on behalf of another client, and not as the representative of the trustees. He also testified he made no protest against the sale, and considered the trustees had discharged their duty in attempting to secure a postponement. The trustees are not here complaining, nor is appellant complaining on their behalf, but on his own behalf, as real and registered owner. It may be doubted whether appellant has shown such interest in the property as entitles him to intervene on his individual behalf, and especially is this so as he does not claim to act on behalf of those who have the beneficial interest.

[2] Neither does it appear that the description was calculated to mislead bidders. The property alleged to have been insufficiently described consisted of a lot on which was built a three-story brick house and a two-story brick stable. On the books of the board of revision of taxes the house is No. 2409, and the stable Nos. 2411-2417 Cedar street. In advertising the premises they were properly described by metes and bounds, but the numbers were given as "2409-11-18 Cedar street," instead of "2409-11-13-15-17 Cedar street." The evidence failed to show that there were in fact any numbers on the property, except on the house, which was No. 2409.

This case falls within *Home Buyers' B. & L. Ass'n v. Peterman*, 253 Pa. 418, 421, 98 Atl. 619, 620, where premises, described as messuage, in fact consisted of a three-story brick store, with two upper floors suitable for apartments, and also a garage. The court below held, in an opinion adopted on appeal, that as "the dimensions of the lot are correct, the property is a corner property, so that the garage was visible to any one inspecting it, and no allegation appears in the petition that any buyers were deterred from bidding, and the person who makes the objection does not allege that she had no knowledge of the sale, and there is no offer on the part of the petitioner, either individually or as trustee, to make any bid at a sale," the rule was properly discharged. In the present case it is difficult to see how the omission of the additional street numbers could have misled any one, in view of the situation of the property,

the notice of the improvements, and the fact that the only number on the main building was 2409. The additional numbers in the advertisement gave notice that more than the single building was included in the sale.

A discussion at length of the irregularity in the sale, by reason of the announcement that the premises would not be sold and the subsequent sale thereof, becomes unnecessary, as it does not appear appellant was harmed thereby. The evidence offered to show that, following the announcement of a postponement of the sale by the sheriff, intending bidders left the room, is not convincing. Furthermore, appellant makes no offer to bid or secure a purchaser at a higher price, merely averring he is informed and believes that upon a resale the property would bring approximately \$8,000. This is not enough. *Snyder v. Snyder*, 244 Pa. 331, 90 Atl. 717.

Appellant not only failed to establish to the satisfaction of the court below that he possessed sufficient interest to enable him to intervene, but also failed to produce sufficient evidence of a material misdescription and an irregularity resulting in the sale of the property at a less price than would otherwise have been obtained. We can find no such error in the record as would justify a reversal.

[3] Setting aside or refusing to set aside a sheriff's sale is in the sound discretion of the court below, and the decree of that court will not be reversed, in absence of clear abuse of discretion. *Chase v. Fisher*, 239 Pa. 545, 86 Atl. 1094; *Snyder v. Snyder*, 244 Pa. 331, 90 Atl. 717; *Watkins v. Justice*, 256 Pa. 37, 100 Atl. 488.

The judgment is affirmed.

(261 Pa. 6)

TWERSKY v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, March 18, 1918.)

1. CARRIERS \Leftrightarrow 333(1) — INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A passenger who, though there was no pressure from behind, walked so close to the passenger in front of her that she was not able to see the open space between the car platform and the station platform into which she fell, was guilty of contributory negligence and could not recover.

2. CARRIERS \Leftrightarrow 280(1) — SAFETY OF PASSENGERS—STATION.

The duty of a carrier rises no higher than to make and keep its stations safe for persons exercising ordinary care.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass to recover damages for personal injury by Rebecca Twersky against the Pennsylvania Railroad Company. Verdict for plaintiff for \$2,800, motion for judgment n. o. v. denied, and judgment thereon, and defendant appeals. Reversed.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Francis B. Biddle and Sharswood Brinton, both of Philadelphia, for appellant. William Morgan Montgomery, Samuel R. Lazowick, and E. Clinton Rhoads, all of Philadelphia, for appellee.

STEWART, J. On the afternoon of the 3d of July, 1915, the plaintiff, a middle-aged woman, unescorted, was a passenger on one of defendant company's trains, her destination being North Philadelphia, where she intended to alight. She had boarded the train at New York, and had arrived on schedule time, 4:45 p. m. The passenger station at this point is provided with a raised platform, which is on a level with the platform of the car when the train stops. The car platform is a trapdoor which is let down when the car stops, and the door of the car is opened for the discharge of the passengers. There is always, in such cases where the station platform is elevated, somewhat of a space between the station platform and the car platform. This is required in order to give sufficient clearance to passing trains. On arrival at North Philadelphia station plaintiff left her seat, and, with two or three other passengers walking in advance of her, she proceeded out to the platform of the car. When about to step from this platform over to the station platform she encountered the open space between the platforms, which she had not previously observed, and into which she stepped with one of her feet, with the result that she received the injury of which she complains, and for which she claimed to recover damages in the present action, referring the accident to negligence of the defendant company in failing to provide for passengers at this point a safe means of exit from the car. As the case was submitted to the jury it presented two questions of fact for their determination: First, the question of negligence of the defendant; and, second, the question of plaintiff's contributory negligence. Both issues were found in favor of the plaintiff, and a verdict in her favor was accordingly rendered. A motion for judgment for defendant, on the whole record, non obstante, was refused, and judgment on the verdict was directed. To this order of the court exception was taken, and it is made the subject of defendant's fifth assignment of error, the only assignment necessary to be here considered.

[1, 2] Whether in the light of the evidence the defendant came short of its legal duty, which is to so construct and maintain its platforms in the condition that they may be used, without danger, by a passenger exercising ordinary care (Graham v. Penna. Co., 189 Pa. 149, 21 Atl. 151, 12 L. R. A. 293), is a question in regard to which there may be diversity of view; but that question calls for

no consideration here, inasmuch as the plaintiff's testimony discloses in unmistakable way contributory negligence on her part. In broad daylight, with her eyes open, herself unincumbered with baggage of any character, with entire freedom of limb, with nothing requiring haste on her part, she apparently walked this platform with as much unconcern and indifference for her own safety as one would walk the floor of his own domicile with which he was familiar. She did not see this open space between the platforms, into which she stepped until after she had been extricated therefrom. She says that if she had seen it she would have avoided it. But why did she not see it? The only answer that can be made is that she did not see it because she did not look. This is her own explanation: When advancing on the platform toward the open space, she was following some three or four passengers who had left the car before she did. The one passenger immediately in her front was a woman wearing a trailing dress and carrying a suit case. Plaintiff was so close to this woman that she could not see the open space had she looked directly down. Whether the trailing dress, or the suit case, or both interfered is a matter about which she was somewhat indefinite in her statement, but she leaves it in no doubt that she attributes her failure to observe the open space as due wholly to the circumstance that she was following too closely upon the passenger next in advance of her to admit of her looking down. She makes no complaint that this person was detaining her, or that there was pressure by those following her, nor does she suggest any reason whatever why she could not at her own pleasure have increased the distance between herself and the passenger in front. The insufficiency of the excuse she gives for not seeing the open space becomes apparent when it is considered that with knowledge of the fact that because of her position, so close behind the woman walking next in advance of her, she was prevented from seeing what lay directly in her path, she chose to retain that position when there was nothing requiring her so to do. A moment's delay on her part would have prejudiced nothing, and would have enabled her with a mere look to take in the whole situation with respect to her own safety. All that we have said is derived from the plaintiff's own testimony, and it leaves it not open to question that her own want of ordinary care was a contributing factor in the accident. The duty resting on the railroad company rises no higher than to make and keep its stations safe for persons exercising ordinary care. When injury results to any one who fails in this regard, the law charges the injury to the party's heedlessness as the proximate cause.

Defendant's motion for judgment non obstante should have prevailed.

The judgment is reversed.

(117 Me. 559)

BERMAN v. LANGLEY.

(Supreme Judicial Court of Maine. June 17, 1918.)

SALES \Leftrightarrow 398—ACTION FOR PURCHASE MONEY—NONSUIT.

In assumpsit to recover part of agreed price of an automobile in view of plaintiff's pleadings and contentions that there was a written contract that the automobile should be in good condition when delivered, and that the vendor should keep the car in repair, a breach by defendant and rescission by plaintiff, it was error to nonsuit plaintiff.

Exceptions from Superior Court, Androscoggin County.

Action by Mark Berman against E. P. Langley. Judgment for defendant, and plaintiff excepts. Exceptions sustained.

Argued before CORNISH, C. J., and SPEAR, HANSON, and PHILBROOK, JJ.

Benjamin L. Berman, of Lewiston, and Jacob H. Berman, of Portland, for plaintiff. J. G. Chabot, of Lewiston, for defendant.

PER CURIAM. This is an action of assumpsit to recover \$800 paid by the plaintiff as part of the agreed price of one National Highway Six automobile, and is before the court on the plaintiff's exceptions: (1) To the ruling of the presiding justice excluding the contract between the parties; and (2) an order of nonsuit.

The declaration contained four counts, the first two alleging a breach of warranty in the sale of the automobile, the third for money had and received, and the fourth the general omnibus count, with the specification:

"That under the latter the plaintiff will rely upon the evidence to be introduced under counts 1 and 2 in this declaration, as constituting grounds for the rescission of his contract, and that the evidence to be introduced under these counts will amount to a rescission of his contract, and thereby entitle him to recover the money paid by him on account of said automobile."

The plaintiff in his brief abandons the first count, and as to the second says:

"Plaintiff under this count does not seek to enforce the contract; he does not attempt to recover damages for its breach. Nor does he attempt to enforce his rights under it. But, on the contrary, he says the sealed contract has been terminated, ended, and as a result of its termination the defendant is unjustly enriched and has of the plaintiff's money the sum of \$800. Plaintiff offers the sealed contract in evidence, not to support his claim for damages for its breach, but to prove the status of the parties, and to show the circumstances under which the defendant unjustly came into possession of his money."

The contract in question contained the usual clause that the automobile to be delivered should be "in good order and condition," and a further and final provision "that the vendor shall keep said car in repair for the term of one year from this date on account of any imperfections in the construction of

said car at time of delivery to said purchaser or his agent." The contract is printed in the record. The only provisions of moment here are as quoted above.

A perusal of the evidence in the case, in view of the plaintiff's pleadings and contention that: (1) There was a written contract between the parties; (2) that the contract contained the provision that the automobile should be in good order and condition when delivered; (3) that the vendor shall keep said car in repair for the term of one year, etc.; and (4) that the contract was broken by the defendant and for that reason rescinded by the plaintiff—persuades us that in directing a nonsuit the trial judge erred. The questions involved were nearly, if not quite all, properly for the jury, and not for the court. The entry must be:

Exceptions sustained.

(117 Me. 562)

ROLFE v. LEWISTON, A. & W. ST. RY.

(Supreme Judicial Court of Maine. July 14, 1918.)

APPEAL AND ERROR \Leftrightarrow 1002 — REVIEW — VERDICT.

A verdict on conflicting evidence will not be disturbed.

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by Abbie J. Rolfe against the Lewiston, Augusta & Waterville Street Railway. On motion for new trial before the law court. Motion granted conditionally.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Clifford & Clifford, of Lewiston, for plaintiff. Newell & Woodside, of Lewiston, for defendant.

PER CURIAM. This is an action to recover damages caused by the alleged negligence of employees of the defendant in negligently starting a car of defendant, on Court street, in Auburn, whereby the plaintiff was thrown to the pavement and sustained injuries. The case comes before the law court upon motion for a new trial specifying the usual grounds.

The testimony was conflicting; the account given by the plaintiff and her witnesses would, if believed, warrant a verdict in her favor; on the other hand, the testimony of the defendant's witnesses would warrant the opposite conclusion. In weighing this conflicting evidence, the opportunity of the jury to see and hear the witnesses, to consider their appearance and demeanor on the stand, and to judge of the spirit with which they testified, must have been of great assistance in arriving at a correct de-

cision; and we cannot say that upon the question of liability their conclusion was clearly wrong.

Upon the question of damages, however, we think the jury have exceeded the amount which will afford full and just compensation. Upon a careful consideration of the evidence we conclude that the following entry should be made:

Motion granted, unless within 30 days after this decision is received by the clerk of courts for Androscoggin county, the plaintiff remit all of the verdict in excess of \$750; in which case, motion overruled.

(117 Me. 563)

GERARD v. LEWISTON, A. & W. ST. RY
(Supreme Judicial Court of Maine. July 14, 1918.)

APPEAL AND ERROR ¶999(1) — ISSUES OF FACT.

The Supreme Judicial Court will not interfere with verdict of jury unless manifestly wrong.

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by Katherine J. Gerard against the Lewiston, Augusta & Waterville Street Railway. Verdict for plaintiff. On motion. Motion overruled, and verdict sustained.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Seth May, of Lewiston, for plaintiff. Newell & Woodside, of Lewiston, for defendant.

PER CURIAM. Action to recover damages for personal injuries. No questions of law were reserved for consideration by the court. In addition to a general denial of liability, and a claim that the damages awarded were excessive, the defendant also depended upon a release under seal, executed by the plaintiff, which purported to be an acknowledgment of satisfaction of damages. The plaintiff's reply is that the release was prematurely obtained, was misunderstood by her when she signed it, and was obtained under circumstances amounting to a fraud, in view of her mental and physical condition at the time when the alleged release was given. These claims of the plaintiff were strenuously denied by the defendant. All these issues of fact were submitted to the jury, and we cannot say that their finding was so manifestly wrong as to call for interference by this court. On the contrary, the court is of opinion that the verdict was amply justified and the damages exceedingly moderate.

Motion overruled.

(7 Boyce, 133)

STATE v. ALAMANIO.

(Court of General Sessions of Delaware. New Castle. May 7, 1918.)

ADULTERY ¶1—WHAT CONSTITUTES.

Under Rev. Code 1915, § 4788a (29 Laws Del. c. 264), amending Rev. Code 1915, § 4783, a single person having sexual intercourse with a married person is guilty of adultery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adultery.]

RICE, J., sitting.

David J. Reinhardt, Atty. Gen., and Percy Warren Green, Deputy Atty. Gen., for the State. Caleb B. Burchenal, of Wilmington, for accused.

Vincenzo Alamanio was indicted for adultery, under Code, § 4788a, 29 Laws of Delaware, 854, amending Rev. Code 1915, § 4783. On general demurrer to the indictment. Demurrer overruled.

It was urged: That the unlawful, voluntary sexual intercourse between two persons of opposite sexes, only one of whom is married, as in this case, the offense of adultery is committed by the married party only and not by the unmarried. State v. Chafin, 80 Kan. 653, 103 Pac. 143; Com. v. Lafferty, 6 Grat. (Va.) 672; Miner v. State, 58 Ill. 59; Cook v. State, 11 Ga. 54, 56 Am. Dec. 410; Helfrich v. Com., 33 Pa. 68; In re Cooper, 162 Cal. 81, 121 Pac. 318.

That, under the facts disclosed by the indictment, the unmarried party is never deemed to have committed adultery, except the statute clearly embraces both parties, as in State v. Mahan, 81 Iowa, 122, 46 N. W. 855, and In re Smith, 2 Okl. 153, 37 Pac. 1090.

That the statute under which the accused is indicted does not, in a case like this, expressly provide that both parties are guilty of adultery.

For the state it was contended that the statute embraces the unmarried as well as the married party.

RICE, J., delivering the opinion of the court:

The indictment in this case charges the defendant Vincenzo Alamanio with adultery in the following language:

"The grand inquest for the state of Delaware, and the body of New Castle county, on their oath and affirmation, respectively, do present that Vincenzo Alamanio, late of Wilmington hundred in the county aforesaid, on the seventeenth day of March in the year of our Lord one thousand nine hundred and eighteen, with force and arms, at Wilmington hundred in the county aforesaid, being then and there an unmarried man, did commit adultery by then and there having carnal knowledge of the body of one Carmello Discorso, the said Carmello Discorso being then and there the wife of a man other than the said Vincenzo Alamanio, to wit, of one John Discorso, against the form of the act," etc.

To this indictment the defendant demurred on the ground:

"That the indictment states that the defendant is an unmarried man, and the crime of adultery under the statutes of the state of Delaware cannot be committed by an unmarried person."

Chapter 264, Laws of Delaware, volume 29, which is an amendment to section 8, chapter 153, Rev. Code 1915, provides as follows:

"4788a. Section 8a. Adultery is the sexual intercourse of two persons either of whom is married to a third person.

"4788b. Section 8b. A person who commits adultery is guilty of a misdemeanor."

It appears from the statute that adultery is defined to be "the sexual intercourse of two persons either of whom is married to a third person," and irrespective of what the common law may be with respect to this offense, or what it may be under the statutes of other states, the court is clearly of the opinion that under our statute if either of two persons having sexual intercourse is married to a third person, then either or both of the parties to the intercourse may lawfully be indicted charged with committing the act of adultery.

The demurrer is overruled.

(92 Conn. 698)

BRUNDRETT v. ROSOFF.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. EVIDENCE \S 461(3)—PAROL EVIDENCE—LEASE—DESCRIPTION.

In action against landlord by tenant of living rooms on top floor for injuries on stairway between ground floor and cellar, where there were storerooms, parol evidence for plaintiff was admissible to show what was intended to be included within the lease, not altering terms of writing.

2. LANDLORD AND TENANT \S 124(1) — APPURTENANCES OF ROOMS.

There necessarily passed to a tenant, with living rooms leased, all other appurtenances provided by the landlord and intended by him to be used by the tenant in connection with the rooms.

3. TRIAL \S 136(3)—SCOPE OF LEASE—QUESTION OF FACT.

The intention of landlord and tenant as to what was included within the lease was a question of fact for the jury.

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Action by James Brundrett against Max Rosoff. Judgment for plaintiff, and defendant appeals. No error.

George E. Beers and Claude B. Maxfield, both of New Haven, for appellant. Samuel E. Hoyt, of New Haven, for appellee.

SHUMWAY, J. Of the numerous reasons of appeal, it is apparent that the treatment by the trial court of what the defendant calls a "vital" question of fact is the controlling question in this case. This question is what was the relation of the parties with respect to the stairway leading from the ground floor of the building to the cellar. It was

clearly shown that the plaintiff was injured while using this stairway. The plaintiff contended that he was properly using this stairway, and by reason of the defective and dangerous condition of the stairs, which condition resulted from the negligence of the defendant, he was injured. The finding discloses that the plaintiff was a tenant in a building owned by the defendant. The plaintiff occupied a part of the building under a written lease. The first or ground floor of building was fitted and used for stores, and the floor or floors above contained a number of apartments, and were rented for dwellings. The written lease did not mention the cellar. At the time the plaintiff was negotiating for the lease he was informed by the defendant that there was a cellar in the building for use of the tenants, and that therein each tenant had a compartment for coal, wood, and goods, and the plaintiff would have one of the compartments. After the plaintiff moved into the building he was told by the defendant that the compartment in the cellar designated for his use would be marked with his name, and the plaintiff found his name on one of the compartments, and used the same from July, 1916, until the November, following. The cellar was reached by a stairway from the hall of the first floor, which hall and stairway were used in common by the tenants of the building.

The court in the charge to the jury stated that among the facts the plaintiff must prove were these: First, that the cellar in said building was used in common by the various tenants, in connection with their apartments, as a place for coal and wood and other storage, with consent of the defendant; second, that the entrance to said cellar was by a stairway from a hallway used in common by the tenants in the building, and that said cellar stairway was used in common by the tenants and reserved and intended by the defendant or used in common by the tenants. The court also said to the jury, as to the first fact as above quoted:

"On the evidence the plaintiff claims that that fact is proven. I do not recall any evidence that seriously disputes that fact."

As to the second fact, the court said:

"This the defendant denies. That fact, also the plaintiff must prove by a fair preponderance of the evidence. The plaintiff claims that the condition of the cellar, divided up into compartments in connection apparently with the tenements above, the dumb-waiter which goes from the cellar to the floors above, all indicate that the facts just recited to you in this paragraph are proven. And, as I recall, the defendant upon the stand did not testify as to that feature of the case. The plaintiff, therefore, claims that that fact is proven."

A review of the entire evidence now before this court sustains the comment of the court as to the testimony, but the defendant contends that the rulings and charge of the court were erroneous because the court did not charge the jury in accordance with his request, to wit:

"If the plaintiff had no right to use the stairs under his contract of letting, but was simply allowed to use them through courtesy, there is no liability on the part of the defendant."

If the court's treatment of the question involved in this request was correct, it disposes of all the questions raised by the appeal.

[1-3] First, the defendant objected to parol evidence that the defendant designated the apartment in the cellar the plaintiff was to use and occupy in connection with his tenement on the upper floor. The ruling of the court was correct. The plaintiff could show what was intended by both parties to the lease to be included within it. Such testimony does not alter the terms of a written agreement. The only description of the tenement contained in the lease is "five rooms on the top floor of the building as living rooms." The plaintiff surely could show what five rooms were leased, and necessarily there passed with the rooms all other appurtenances provided by the landlord, and intended by him to be used by the tenant in connection with his occupancy of the rooms. The intention of the parties was a question of fact, and this was properly submitted to the jury by the court, and found adversely to the defendant's claims. This finding in effect disposed of the defendant's contention that as a matter of the law the plaintiff was occupying the apartment in the cellar, not under and by virtue of his lease, but by the permission of the landlord, and that the plaintiff was a mere licensee. All of the claimed errors of the court hinge upon this ruling. If the plaintiff was occupying the cellar and using the stairway as a tenant, all the other rulings of the court were obviously correct.

There is no error. The other Judges concurred.

(96 Conn. 20)

FERRY et al. v. ALDERMAN.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. LANDLORD AND TENANT §37—LEASES—CONSTRUCTION.

The intended meaning of the language used in a lease must control in its interpretation and enforcement, if the words used are susceptible of such meaning.

2. LANDLORD AND TENANT §182—LEASES—CONSTRUCTION—RENT.

Lease providing for contingency of tenant's access being permanently interrupted by the construction of a building, "but if the interruption, having previously occurred, shall continue for two years from the date of the lease the tenant will continue to hire the entire building" at a stipulated rental for the full term, bound the tenant to pay the rent for the entire building from a date two years after the interruption of his access by the construction of a building.

Appeal from City Court of New Haven; Samuel E. Hoyt, Judge.

Action by Emily M. Ferry and others against Samuel Alderman. Judgment for plaintiffs, and defendant appeals. No error.

August 20, 1915, the plaintiffs were the owners of property in New Haven upon which stood two buildings. One was a large block fronting on Chapel street, and the other a small one-story structure in the rear of the block. Access to the latter building could be had only by means of an alleyway extending therefrom to the street, or through the front block. The plaintiffs were neither owners of the alleyway nor had they any other interest therein than the right to use it until it should be built upon. On that day they, as a result of prior negotiations, executed a lease in writing of the rear building to the defendant. The term ended August 31, 1920, and the stipulated rent was an annual one of \$1,200, plus a sum equal to 10 per cent. per annum on any excess over \$900 which the stipulated alterations should cost. This rent was payable in monthly installments in advance. By the terms of the lease they agreed to make sundry improvements and to increase the height of the structure by the addition of a second story, and gave to the defendant the privilege of using the alleyway so long as it remained unobstructed by the erection of a building thereon. The defendant thereupon went into occupation, using the lower floor as a garage and the upper, when completed, as a workshop in connection with his tailoring business. To the lease was attached a rider containing further stipulations concerning the payment of rent which has been the occasion of the present controversy. Those stipulations are as follows:

"In the event that the tenant's access to the said rear building shall be permanently interrupted by the construction of a building in and upon said Leavenworth alley or otherwise, then the tenant at his option may thereupon give up possession of the first or ground floor of the said rear building, and in that event, during the period of this lease, shall continue to rent and hire the second story of the said building at a rental of thirty-five dollars (\$35) per month, or at his option the tenant may continue to occupy the entire rear building at a rental of eighty-three dollars and thirty-three cents (\$83.33) per month; but if the said interruption shall occur, or having previously occurred, shall continue, after two years from the date hereof, the tenant will nevertheless continue to hire the said entire rear building at a rental of \$1,000 per year. In that event, permission is hereby given to sublease a portion thereof to a tenant whose business shall not be objectionable or prejudicial to other tenants of the building No. 962 Chapel street, and who shall be reasonably satisfactory to the landlords, provided that his occupancy of the premises for the purpose for which they may be used by him shall not increase the rate of insurance on the said rear building or the front building, No. 962 Chapel street, or their contents."

During December, 1915, the owners of the alleyway began the erection of a building covering it. Thereupon the plaintiffs, through their attorneys, wrote the defendant, calling his attention to that fact, and asking him to notify the plaintiffs' agent in charge of the property whether he desired to exer-

cise the option and to continue to occupy the entire building. The defendant on the same day wrote the agent, saying that he did not care to occupy the ground floor any longer, but would continue to rent the upper floor as theretofore. The ground floor was already vacated, and has not since been used by the defendant. He has continued his use of the upper floor to the present time. August 1, 1917, the plaintiffs sent the defendant a bill for the current month's rent, made out at the rate of \$35 from the 1st to the 20th of the month, and of \$83.33 for the remainder of the month. The defendant's refusal to pay at a higher rate than \$35 per month resulted in the bringing of this action, which was forthwith commenced.

The defendant answered, setting up the terms of the lease and the fact of his election thereunder in bar of a recovery in excess of \$35, and asked by way of counterclaim that the lease be reformed by the striking out of the paragraph quoted of the words "or, having previously occurred, shall continue," so that it should conform to what was alleged to be the understanding and intention of the parties. In support of the prayer for reformation the counterclaim alleges that at the time the lease was drawn it was distinctly understood and agreed between the parties that, in the event that the alleyway should be permanently built upon, the defendant should have the option to surrender the first floor of the building, with the qualification, however, that, if the obstruction by the erection of a building should not occur for a period of two years after the signing of the lease, then the defendant was to continue to hire the whole building at a rental of \$1,000 per year. The court has found that this was not the understanding and agreement of the parties. On the contrary, its finding is that their understanding and agreement, reached after a full discussion of the situation which the location of the building and the proposed enlargement and improvement of the property presented, and the one which the parties intended that the lease should express, was that, if the interruption of the use of the alleyway should occur within the first two years of the same lease, the lessee should have the right to give up the lower floor during the balance of the first two years only, and that the defendant was to pay for the entire building during the last three years of the lease in any event.

Walter J. Walsh, of New Haven, for appellant. Harrison T. Sheldon, of New Haven, for appellees.

PER CURIAM. [1, 2] The court's finding as to the understanding and agreement of the parties intended by them to be expressed in the lease which they executed is decisive of the correctness of the action of the court

in the rendition of its judgment. The intended meaning of the language used in the lease must control in its interpretation and enforcement, if it is susceptible of that meaning. Upon the latter point there certainly can be no reasonable question. The court, therefore, did not err, either in refusing to reform the lease as requested, or in rendering judgment for the plaintiffs for the full amount of their claim.

There is no error.

(260 Pa. 481)

WOOD v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania, March 11, 1918.)

1. CARRIERS §238—WHO ARE "PASSENGERS."

One impliedly invited to enter a car is a passenger, and the carrier is required to exercise the highest degree of care and diligence in protecting him while entering and going into the body of the car.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

2. CARRIERS §316(1) — PERSONAL INJURY — NEGLIGENCE—PRESUMPTION.

Where a passenger was not hurt by any instrumentality connected with the means of transportation, but by an iron pipe carried by an alighting passenger, there was no presumption against the carrier, and the burden of proof was on the passenger.

3. CARRIERS §284(2)—PASSENGERS—NEGLIGENCE.

Street cars being for the use of people with or without their luggage, negligence cannot be inferred because a workman is permitted to enter or leave carrying tools, etc., though there might be some piece of machinery or instrument so dangerous that to suffer a passenger to take it with him on a street car would be evidence of the company's negligence, though that could not be affirmed of an iron pipe carried by an alighting passenger.

4. CARRIERS §284(2)—INJURY TO PASSENGER —LIABILITY.

In an action for personal injury to a passenger while entering a trolley car from being struck by an iron pipe which a workman who was leaving the car was carrying, where the safety of passengers would not have been promoted by requiring the workman to remain on the platform until all passengers had entered or to leave by another door, the carrier was not liable.

5. NEGLIGENCE §1 — MODE OF DOING PARTICULAR ACT.

In the absence of a fixed duty, negligence cannot be inferred from the failure to do an act in some other way not shown to be safer.

6. TRIAL §141—QUESTION FOR JURY.

Where the facts are simple and not controverted, their legal value is for the court.

7. CARRIERS §284(1) — PERSONAL INJURY — ACTS OF OTHER PASSENGERS.

A carrier is only required to interfere with the voluntary acts of passengers when they suggest a reasonable probability that injury will thereby result to others.

8. CARRIERS §284(2)—PASSENGERS—INJURY FROM OTHER PASSENGERS.

A carrier is not liable for injury sustained to one passenger from the rudeness, crowding, or jostling of another.

3. CARRIERS — 284(2) — PASSENGERS — INJURY BY OTHER PASSENGERS' NEGLIGENCE.

Knowingly to suffer the luggage of a passenger to remain so placed in a car as to endanger other persons is evidence of the carrier's negligence.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass to recover damages for personal injury by John L. Wood, in his own right and as executor of the estate of Ellie B. Wood, deceased, against the Philadelphia Rapid Transit Company. Verdict for John L. Wood in his own right for \$10,000, reduced by the court to \$7,500, and verdict for John L. Wood, executor, for \$8,000, reduced by the court to \$5,500. Judgment was entered on the verdicts as reduced, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

David J. Smyth, of Philadelphia, for appellant. William T. Connor and Hugh Roberts, both of Philadelphia, for appellee.

WALLING, J. This is an action against a street railway company for personal injuries to one passenger by the act of another. On the afternoon of February 5, 1915, Mrs. Ellie B. Wood boarded one of the defendant's north-bound cars in Fifty-Second street, Philadelphia, at the Market street intersection. It is a transfer point, and, as was customary at that hour, a group of some 25 people were waiting, and they took passage on the car with Mrs. Wood, while others, including a man who carried an iron pipe on his left shoulder and a canvas bag in his right hand, left the car at the same place. As he alighted from the rear platform, where Mrs. Wood and other passengers were entering, the pipe came in contact with her head, inflicting a scalp wound, on account of which Mr. and Mrs. Wood brought this suit. Thereafter she died, and he prosecuted the case in his own right and as her executor.

There was a sliding door on the side of the car at each end; over that in the rear was the word "Entrance" or "Entrance Only," and over that in front was the word "Exit"; but so far as appears passengers left the car at either end. The conductor was stationed near the back platform, where he could collect the fares and look after the rear door. It was an old-fashioned car with seats along the sides, and was carrying 7 or 8 passengers as it came to Market street. The man was riding on or near the back platform, and there was nothing unusual in his appearance or conduct. The pipe was some 5 feet long and 2¼ inches in diameter, and as carried projected about 2 feet in front of the man. The conductor knew that people were there waiting to board the car as the man started to alight.

The trial judge charged the jury in effect that as defendant knew the man had the pipe it was its duty to see that he so carried it as not to harm a fellow passenger. The verdicts were for plaintiffs, and the court entered judgments thereon, from which defendant appealed. In our opinion the judgments cannot be sustained.

[1, 2] Mrs. Wood was a passenger and entitled to protection as such. "The carrier, having impliedly invited the plaintiff to enter the car, was required to exercise the highest degree of care and diligence in protecting her while she was in the act of ascending the steps and going into the body of the car." *Bickley v. Philadelphia & R. Ry. Co.*, 257 Pa. 369, 376, 101 Atl. 654, 656. However, Mrs. Wood was not hurt by any instrumentality connected with the means of transportation; hence the accident created no presumption against the carrier, and the burden of proof rested upon the plaintiffs. *Penna. R. R. Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601; *Thomas v. Philadelphia & R. Ry. Co.*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416.

[3] Street cars are for the use of the people, with as well as without their luggage, and negligence cannot be inferred because a workman is permitted to enter thereon carrying the tools and implements of his trade. And the right so to enter implies the right so to depart. There might be some piece of machinery or instrument so dangerous that to suffer a passenger to take it with him on a street car would be evidence of the company's negligence, but that cannot be affirmed of the pipe or bar here in question.

[4] There is no suggestion that the man indicated any want of care in the manner of taking his luggage onto the car or of placing it while there. Nothing is alleged against him until he shouldered the pipe to leave the platform. No complaint is made down to that point, but it is urged that right there the conductor should have required the man to do something different. Counsel suggest that he should have ordered him to go through the car and out at the front door. If so, he would have been on a level with passengers going out in front of him and of others rushing in behind him—a more dangerous situation, as injury might be caused by either end of the pipe. It is also urged that the conductor should have required him to remain standing on the back platform until all the incoming passengers had entered. The passage there is narrow, and to require a man to stand in it, incumbered with such an iron pipe and bag, while 25 passengers rush by, would increase the danger. Had he carried the pipe in his hand or under his arm, it would have occupied equal space and been more likely to come in contact with incoming passengers. Our conclusion is that

there was no safer method for the man to leave the car than the one he pursued, and that the conductor was not at fault in failing to interfere. There is no evidence that the safety of the passengers would have been promoted had the conductor pursued any one of the courses suggested, or that the hazard was increased by his failure to do so, and nothing that justifies a conclusion to that effect.

[5, 6] In the absence of a fixed duty, negligence cannot be inferred from the failure to do an act in some other way, not shown to be safer. The facts being simple and not controverted their legal value is for the court to determine. *Davidson v. Lake Shore & M. S. Ry. Co.*, 171 Pa. 522, 33 Atl. 86; *Wolf v. Philadelphia Rapid Transit Co.*, 252 Pa. 448, 97 Atl. 684.

[7] A carrier is required only to interfere with the voluntary acts of passengers when they constitute a breach of the peace or are such as to suggest a reasonable probability that injury will thereby result to others. When the car stopped it required only two or three steps to place the man on the pavement and out of the way. As he was going forward he practically had only to guard the front end of the pipe and that was before his face and held by his hand. The presumption was that he would use due care and we see no reason why the conductor should have anticipated danger. The conditions were not essentially different from those constantly arising.

[8] It is well settled that a carrier is not liable for injuries sustained by one passenger from the rudeness, crowding, or jostling of another (*Ellinger v. P. W. & B. R. R.*, 153 Pa. 213, 25 Atl. 1132, 34 Am. St. Rep. 697; *Graeff v. Philadelphia & R. Ry. Co.*, 161 Pa. 230, 28 Atl. 1107, 23 L. R. A. 606, 41 Am. St. Rep. 885), nor for injury from the negligent or willful act of another, unless given an opportunity to prevent it. See *Widener v. P. R. T. Co.*, 224 Pa. 171, 73 Atl. 209; *Kantner v. Philadelphia & R. Ry. Co.*, 236 Pa. 283, 84 Atl. 774; *Hillebrecht v. Pittsburgh Rys. Co.*, 55 Super. Ct. Rep. 204; 10 Corpus Juris, 901. To hold otherwise would render a common carrier an insurer of the safety of its passengers, which it is not. This unfortunate accident resulted from the modern method of travel on electric street railways, and was a risk assumed by the traveler as incident thereto.

[9] Knowingly to suffer the luggage of a passenger to remain so placed in a car as to endanger other passengers is evidence of the carrier's negligence. *Burns v. Penna. R. R. Co.*, 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811; *Diffenderfer v. Penna. R. R. Co.*, 67 Super. Ct. Rep. 187. And the same rule applies where passengers or trespassers are permitted to engage in a fight upon a car to the terror or danger of other passengers.

P., F. W. & C. Ry. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; *Pittsburgh & Connellsville Ry. Co. v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424. But those cases are different from this.

At popular resorts and other like places where hundreds collect at one time to board the cars, it is sometimes necessary to employ assistants to keep back the people and prevent accidents from crowding. *Coyle v. Philadelphia & R. Ry. Co.*, 256 Pa. 496, 100 Atl. 1005; *Kennedy v. Penna. R. R. Co.*, 32 Super. Ct. Rep. 623. But a transfer point where 20 or 30 people gather to take passage on a street car is not such a place, and none of the cases above cited apply to the facts here presented. The diligence of counsel, supplemented by our own research, has failed to find an analogous case where a recovery has been sustained. Defendant's request for binding instructions should have been granted, as the evidence failed to disclose negligence on its behalf. That not having been done, the court should have granted the motion for judgment non obstante veredicto. This being decisive of the case, it is unnecessary to consider the other questions presented in the record.

The first and seventh assignments of error are sustained, and thereupon the judgment is reversed and is here entered for the defendant.

(41 R. I. 474)

MORRISON v. RHODE ISLAND CO. *
(No. 5073.)

(Supreme Court of Rhode Island. July 2, 1918.)

1. STREET RAILROADS ⇨117(35)—INJURY TO PERSON NEAR TRACK—LAST CLEAR CHANCE—QUESTION FOR JURY.

Conflicting evidence in action for injury by street car to person standing near track *held* to make a case for the jury under the last clear chance doctrine.

2. STREET RAILROADS ⇨103(1)—INJURY—LAST CLEAR CHANCE—DUTY TO SEE.

The question of negligence, under the last clear chance doctrine, of the motorman whose car struck a woman near the track, depends, not merely on whether he saw her in time, but whether he could have seen her.

3. STREET RAILROADS ⇨117(17)—INJURY TO PERSON NEAR TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Contributory negligence of person struck by street car using left-hand track, because of work on other, *held* for the jury, though she did not look for car from that direction; she testifying to ignorance of such use, and to not knowing of approach of car.

4. DAMAGES ⇨132(8)—PERSONAL INJURY—EXCESSIVE VERDICT.

A verdict for \$16,000 for injury chiefly to left arm of woman 26 years old, earning \$10.50 per week, *held* excessive to the extent of \$5,000, making allowance for pain and suffering, and conceding 50 per cent. impairment of earning capacity; medical expenses not being shown.

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Rose Morrison against the Rhode

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* For opinion on defendant's motion for reargument, see 104 Atl. 609.

Island Company. Verdict for plaintiff, and defendant brings exceptions. Exception to damages sustained, and case remitted.

A. B. Crafts and Augustine H. Downing, both of Providence, for plaintiff. Clifford Whipple and G. Frederick Frost, both of Providence, for defendant.

BAKER, J. This is an action of trespass on the case to recover damages for injuries alleged to have been caused by the negligence of the defendant's agents and servants. The case was tried in October, 1916, before a justice of the superior court sitting with a jury, and a verdict was rendered in favor of the plaintiff in the sum of \$16,000. The defendant excepted to the refusal of the court to direct a verdict in its favor, to the denial of a motion for a new trial, to a certain portion of the charge to the jury, and to the refusal of the court to charge the jury in accordance with four separate requests made by it, and the case is now before this court on these exceptions. The bill contains four other exceptions, but they are waived.

The testimony shows that the plaintiff was struck by an electric car of the defendant corporation at about 20 minutes after 9 o'clock in the evening of June 20, 1915, on Elmwood avenue in the city of Providence at a point a short distance south of its junction with Roger Williams avenue.

The plaintiff and a friend, named Thomas Rondina, on the evening in question, had taken a jitney near the city hall in Providence for the purpose of having a ride to East Greenwich. In the car beside the driver were two other passengers, a man and his son, a boy nine years old. As the car proceeded southward, there was a puncture of the tire on its right rear wheel, and the driver drew up alongside the westerly curb on Elmwood avenue in order to make the necessary repairs. In Elmwood avenue at this point are two car tracks, one on each side near the sidewalk, leaving the middle or central portion of the avenue for use by other vehicles. Ordinarily, south-bound cars use the westerly track, and the north-bound cars the easterly track. In June, 1915, owing to the fact that a bridge over a steam railroad track farther to the south was in process of repair, the westerly track was alone used by cars going in both directions between Roger Williams Park on the south and the car barn on the north, a distance of about half a mile. The situation at the place of the accident, more fully described, was this: The car track was practically straight for several hundred feet and was located near the west sidewalk. Next east of the track was a strip of earth several hundred feet in length, bounded on its easterly side by the westerly street curb, which strip measuring from the said curb to the easterly rail of the track was practically 6 feet in width for its entire length. On it near the curb were trolley and

electric light poles and a row of trees about 50 feet apart—two of them of considerable size being upwards of 20 inches in diameter, the others small, ranging from 4 to 5 inches in diameter. The strip for the most part was covered with grass. The distance between the easterly rail of the track and the westerly side of the poles and trees was for the most part more than 4 feet, but as to one pole was given as 3 feet and 3 inches and the southernmost large tree as 3 feet and five inches. The overhang of the running board of the car in question when down—as it was shown to be at the time of the accident—was 24 inches.

After the jitney drew up to the curb, the driver and all the passengers got out; the plaintiff and boy after the others, and doing so in order to permit the driver to obtain from under the rear seat certain tools and a fresh tube. Mr. Rondina assisted the driver, while the other three stood upon the strip looking on; the plaintiff standing between the father and son and a little to the rear of them. All the occupants of the jitney say that it was drawn up at or close to a bare spot on the strip, which was shown to be about 70 to 75 feet south of the southernmost large tree and about 100 feet north of an electric light pole and nearly opposite but a little south of a hedge which was a few feet south of a house located on the west side of Elmwood avenue. The plaintiff says she stood about 2 or 2½ feet away from the car track; that she was facing towards the park as she alighted, and there was then no car in sight; that she had not been on Elmwood avenue for seven or eight months, and did not know that the westerly track was then being used by the north-bound cars, or that, when there were two tracks on a street, cars ever ran on the left side of the street; that while watching the fixing of the tire she stood facing the roadway, but in such way that she could see a car coming from the city, as she thought that such a car might strike her where she stood, but did not again look toward the park. Two or three minutes after alighting and while so standing and without having moved, she was struck by the car, a north-bound electric, which she had not before seen or heard, and which was the first car passing after their arrival at the place of the accident. All of the occupants of the jitney say that they neither saw nor heard the electric car until it was upon them, except the driver, who testifies that, as he was bending over to pick up a tool from the ground at the rear of his car, he saw the electric car headlight when the car was 20 or 25 feet away and shouted a warning, but it was too late. The speed of the car so far as it was specifically stated by plaintiff's witnesses, some of whom were passengers on the car, ranged from 15 to 25 miles an hour. The jitney was a Ford car, and after it stopped displayed no large headlight, but did show at the front of the car a

red light on the right and a white light on the left. At the time many automobiles were said to be passing in the roadway blowing their horns. The plaintiff wore a dark suit and a large black hat.

The defendant offered testimony by the crew of the car and by one or more of its passengers that the jitney was drawn up to the curb near but north of the southernmost of the two large trees, or approximately 75 feet to the north of the location of the bare spot as testified to by several of the plaintiff's witnesses. The electric car was a large open one, more than 40 feet long. The track there was on an incline, and the motorman said the car was running from 10 to 15 miles an hour with the power shut off, and that he was ringing his bell and looking ahead, and that just before the plaintiff was struck he blew his whistle and threw on the power in reverse. Several passengers testify to his ringing of the bell and the blowing of the whistle. The car had a headlight of the size ordinarily used in the city. The motorman and other witnesses say that it was quite dark along there. He says that, just before he "got in front of the house where the hedge was, perhaps 15 or 20 feet," he "saw an automobile on the right-hand side of the road, * * * and there were some people down in there by the tree." "There was a girl come out dressed in black. She had a black hat on." If the first big tree was referred to, then he saw them at a distance of about 90 feet. He says elsewhere that he was 15 or 20 feet away from them when he first saw them. He also says that, when he first saw plaintiff, "she was about 3 feet or thereabout from the track"; that "she stepped out around there," which brought her within the overhang of the car. In another place, he says she stepped out from behind the tree; that before she stepped out the tree was between her and him. Another witness, a passenger sitting near the front of the car, testifies to seeing something step from behind a tree, and they were "right on top of the tree when the object came from behind it," four or five feet away. This witness gives the speed of the car as 6 or 7 miles an hour.

On the front seat of the car, immediately behind the motorman, sat three young ladies who testified in the case; two called by the plaintiff, the third by the defendant. The one sitting at the right end of the seat testified that when the car was at the top of the hill she saw a woman ahead, standing by a machine on which was a red light; the woman wore a dark suit and a big black hat. In answer to a question as to whether the woman moved after she saw her, she replied, "Not that I know of." After saying that the distance from the top of the hill to the woman was "considerable," that she could not estimate it in feet, on being pressed judged it to be "about a hundred if not more feet

away." It developed in cross-examination that she had in an interview with an agent of the defendant signed a sworn statement in which, among other things, she had said:

"The car was about 15 yards away when I first saw her." "She seemed to be stooping over as car approached her, and she paid no attention to the warning." "I feel sure car wouldn't have hit her if she hadn't moved back, but I couldn't say whether she took a step backwards or not, as it was quite dark where this took place." "She had stood about two feet from the right rail alongside of auto and there were one or two other people with her."

She admitted making the last three quoted statements and said they were true, but did not remember making the first.

The young lady sitting at the left end of the front seat testified that from the "top of the hill" she "saw the lady and * * * a fellow stooping down"; also, the red light on an automobile. There was no one in the automobile. The woman did not move as the car approached her. Learned afterwards that her name was Morrison. When halfway down the hill, thought the woman was going to be struck. Witness said she was not a good judge of distances, and did not know how far it was from top of hill to place of accident. This witness some eight months after the accident had signed a statement. Witness denied saying she "first saw the woman at right of track when car was over one length away," as was recorded in the statement.

The third one of the young ladies who sat on the front seat was called by the defendant. She said the accident happened "right near the house with the hedge around it." She saw an automobile right at the curbstone and a stooping figure. When she first saw the stooping figure, the car was about opposite a slate-colored house, which she thinks is next south of the house with the hedge. She saw the figure move, and it seemed to move back towards the track. She was shown a signed statement which contained this sentence, "This lady was about 50 feet away when I first saw her." The witness said positively that she did not say that; that the defendant's agent asked her if it was 50 feet, to which she had replied, "I couldn't say how much 50 feet was." The agent of the defendant who obtained these statements testified in effect that he did not remember any thing these witnesses had told him, but that he had written only what they related to him.

From the top of the hill to the middle of the bare spot is shown to be upwards of 400 feet, the exact location of the top not being stated with exactness in the testimony. If the slate-colored house be the one next south of the house with the hedge, then the distance from the entrance to the south apartment thereof to the middle of the bare spot is given as 131 feet. Some of the witnesses say that the electric car made a quick stop. The motorman says it stopped in two-thirds of its

length, or 28 feet. The conductor says that when it stopped the rear of the car was a little to the south of the first large tree. Several witnesses say that after the car stopped the plaintiff was to the rear of the car a car length or $1\frac{1}{2}$ car lengths.

[1] There was therefore conflicting testimony as to the precise place of the accident, as to the speed of the car, as to whether the plaintiff moved towards the track just before the accident, and as to the distance from which she could be seen by those on the car as it approached her. We think there was testimony from which, if believed, the jury could properly conclude that the plaintiff did not move from the position she had taken, that she was seen by those on the front seat of the electric car at such a distance as to permit the motorman to see that she was in a place of danger and apparently unaware of it, and that he was negligent in not stopping the car in order to avoid hitting her, in accordance with the doctrine of the last clear chance as stated in *Underwood v. Old Colony Street Ry. Co.*, 33 R. I. 319, 325, 80 Atl. 390. Accordingly, it was not error to submit the case to the jury. The exception to the denial of the motion to direct a verdict is therefore overruled.

[2] The eleventh request of the defendant, on the denial of which the ninth exception is based, may be considered out of its order in this connection. It is as follows:

"(11) That if, as soon as the motorman saw the plaintiff in a position of danger, he used every appliance at his command to stop the car, he was not guilty of negligence in failing to stop the car before he struck the plaintiff."

The court below refused to so instruct, "because that leaves out the point that he should have seen her, if he could have seen her." We think there was no error in this ruling, and the ninth exception is overruled.

[3] Exceptions 6, 7, 8, and 10 are considered together in defendant's brief, and, instead of discussing them separately, we will consider the one question to which they all relate which is made clear by the charge and the exception thereto. The portion of the charge excepted to is as follows:

"Now, I cannot say to you, as a matter of law at this time, whether or not she was guilty of negligence in not looking toward the park. That is a question of fact for you to decide, whether, in view of all the conditions existing there, all of the dangers which a reasonably prudent person might apprehend, whether she should have taken a look occasionally in the other direction. It is a question of fact for you to say, in the particular situation which existed there that night whether she should have looked occasionally at least in the direction of the park. Now she says that she knew that the cars used the right-hand tracks, and, having that in mind she was looking in the direction from which she might expect danger to arise. It certainly has appeared in the testimony, and perhaps we all know, that the customary way for cars to run is on the right-hand track unless some exigency exists. It also appears that, although that is the customary practice all over the city where there are two tracks, it isn't a uniform practice. Any man who has ob-

served at all the method of transportation knows perfectly well, as the evidence shows here, that where there is an occasion to tear up a street or repair tracks, or anything of that sort, sometimes only one track is used or the cars are run in a different way from what they are ordinarily run. Now, it is a fair question of fact for the jury, having in mind the fact that the custom was to use that outbound track on the right-hand side of the street for cars outbound, having in mind the fact that properly cars could use that track going in the other direction if they saw fit or if necessity required, whether or not she should have taken a look in the other direction and if she failed to do that, as a consequence of her failure to look up toward the track, she received this injury, whether that would be contributory negligence. If you say, however, that ordinary care did not require her to do that in the particular situation which existed there, if you say that that would amount to extraordinary care and not ordinary care, then she is not bound to take extraordinary care. If ordinary care is consistent with simply looking down at the place where the car ordinarily would run and watching out for that, then she would have complied with the standard I have indicated to you as requisite."

Defendant excepted on the ground that the jury should have been instructed that plaintiff was negligent as a matter of law in not again looking to the south.

As to the conflict of testimony relative to the question of whether the plaintiff suddenly moved towards the track or simply stood in the position originally taken by her, the court charged the jury in substance that if she stepped out suddenly, as one witness had stated, and in consequence was struck, the defendant would not be liable; so that the portion of the charge quoted clearly refers only to the question of her negligence as based on her own statement of where she stood, and particularly as to whether she was negligent in not from time to time looking along the track towards the south. Having seen no car approaching from the south as she alighted facing in that direction, and immediately taking a position which permitted her to see a car coming from the north, there must have been an appreciable period of time within which she was not negligent, even if the position occupied would be a place of danger when a car was passing. The question is whether or not she was negligent in continuing to remain in the place in which she stood without looking again in the direction of the park. She says that, according to her observation, where there were two tracks in a street cars always proceeded on the track which, in relation to the direction in which they were going, is on the right, and that she never knew them to go otherwise; that she had not been on Elmwood avenue for seven or eight months; and in substance that she was not aware of any existing condition or situation which affected or altered the mode of operating cars there. If her statements in this regard be accepted as true, yet if she heard a car approaching and thereupon, having observed that no car was to be seen coming from the city, if she

then omitted to look in the other direction there would certainly be some basis for a claim of negligence on her part. She says, however, that she did not see or hear the car. Two other persons standing by her side also say that they did not see or hear it until it was right upon them. The chief reason suggested for this failure to hear the car and any warning it gave by bell or whistle is the noise caused by numerous automobiles passing there and the blowing of their horns. The court is of the opinion that the situation thus presented made it proper to submit to the jury for its determination as a question of fact whether the plaintiff was in the exercise of the care required of her in the circumstances in failing to see or hear the approaching car in season to move from the place where she stood, if need be, and that therefore the trial court did not err in so submitting it. While some of the cases cited by the defendant are somewhat similar to the case at bar in showing a reliance upon the regular or customary movement of steam trains and street cars, in other respects they contain features making them distinguishable.

The plaintiff in *Beerman v. Union R. Co.*, 24 R. I. 275, 52 Atl. 1090, lived near the scene of the accident and was thoroughly acquainted with the location and the running of the cars. Apparently there was a single track on Camp street, the place of the accident, on which cars were operated in both directions. The plaintiff came out of a cross street at right angles, looked to his right, and proceeded to cross the track with a car coming from the other direction so near that an accident was inevitable. Obviously the failure to look in both directions was in the circumstances a lack of ordinary care. As to what constitutes ordinary care, the court on page 280 of 24 R. I., on page 1091 of 52 Atl., says:

"What is ordinary care under one set of circumstances might amount to negligence under a different set of circumstances. Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended."

In *Baldwin v. Heraty*, 136 Mich. 15, 98 N. W. 739, which the defendant says is in its facts more nearly like those in the present case than any other case cited, the jury returned a verdict for the defendant in the lower court from which the plaintiff appealed. In that case a person riding a bicycle in a northerly direction in the middle of the easterly of two street car tracks, on hearing a car approaching behind him, apparently assumed that the car was on the easterly track, and without looking behind crossed over to the westerly track on which the approaching car really was and was almost immediately struck and killed. The court said that:

"The evidence conclusively shows that the deceased, knowing that a car was coming, and hearing its warning, rode in front of it without

looking behind, upon the assumption that it was upon the easterly track. This was contributory negligence, unless he had a right to rely upon the practice as an invariable one."

As a matter of fact the practice was not an invariable one, as some north-bound cars ran regularly on the west track. Plaintiff's proof on this point rested upon the testimony of a witness, who was with the deceased at the time of the accident, that, so far as he had observed, it was customary for north-bound cars to go on the east track. The court said:

"But this was not proof of such uniformity of practice as to justify the decedent in taking it for granted that this car was upon the east track, and disregarding the duty of turning his head to see whether he was safe when he heard the bell."

In that case the decedent heard the approaching car and suddenly without looking placed himself in its path. His failure to look after being warned of its approach is recognized as significant evidence of his negligence. It is distinguishable from the present case in that the plaintiff, if her testimony is believed, did not hear the car and was not aware of its approach. In passing it may be noted that in *Baldwin v. Heraty* the court held that there was no evidence warranting the inference that the accident could have been prevented after discovery of decedent's negligence.

The other cases cited by defendant do not seem sufficiently in point to require separate consideration. They are cases in which persons attempted to cross, without looking, steam railway tracks in front of approaching trains, which were close at hand and plainly in sight. The only suggested similarity is that in so doing they relied upon what they understood was the regular or customary movement of trains. We think, however, that the other circumstances of those cases readily distinguish them from the present case.

Exceptions 6, 7, 8, and 10 are therefore overruled.

The court later in its charge explained the doctrine of the last clear chance and instructed the jury in effect that if it were assumed that the plaintiff was negligent in failing to look towards the park, and continued to be negligent until she was struck, and that the motorman saw she was standing in dangerous proximity to the track, and apparently did not appreciate her danger or hear his warning signal, and he then had the opportunity to avoid striking her by using the appliances under his control for stopping the car and failed to do so, the company would be liable notwithstanding her negligence. No exception was taken to this portion of the charge. Therefore, under this statement of the law, even if the jury were of the opinion that she was negligent in not looking towards the park, and in standing where she did, that would not be decisive of the case in the event that they also found

that the motorman was guilty of negligence under the doctrine of the "last clear chance." In such case the final act of negligence of the motorman would be the proximate cause of the injury to the plaintiff. The question of whether he was thus negligent clearly appears to be the vital one in this case.

A careful examination of the testimony satisfies us that it would be difficult to uphold the verdict except on the testimony to which the doctrine of the last clear chance is applicable. In all probability the car was going at a rate of speed greater than that permitted by ordinance. There is little, if any, evidence however to show that this was negligence in the existing circumstances.

So far as the exception taken to the denial of the motion for a new trial relates to the question of liability, inasmuch as there was conflicting evidence justifying the submission of the case to the jury and the trial judge has approved of the verdict, we do not find that he was clearly in error and the exception in this respect is overruled.

[4] It remains to consider this exception as based on the claim that the damages awarded are excessive. By the blow she received when struck by the car, the plaintiff received a comminuted fracture of the humerus of the left arm. She was immediately taken to the Rhode Island Hospital. After the lapse of about a week, to use the language of the surgeon in charge: "It was deemed necessary to make of this * * * a compound fracture; that is, * * * to cut in upon the fracture itself from the outside." This was done, and after a few days the cut or wound became infected, pus formed, followed by necrosis of the splintered bone, necessitating three operations at later periods for the removal of fragments of diseased bone, as well as another for an abscess in the left armpit which had resulted from the infection. She remained in the hospital from June 20th to November 13th. She returned to it in January, 1916, for one of the operations and remained about two weeks; was there in February for about the same time for a second operation, and in April for another. In the first operation the broken bones were wired into position; later drainage tubes of considerable length were inserted in the wound and maintained there for a long period, causing severe pain by their insertion and removal; and from May, 1916, to the end of the following September the arm was subjected to more than 40 bakings at a high temperature. The plaintiff early complained of pain in the right thigh and in the right leg above the knee, and after leaving the hospital and at the time of trial of a painful condition of the coccyx; but there were no objective symptoms of injury to either. At the time of the trial the wound on the arm had healed, leaving a depressed or

grooved scar on the outside of the arm about seven inches in length. The freedom of movement of the arm, particularly at the elbow, was impaired to a considerable extent, and the medical testimony was practically unanimous in saying that there would be some permanent diminution in the movement and usefulness of the arm, although differing somewhat as to its extent. It was also said that she would probably on occasions suffer pain in it due to changes in the weather. At the trial she testified that she slept well, had a good appetite, and had regained her normal weight of about 155 pounds. She had walked to Market Square from Olneyville on seven or eight occasions since the accident, but it made her tired and she rode back. She had done no work since she was hurt. When injured she was 28 years old, was in good health, was then working and for about a year before had worked in the Paragon Worsted Mills as a burler, earning on an average of \$10.50 a week. She had worked in mills previously, but her earnings in them were not given. By the life tables her expectancy of life was about 37 years. There was no evidence that she had incurred any expense for surgical or medical services. The court in its charge to the jury as to the matter of damages in pointing out the different things for which the plaintiff was entitled to compensation, in case the defendant was held to be liable, said:

"So far as it appears, the principal injury to this plaintiff is in the left arm, also shoulder joint, and things connected therewith."

In his rescript the trial judge says that, when the jury announced its verdict, he "was inclined to believe that the damages were excessive," but that "after a re-examination of the testimony, and upon careful deliberation," he had concluded that, "although the amount awarded is larger than" he would have given, he is unable to "say that the excess is so large" as to warrant "setting the verdict aside as excessive." He also says:

"It seems to me reasonable to suppose that a considerable part of this award was given by the jury as compensation for the pain and suffering endured by the plaintiff."

We think it must have been the chief element of the award.

As to the action of the trial judge in denying the motion for a new trial on the ground that the damages awarded were excessive, the court is of the opinion that said damages are so excessive that justice requires that there should be a new trial on that question unless they are reduced. In the trial no evidence was offered showing that the plaintiff had been subjected to any expense for medical attendance or other service rendered in her recovery from her injuries, so that the two principal elements of damage were the loss of wages, actual and prospective, and compensation for pain and suffering,

past and future. Plaintiff's counsel in his brief computes her actual loss in wages from the date of the accident to the date of trial at \$10.50 a week, which she was earning prior to the accident, to be \$724.50. Then estimating that for the future she would be able "on the average to earn half as much as she has in the past at some kind of employment," he computes that her prospective loss on an expectation of life for 37½ years would be \$10,287.50; the two items of pecuniary loss as thus computed together amounting to \$10,962. It is not too much to presume that this claim of the pecuniary loss of the plaintiff was urged upon the jury. If the jury accepted this claim of loss as a fair one, then in their total award of damages an allowance of not much in excess of \$5,000 was made as compensation for pain and suffering. This, of course, cannot be asserted as a fact. But, if we accept the suggestion of her counsel that for the future the plaintiff will be able on the average to earn half as much as she did before the accident, a suggestion which in the light of the evidence seems reasonable, then his computation of the prospective loss is erroneous, in that there is no attempt to estimate the present pecuniary value of such loss to be paid now in one sum instead of in weekly payments spread over a period of 37 years, which is the average of the two tables of expectancy of life in evidence. Wages at \$10.50 a week yield a total of \$546 for one year, one-half of which is \$273. The present value of an annuity of \$273 for 37 years at 4 per cent. as shown by approved tables is \$5,225.93. If to that the actual loss of wages shown \$724.50, be added, the total pecuniary loss, actual and prospective, is \$5,950.43. Computing the present value at 4 per cent. is not unfavorable to the plaintiff inasmuch as an increase in the rate of interest results in a smaller present value of the annuity. Assuming as before that the jury allowed the plaintiff's claim of pecuniary loss of one-half earning power for the future, then the verdict would represent an allowance of about \$10,000, for pain and suffering.

We are of the opinion, therefore, upon a consideration of the evidence, that the damages are excessive, and that there was error in the denial of the motion for a new trial on the question of damages. In so far as the exception taken to the denial of the motion for a new trial relates to the question of damages, it is sustained; all the other exceptions are overruled.

The cause is remitted to the superior court, with directions to grant a new trial on the question of damages only unless within 10 days after the return of the papers in said cause to said court the plaintiff shall file her remittitur in writing of so much of its verdict as is in excess of \$11,000; and,

if such remittitur be filed, to enter judgment for the plaintiff on the verdict as thus reduced by the remittitur.

(41 R. I. 468)

GILBANE v. LENT, City Treasurer.
(No. 5045.)

(Supreme Court of Rhode Island. July 5, 1918.)

1. MUNICIPAL CORPORATIONS ⇨821(20) — DEFECTIVE SIDEWALKS — CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Pedestrian's contributory negligence in falling into hole in sidewalk is generally for the jury, unless the only proper inference from the facts is that an ordinarily prudent man would not have acted as the pedestrian did.

2. MUNICIPAL CORPORATIONS ⇨806(1) — DEFECTIVE SIDEWALKS — CARE REQUIRED.

A pedestrian must be on his guard against such perils only as a reasonable man would apprehend in like circumstances.

3. MUNICIPAL CORPORATIONS ⇨821(23) — DEFECTIVE SIDEWALKS — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Presence of fence across street and sidewalks beyond which a bridge was being built was not as a matter of law notice to pedestrian of unsafe condition of sidewalk on part of street not closed by the fence.

4. MUNICIPAL CORPORATIONS ⇨821(23) — DEFECTIVE SIDEWALKS — CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Presence of street obstruction, with sign, barring passage, was not as a matter of law notice to pedestrian on sidewalk that the sidewalk was closed or unsafe.

5. MUNICIPAL CORPORATIONS ⇨821(25) — DEFECTIVE SIDEWALKS — CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Plaintiff's testimony that, had he looked, he could have seen a hole in the sidewalk into which he fell, was not conclusive of his contributory negligence, when his attention was momentarily diverted from the walk.

6. MUNICIPAL CORPORATIONS ⇨806(2)—DEFECTIVE SIDEWALK—CARE REQUIRED.

A pedestrian on a sidewalk, ignorant of a defect therein, may assume that the way is safe, and need not exercise the highest degree of care by keeping his eyes constantly on the walk, but he need use only the care of an ordinarily prudent man.

7. MUNICIPAL CORPORATIONS ⇨761(1) — STREET IMPROVEMENTS—INJURIES TO PERSONS—CONTROL OF STREET.

Where city authorized railroad contractors, building a viaduct to carry street over tracks, to use part of street for storing materials, the city was not thereby absolved from liability to pedestrian, injured by defect in sidewalk outside fence barring the street, and between it and a warning sign placed by the contractors.

8. MUNICIPAL CORPORATIONS ⇨769 — STREET IMPROVEMENTS—INJURIES TO PERSONS—LIABILITY.

When changes are being made in street by body independent of the city, under direct legislative authority for abolition of grade crossings, the city is not thereby relieved from statutory liability for injuries to pedestrians, if the street has not actually been closed to public travel.

9. TRIAL ⇨189(1)—DIRECTION OF VERDICT —SUPERIOR COURT.

Since power of justice of superior court in ordering judgment does not exceed power of the Supreme Court, which is limited to cases in which there is no legal evidence to support the

verdict, the justice of the superior court cannot direct a verdict according to the preponderance of the evidence.

Vincent, J., dissenting.

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Trespass on the case, by John J. Gilbane against Elmer E. Lent, as City Treasurer of Central Falls. On plaintiff's exception to order directing verdict for defendant, and to certain rulings as to admission of testimony. First exception sustained, other exceptions overruled, and cause remanded for new trial.

John P. Beagan, of Providence, for plaintiff. Mumford, Huddy & Emerson and George H. Huddy, Jr., all of Providence, for defendant.

SWEETLAND, J. This is an action of trespass on the case, brought against the defendant, as city treasurer of Central Falls, to recover damages for injuries alleged to have been received by the plaintiff by reason of the unsafe condition of a portion of the sidewalk on Cross street, a public highway in said city. The case was tried before a justice of the superior court sitting with a jury. At the conclusion of the evidence said justice directed the jury to return a verdict for the defendant, on the ground that it appeared from the evidence that the plaintiff was guilty of contributory negligence. The case is before us upon the plaintiff's exception to this ruling of said justice, and upon his exceptions to certain rulings made by said justice with reference to the admission of testimony.

It appeared that at the time of the alleged accident to the plaintiff the Pawtucket & Central Falls Grade Crossing Commission, acting under the authority of chapter 896 of the Public Laws of 1912, had removed the bridge upon which said Cross street had formerly been carried over the railroad location operated by the New York, New Haven & Hartford Railroad Company, and were engaged in erecting the abutments for a new bridge at that point. To the east of the railroad location, and outside of the land which had been condemned for railroad purposes, said commission had built a tight board fence across the northerly sidewalk and the roadway of Cross street, and had placed a picket fence across the southerly sidewalk on said street. In this manner persons using Cross street were entirely excluded from the place where said abutments were being constructed. At the time of the alleged accident the plaintiff lived on the northerly side of Cross street, a short distance east of the point where said fences had been placed. There was evidence presented at the trial from which it might be found that on Sunday, August 9, 1914, at about half past 7 o'clock in the evening, two of the plaintiff's children, a little girl about 2½ years old and a boy about 7 years old, were playing near the curb on the southerly

side of Cross street; that the plaintiff, having a baby about 10 months old in his arms, came from his home on the northerly side of the street, and crossed to where the children were playing, for the purpose of having them come home, because it was becoming dark; that as he approached them the little girl ran upon the southerly sidewalk, and the plaintiff, for the purpose of reaching her and getting her between himself and his home, went upon the southerly sidewalk, and while there stepped into a hole, of the existence of which he was ignorant. This caused the plaintiff to fall, and as a result of said fall he suffered the injury to recover damages for which this suit has been brought. The plaintiff testified that said hole was irregular in shape, extended from the curb across a portion of the sidewalk, was about 3 feet wide at its widest point and about 2½ feet deep in the deepest part, and was shallowest at the curb; that there were no lights and no guard about said hole.

[1-3] The ruling of said justice in directing a verdict is in accordance with the claim of the defendant that it should be said as a matter of law that the plaintiff was guilty of contributory negligence. The question of contributory negligence is generally one for the jury, unless it clearly appears that the only proper inference from the facts is that in the circumstances of the case an ordinarily prudent man would not have acted as did the plaintiff. This court has frequently held that a verdict should not be directed if on any reasonable view of the testimony the plaintiff can recover. *Baynes v. Billings*, 30 R. I. 53, 73 Atl. 625; *Reddington v. Getchell*, 40 R. I. 463, 101 Atl. 123. It is the generally accepted rule that a person is required to be on his guard against such perils only as a reasonable man would apprehend in like circumstances. The fence across the highway was notice to the public that beyond that point the construction operations of the Grade Crossing Commission were being carried on; but it cannot be said as a matter of law that the presence of the fence was notice to the public that the highway to the east of the fence was not in condition for its ordinary use. It also appeared that in the middle of the roadway of Cross street, about 20 or 30 feet in front of the fence, was placed a wooden horse, estimated by different witnesses as from 8 to 16 feet long and about 3½ feet high. To this horse was attached a sign reading: "Street Closed. No Passing. C. W. Blakeslee & Son." C. W. Blakeslee & Son were the contractors who were engaged in constructing the abutments of the new bridge. The roadway of Cross street was about 21 feet wide. It thus appears that said horse did not extend entirely across said roadway, whichever estimate of its length be accepted as true.

The defendant contends that from the presence of this horse and sign it is conclusively shown that the plaintiff was given

warning that he should be on the lookout for a possible defective condition, which might render the sidewalk unsafe for use. Just what interpretation an ordinarily prudent man would give to said notice is clearly a question of fact and not of law. The New York, New Haven & Hartford Railroad Company had charge of the reconstruction work under the commission. From the testimony of the civil engineer, the bridge foreman, and the construction inspector of said railroad company, the conclusion is warranted that said horse and sign were placed by them in the roadway of Cross street in connection with the removal of the temporary bridge and the erection of said fence, and were so placed for the purposes of notifying the public that the railroad could not be crossed at that point. It does not appear from their testimony that said horse and sign were intended to have any reference to the condition of Cross street to the east of the fence. It may be said that the sign on the horse would be a superfluous notice that Cross street no longer crossed the railroad; for the fence itself constituted a physical bar to such crossing, and hence the above conclusion is not a reasonable view to take of the purpose of the sign. Without the testimony of these agents of the railroad company, that would be a pertinent suggestion; what we have said above, however, appears to us to be the reasonable conclusion to draw from their testimony.

[4] But whatever may have been the intention in the minds of the agents of the railroad company who placed the horse and sign in Cross street, in our opinion a notice such as the one in question, placed upon a barrier in the roadway of a city street, may well be understood by a traveler upon the sidewalk, which is not barred, as referring merely to that portion of the roadway which lies beyond the barrier; and when in such circumstances the traveler proceeds along the unobstructed sidewalk the question of his due care is not concluded against him as a matter of law. This view is well supported by the authorities. In *Hurley v. Boston*, 202 Mass. 68, 88 N. E. 586, the court said:

"In the case of such a street, a barrier erected across the part used for carriages, but not across the sidewalk or part ordinarily used by pedestrians, may be interpreted by the traveler as being intended to stop the progress of carriages, but not of pedestrians upon the sidewalk; and many times that interpretation will be correct. And even if there be a notice that the street be closed to travel while grading, the question is not absolutely concluded against the traveler. In many cases he may be justified in thinking that the notice is no broader in its scope than the barrier, and that the thing closed to public travel is only that part of the street which is shut off by the barrier."

To the same effect is *Stoliker v. Boston*, 204 Mass. 522, 90 N. E. 927, and *Leonard v. Boston*, 183 Mass. 68, 66 N. E. 596.

In the view which we have taken of the meaning and the effect of said horse and

sign, it was for the jury to say as a matter of fact whether their presence in the roadway should have caused the plaintiff as a reasonable man to apprehend danger on the sidewalk, and would call for the exercise of a degree of caution greater than that ordinarily required of a traveler upon the sidewalk of a city street.

[5] In support of his position the defendant places great reliance upon certain testimony given by the plaintiff at the trial. In cross-examination he testified as follows:

"975 Q. Then why couldn't you see the hole? A. Well, I didn't see the hole. 976 Q. The reason is you didn't look; isn't that the reason? A. I didn't look for it, no; I didn't look for the hole. 977 Q. If you had looked, you would have seen it? A. If I had looked, I would have seen it."

And in answer to questions by his attorney the plaintiff testified:

"982 Q. Now, as I understand you to say, you didn't know this hole was there or didn't expect to find the hole? A. No, sir. 983 Q. If you went looking for the hole, it was big enough to be found? A. Yes; yes."

The meaning of the plaintiff is plain; he was ignorant of the existence of the hole; the hole was large enough to be seen, if he had looked for it or had looked at it. We must assume that the plaintiff did not see the hole, for he stepped into it, thereby causing serious injury to himself and offering the possibility of very severe injury to the child which he was carrying in his arms. In our opinion it is immaterial whether or not the plaintiff stated that he could have seen the hole if he had looked for it, as it is perfectly apparent that, in the state of the light on the street at that time, a person of ordinary eyesight could not have failed to see a hole of the size of the one in question if he had looked for it. The same is true in most cases where a plaintiff is seeking to recover damages for injuries received by reason of a defect in a highway, when said defect is not concealed by the darkness or otherwise. If the contention of the defendant is adopted, recovery could rarely be had in such cases. There are few defects in the surface of a highway which in the daytime, or even in the twilight, cannot be seen by one who looks at them, or looks for them, or, having reason to apprehend their existence, is particularly on his guard against injury from them. However, whether or not a traveler could have seen such defect, if he had looked for it, is not conclusive in determining whether he is guilty of negligence contributing to his own injury, unless the surrounding circumstances are such that no other inference can be drawn from his conduct. In this case, in our opinion, notwithstanding the admission of the plaintiff, there still remained the question of fact for the determination of the jury whether, acting upon the assumption that the city of Central Falls had performed its statutory duty, with his attention momentarily diverted, the plaintiff was exercising the care of an ordinarily prudent man in the circumstances.

In support of his contention the defendant cites *Nicholas v. Peck*, 20 R. I. 533, 40 Atl. 418. The decision there is not applicable to the facts in the case at bar. In *Nicholas v. Peck* it appeared that the plaintiff was injured by falling over stones projecting above the surface of the highway. The plaintiff had previous knowledge of the defect, and when she had occasion to pass that way had been in the habit of going around said stones. The court held that the plaintiff was bound to look for said stones, if they were dangerous and she knew of the danger. The defendant also cites cases from other jurisdictions, where the facts were somewhat similar to those that appeared in *Nicholas v. Peck*. These cases are based upon the principle that, when a traveler has previous knowledge of a defect in a highway, a greater degree of caution is required of him, and he must be on his guard to avoid injury from a known danger. It may be noted that in some jurisdictions it has been held by the courts of last resort that, in case of injury to a plaintiff through a defect in a highway, the fact of previous knowledge of such defect on the plaintiff's part is not in all circumstances conclusive upon the question of his contributory negligence.

[6] The ordinary rule is that, when a person is traveling on the sidewalk of a public street and is ignorant of a defect in its surface, he has a right to assume that the way is safe, and is not required to exercise the highest degree of care and keep his eyes constantly on the walk. The care required of him is that of an ordinarily prudent man, and the question of his contributory negligence is for the jury. In *Wood v. Boston*, 121 Mass. 337, the plaintiff alleged that, while walking along the sidewalk of one of the public streets of the city of Boston, she stepped into a hole and was injured. The plaintiff in that case, in answer to the question whether she knew of any reason why she did not see the place into which she stepped, testified as follows:

"I don't know any reason why, except I didn't expect it was there. I wasn't looking at the sidewalk. I suppose I was looking at the ferry. It is most natural, if I was looking at it, I would most likely see it."

She also testified:

"If I had been looking on the sidewalk for the hole, I would have stepped past it. I don't think, if I saw it, I should have gone into it. I can't say why I was not looking at the sidewalk. I know I wasn't looking for an accident, or expecting it, until it came onto me."

The court said:

"The surrounding circumstances, and the conduct of the plaintiff at the time she stepped into the hole in the sidewalk, were fully disclosed by the evidence. It cannot be said to appear conclusively that she was careless, because she failed to keep her eyes constantly upon the sidewalk before her. Whether she was in the exercise of that due care which persons of common prudence would exercise under like circumstances was properly submitted to the jury."

In *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271, the court said:

"A person passing along a sidewalk in a city is required to use ordinary and reasonable care and diligence to avoid danger; but what is such ordinary and reasonable care depends upon the circumstances of each particular case, and is a question of fact for the jury. A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. To hold that such person is absolutely bound to keep his or her eyes constantly fixed on the sidewalk in a search for possible holes or other defects would be to establish a manifestly unreasonable and wholly impracticable rule."

In *Cantwell v. City of Appleton*, 71 Wis. 463, 37 N. W. 813, it appeared that the plaintiff walked into an excavation on the sidewalk in broad daylight, that she was walking slowly, looking straight ahead, and did not see that the sidewalk had been disturbed. The court said:

"Moreover, she was passing along the principal thoroughfare of the city, and had no reasonable cause to fear or suspect that such an unguarded pitfall would be allowed in her path. Many facts were proved bearing upon the question of the alleged contributory negligence of the plaintiff, from which different inferences may reasonably be drawn. In such a case the authorities all agree that the question of negligence is for the jury."

See, also, *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147.

We are of the opinion that a verdict should not have been directed for the defendant on the ground that the plaintiff was guilty of contributory negligence.

[7] The defendant contends before us that a verdict should have been directed in his favor, because the city of Central Falls had no jurisdiction over the place where the plaintiff claimed that the accident occurred, and owed no duty to the plaintiff. He bases this contention on the fact that the Pawtucket & Central Falls Grade Crossing Commission had been empowered by the General Assembly to condemn land, and to make changes in and about public bridges and highways, in the cities of Pawtucket and Central Falls, in order to carry out the purpose of its creation. In regard to any portion of Cross street, which said commission had taken under its jurisdiction in accordance with the power conferred upon it, the claim might well be made that the city of Central Falls had been relieved of its statutory obligation to repair and keep safe for travel. As to the rest of Cross street the duty of the city remained unchanged. For the purpose of operating a steam shovel, and for convenience in erecting the abutments of the new bridge, either by authority of the statute or by permission of the city of Central Falls, said commission had taken temporary control of a part of Cross street beyond the place where the abutments of the new bridge would stand when completed, and beyond the line of its condemnation. Well outside of and to the east of its operations the com-

mission had erected said fence across the highway. Said fence must be held to mark the limit of the control assumed by the commission for the purpose of carrying on its work. Mr. Curtis, the civil engineer of the New York, New Haven & Hartford Railroad Company, called by the defendant, testified that:

"In all street work we have to take as much as is necessary to build a new bridge."

And further that:

"The city gave us authority to go in there and restore our masonry abutments and whatever was necessary in accordance with the plans."

From this testimony of the defendant it appears that the fence was erected and a portion of Cross street to the east of its line of condemnation was occupied by the commission in accordance with a special permission obtained from the city of Central Falls. When the former bridge on Cross street was removed, a similar fence was erected, which was taken down when the temporary bridge was completed and travel across the railroad location was resumed. When the progress of the construction work required that the use of the temporary bridge should be discontinued, the fence which existed at the time of the accident in question was erected. The grade of Cross street to the east of the fence remained undisturbed throughout these operations. It is plain from these circumstances that at all times the control of Cross street to the east of the fence had remained in the city of Central Falls. The placing of the horse and sign in front of the fence does not affect this question. By whomever they were placed there, they cannot properly be regarded as working an extension of the jurisdiction of the Grade Crossing Commission beyond the point which it had clearly marked off as the limit of its operations. If the city permitted the horse and sign to remain in one of its highways, it may avail itself of any advantage to be gained from the notice and warning which their presence gave, in accordance with the principles which we have set out above. Further consideration of this claim of the defendant is unnecessary.

[3] The proposition, however, is well supported by authority that, when changes are being made in a public street of a city by some body independent of the city and acting under direct legislative authority providing for the abolition of grade crossings, or for some other public work, such city is not relieved from its statutory liability for injury to a traveler caused by a defect in the street, if the city has not actually closed said street to public travel. *Connelly v. Boston*, 206 Mass. 4, 91 N. E. 998; *Stewart v. Boston*, 223 Mass. 525, 112 N. E. 218; *Torphy v. Fall River*, 188 Mass. 810, 74 N. E. 465.

[9] The defendant further claims that the direction of a verdict by said justice should

not be disturbed by us, because it was supported by the weight of the evidence that there was no hole in the sidewalk in question, and if the plaintiff fell into a hole it was into one on private land adjoining said street. An examination of the transcript of evidence discloses that there was testimony presented at the trial that the plaintiff was injured by falling into a hole on the sidewalk. We have frequently said that it is not within the province of a justice of the superior court to direct a verdict in accordance with what appears to him to be the preponderance of the evidence. Under the provisions of our statute relating to appellate proceedings, the authority of this court to order judgment against the party in whose favor a verdict or decision has been rendered is limited to cases in which we find that there is no legal evidence to support such verdict or decision. The power of a justice of the superior court in that regard does not exceed the power of this court.

The action of the superior court in directing a verdict for the defendant was not warranted. The plaintiff's exception thereto is sustained. We find no merit in the other exceptions of the plaintiff, and they are overruled.

The case is remitted to the superior court for a new trial.

VINCENT, J., dissents.

(92 N. J. Law, 219)

WINCH v. JOHNSON.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS §708(6) — COLLISION ON STREET—TRAFFIC REGULATIONS.

Where an automobile at an intersecting street collided with a motorcycle coming in an opposite direction, the fact that the automobile failed to observe the provisions of the traffic act (Act April 6, 1915; P. L. 1915, p. 285) does not per se present the basis for the direction of a verdict against the defendant; such fact being but one factor in the situation, which, considered as a whole, presents a jury question as to the defendant's negligence under all the circumstances.

Appeal from Supreme Court.

Action by Percy H. Johnson against Herbert A. Winch. From a judgment on a directed verdict for plaintiff, defendant appeals. Reversed, and venire de novo ordered.

Kalisch & Kalisch, of Newark, for appellant. Herbert Clark Gilson, of Jersey City, for appellee.

MINTURN, J. The plaintiff, while riding upon the rear seat of a motorcycle, operated by another, was run into and injured by an automobile, driven by defendant, on Park avenue, at the intersection of Summer ave-

nue, in the city of Newark, coming in an opposite direction. The collision, it is alleged, arose out of the fact that the defendant was in the act of turning to the left into Summer avenue, contrary to the provisions, *inter alia*, of subdivision 6, section 2, of chapter 156 of the Laws of 1915, commonly designated the "Traffic Act," which provides that:

"A vehicle turning into another road to the left shall, before turning, pass, when possible, to the right of and beyond the center of the intersection of the two roads."

This the defendant palpably failed to do, and his failure in that respect was made *ratio decidendi* for the direction of a verdict against him by the learned trial court. The reason underlying this direction manifestly was that this violation, regardless of other concurring or contributing factors, incident to the collision, dominated the situation, and characterized the defendant's act *per se* as the sole act of tortfeasance.

It will be observed that the section in question is not intended to supply a rigid unvariable rule of conduct, but one to be applied "when possible," *ceteris paribus*, to ordinary road conditions. If extraordinary conditions exist at an intersection, making its practical application obviously dangerous or unwise to a reasonably prudent man, this legislative proviso is intended to vest in the driver a reasonable discretion in order to avoid accident to himself and to others.

The manifest purpose of the legislation being the avoidance of danger and collision upon the highway, its application in any instance must co-ordinate with the rule of reason, which at common law vests an exercise of discretion for care and foresight in the wayfarer, consistent with the exercise of a like discretion in others in the lawful use of the highway. To adopt a construction which would militate against this common-law rule would necessitate a construction as unelastic in its operation as the laws of the Medes and Persians, and which might by its potent mandate and active instrumentality evolve, in many cases, the very dangers which the Legislature intended to obviate. The question, therefore, was one for the jury, under the familiar rule whether, under all the circumstances, including the failure to observe the provisions of the traffic act, the accident arose by reason of the defendant's negligence, and whether the plaintiff, by reason of any act of his, was a proximate and contributing factor to the result, so far as the latter doctrine can be applicable in this instance, in view of the plaintiff's status as a passenger.

Since the only inquiry before us is the legal propriety of the court's direction, in this respect, the construction we have thus put upon the act renders further consideration unnecessary, except to remark that cases in this court not unlike in principle the case at bar are: *Evers v. Davis*, 86 N. J. Law, 196, 90 Atl. 677; *State v. Schutte*, 88 N. J.

Law, 396, 96 Atl. 659; *Pool v. Brown*, 89 N. J. Law, 314, 98 Atl. 262; *Erwin v. Traud*, 90 N. J. Law, 289, 100 Atl. 184, L. R. A. 1917D, 690; *Chiapparine v. Public Service Ry. Co.*, 103 Atl. 180; *Horowitz v. Gottwalt*, decided last term, 102 Atl. 930.

The judgment below will be reversed, and a *venire de novo* is ordered.

(32 N. J. Law, 94)

HYATT ROLLER BEARING CO. v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. June 21, 1918.)

1. APPEAL AND ERROR \S 1011(1)—FINDINGS OF COURT.

Since the trial court possesses the opportunity of viewing the witnesses and considering the credibility of their testimony, its finding upon conflicting testimony will not be disturbed.

2. CARRIERS \S 159(1)—CLAIM OF LOSS.

Where, in addition to notation of shortage on the original delivery receipt, consignee promptly wrote the carrier a letter reciting the facts, and carrier replied in three days that it could not locate the missing goods, there was sufficient compliance with the bill of lading requirement of claim of loss.

3. CARRIERS \S 159(1)—CLAIM OF LOSS.

Substantial compliance with bill of lading requirement of notice of claim for damages is all that is required.

Appeal from District Court of Jersey City.

Action by the Hyatt Roller Bearing Company against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued November term, 1917, before SWAYZE, TRENCHARD, and MINTURN, JJ.

Vredenburg, Wall & Carey, of Jersey City, for appellant. Day, Day, Smith & Slingerland, of Newark, for appellee.

MINTURN, J. The case was tried before the court without a jury, and the following facts were expressly or incidentally found as the basis for the judgment rendered in favor of the plaintiff: Five bundles of steel were consigned to plaintiff at its works at Harrison, in this state, on February 24, 1916, by the Becker Steel Company of America, at Charleston, W. Va. The car provided by defendant for the purpose of carriage to plaintiff's premises from the Harrison station was known as a "ferry car," and was sealed at Harrison in accordance with the tariff filed with the Interstate Commerce Commission, the effect of which was that defendant was relieved of responsibility for the losses incident to the intermediate carriage from the Harrison station to plaintiff's premises at that place. The ferry car was run into the premises of the plaintiff on March 11, 1916, at 1 o'clock in the afternoon. When the car was unloaded, one of the steel bundles was missing, and plaintiff brought suit to recover its value.

Defendant contended that, since the five

bundles had been loaded in the car and properly sealed, the plaintiff, under the terms of the bill of lading, assumed all the liability for loss during transportation. The trial court found that the defendant failed to deliver the goods at the Harrison station. The testimony was that, when the shipment was received at the plaintiff's plant, it was checked up by three of its employes, and the fact of the absence of the fifth bundle was noted by another employé upon the original delivery receipt, and the receipt with that notation was forwarded to defendant. There was, in addition, ample testimony furnished from which the trial court reasonably concluded that the fifth bundle was delivered to the plaintiff at Charleston, in West Virginia, but was not placed by defendant upon its ferry car at Harrison, to be run into the plaintiff's premises, upon the siding maintained for that purpose.

[1] There was a diversity of testimony upon that question, but the trial court, possessing the opportunity of viewing the witnesses pro and con, and with the advantage of considering the credibility of their testimony, found that the five bundles were not placed upon the ferry car at the Harrison station, and that finding upon well-settled rules, we cannot disturb. It eliminates from our consideration the legal effect of the consignment, under the terms of the bill of lading, as well as under the provisions of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), which, under the conditions contended for by the defendant, it may be conceded, would relieve the defendant from responsibility, and impose the risk of transportation upon the plaintiff.

[2] It is insisted, finally, that the claim of loss, required by the bill of lading, to be furnished by the plaintiff, within four months, to the defendant, after delivery, was never furnished. The testimony evinces that, in addition to the notation upon the receipt already referred to, there was a letter written by plaintiff to defendant on April 17, 1916, citing the facts, and informing defendant that the fifth bundle had not been delivered. The defendant, after investigation, notified plaintiff by letter, three days thereafter, that they had been unable to locate it. The stress of the reasoning upon this point is placed upon the word "claim," contained in the bill of lading, as follows:

"Claims must be made in writing, to the carrier, at the point of delivery, or at the point of origin within four months after delivery," etc.

We think the information conveyed by the plaintiff to the defendant was substantially a claim within the meaning of the language quoted. The liberality of interpretation placed upon that term by the federal Supreme Court, and the courts of sister states where the question has arisen, evinces that the fundamental reason for the requirement is to enable the carrier to trace the goods

within a reasonable period after the delivery, or the failure to deliver, so as to protect itself from resulting loss, upon a subsequent claim for damage. Manifestly the delivery of a notice of the loss, from which no other inference is reasonably derivable than that the loss has occurred, and giving the substantial particulars as in the case sub judice, and which resulted in an investigation by the carrier, is substantially a claim or a notice of a claim within the reasonable construction of the bill of lading. The most recent review of the subject is contained in *St. Louis & I. Mt. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917. There the court points out the rationale for a reasonable interpretation of the word as follows:

"Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require, while there is opportunity so to do."

[3] In conformity with that general view, the rule is generally accepted to be that a stipulation requiring the giving of notice of a claim for damages must be given a reasonable construction, and a substantial compliance therewith on the part of the shipper is all that is required. See annotations to *Hoye v. P. R. R.*, 191 N. Y. 101, 83 N. E. 586, 17 L. R. A. (N. S.) 641, 14 Ann. Cas. 417; 4 R. O. L. 796, and cases cited; 10 C. J. 336, and cases cited.

The judgment will therefore be affirmed, with costs.

(31 N. J. Law, 426)

KREBS v. RUBSAM et al.

(Supreme Court of New Jersey. June 5, 1918.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §167(4)—INJURY TO TENANT—FAILURE TO KEEP HALL LIGHTS BURNING—NEGLIGENCE.

An action lies against the owner of a tenement house for failure to keep the hall lights burning until 10 p. m., as required by section 126 of the act (4 Comp. St. 1910, pp. 5323, 5341), when it appears that such failure was negligent, tested by the rules of common law.

2. LANDLORD AND TENANT §167(4) — FAILURE TO KEEP HALL LIGHTS BURNING—NEGLIGENCE.

Where the lights have been properly lit, but extinguished before 10 p. m. by an independent agency for which the owner is not responsible, and an accident occurs in consequence, the question to be answered in determining negligence of the owner or his agent is whether the period of time between the extinguishing of the light and the injury was such that said owner or agent should in the exercise of reasonable care have discovered the situation and relit the light.

3. LANDLORD AND TENANT §169(11)—FAILURE TO KEEP HALL LIGHTS BURNING—QUESTION FOR JURY.

Ordinarily, that question is for the jury; but when the facts are undisputed, and no other inference can be reasonably drawn than that of absence of negligence, a verdict for defendant is properly directed.

Appeal from Circuit Court, Essex County.

Action by Wilma Krebs, administratrix of Julius Krebs, deceased, against Edward F. Rubsam and others. Judgment for defendants upon a directed verdict, and plaintiff appeals. Affirmed.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

A. J. Rossbach, of Newark, for appellant. John A. Bernhard, of Newark, for respondents.

PARKER, J. This is a negligence case. The trial judge directed a verdict for the defendant, and this judicial action is the sole ground of appeal.

[1, 2] Defendants were the owners and proprietors of a house in Newark occupied by three families, one on each floor, and coming within the statutory definition of a "tenement house." P. L. 1904, p. 96, § 2; C. S. 5323. It was their statutory duty as such owners to keep a proper light burning in the public hallways near the stairs, upon every floor, between sunset and 10 o'clock each evening. Section 126; Kargman v. Carlo, 85 N. J. Law, 632, 635, 90 Atl. 292. The complaint alleged a negligent failure to perform this duty, and that in consequence thereof deceased fell while descending the stairs on a specified evening before 10 o'clock, and sustained injuries from which he died. There was a dispute on the evidence as to whether he died as a result of the fall, but this may, for present purposes, be assumed to be a jury question. In cases of this class where the statute is penal in character, and the right of action is predicated on an alleged violation of the statutory duty, the action is governed by the ordinary rules of negligence cases except that the violation of the statute operates as the basis of the defendant's liability, the defendant retaining all the defenses appropriate to an action of negligence that are not affected by the statute. Evers v. Davis, 86 N. J. Law, 196, 204, 205, 90 Atl. 677. Thus to recover in a private action for an omission of the statutory duty, plaintiff must show that the omission was a negligent one (Id.); and, indeed, this was the charge in the complaint. But in the case at bar there was, in our opinion, no evidence to justify the submission of alleged negligence to the jury. It appeared on the testimony that deceased started down stairs from the top floor, occupied by a friend of his named Ruder, just before 10 o'clock, and that as he was descending the stairs from the second to the ground floor the gaslight on the ground floor newel was out; but on the other hand it appeared by plaintiff's own witness, Ruder, that the light in question had been lit that evening until deceased actually started or was ready to start down the stairs. Ruder testified that when he turned up his own

light (on the third floor as Krebs was about to leave) the first floor light was lit, and when Krebs came from his kitchen to go down that went out. There was nothing in the defendant's case more favorable to the plaintiff. It appeared without contradiction that the light had been turned out by a young son of Rubsam, who testified that he was at night school till 9:30, and reached home at 9:55, turning out the light as he went upstairs, and that his father had forbidden him to touch the lights, but on this night he thought his father was already home, and so he turned out the light as he went upstairs. Defendant Edward F. Rubsam testified that no one but himself had any authority to turn out the lights. Mrs. Scherer, the other defendant, also testified that she never gave any authority to the son, and that her brother, Edward Rubsam, had the entire active management of the house. There was no claim that either defendant, or Edward's wife, knew the light was out before the accident. It was therefore uncontradicted that the light was extinguished by the unauthorized act of a third person, and consequently for this direct act defendants were not responsible.

[3] Any claim that they were negligent must rest on the proposition that after the light was turned out, they should, in the exercise of ordinary care, have discovered this and relit it, not merely before 10 o'clock, but before Krebs went down stairs. Schnatterer v. Bamberger, 81 N. J. Law, 558, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912D, 139. Ordinarily this is a jury question, but this case falls within the class of cases where by reason of undisputed facts and an interval of time between the creation of the danger and the accident, so short that men cannot reasonably draw different inferences from the testimony, negligence has been held as a court question to be nonexistent. Timlan v. Dilworth, 76 N. J. Law, 568, 71 Atl. 33; Schnatterer v. Bamberger, 81 N. J. Law, 558, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912D, 139. Assuming, therefore, that the absence of light caused the fall, and the fall caused the death, there was nothing to require the submission to the jury of the question whether the defendants were negligent in not relighting the light prior to Krebs' departure from the Ruder apartment. The trial court therefore properly directed the verdict, and the judgment will be affirmed.

(82 N. J. Law, 185)

CASTELBAUM v. WOLFSON.

(Court of Errors and Appeals of New Jersey. June 17, 1918.)

1. APPEAL AND ERROR \Leftrightarrow 1051(3)—HARMLESS ERROR—EVIDENCE.

If it was error to admit a transcript of the pleadings of another case in evidence, it was harmless, where it was averred in the complaint and admitted in the answer that a certain judgment was entered in such case.

2. CHATTEL MORTGAGES ⇨226—ASSUMPTION OF MORTGAGE—LIABILITY.

Assumption, by grantee of business, of a chattel mortgage upon the property conveyed, is an agreement to assume and pay interest as well as principal notwithstanding that the amount of the principal alone is recited in the assumption clause.

3. EVIDENCE ⇨384 — VARYING TERMS OF WRITTEN CONTRACT.

Where a written agreement is complete on its face, oral testimony will not be permitted, either to contradict it or to supply terms with respect to which the writing is silent.

4. APPEAL AND ERROR ⇨862(1) — MATTERS REVIEWABLE—RECORD.

On appeal, a contention not supported by any ground of appeal will not be considered.

White, J., dissenting.

Appeal from Supreme Court.

Suit by David Wolfson against Jacob Castelbaum. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas Brown, of Perth Amboy, for appellant. Isidor Kalisch, of Newark, for appellee.

GUMMERE, C. J. The material facts in the present case are thus stated in the brief of counsel for the appellant:

"The suit is founded on an agreement wherein the respondent, the party of the first part, agreed with the appellant, the party of the second part, to convey a certain saloon business in the city of Perth Amboy, together with the stock of liquors and cigars. The sale was made subject to the following conditions: 'Subject to a mortgage of \$950 (really \$900) now held by the Peter Breidt Brewery, which the said party of the second part agrees to assume in addition to the consideration above named.' The respondent, who is the party of the first part to this agreement, was sued by the Peter Breidt Brewery, and was obliged to pay interest and costs on the chattel mortgage referred to in the foregoing provision of the agreement, and thereupon the respondent brought this action in the Supreme Court to recover from the appellant the moneys which he claimed to have paid, and the costs and expenses, above the principal sum of the chattel mortgage."

The plaintiff had a verdict for the full amount of his claim, and judgment was entered thereon against the defendant.

[1] The first ground of appeal is directed at a ruling of the trial court admitting in evidence, and permitting to be read to the jury, a transcript of the pleadings in the suit of the Peter Breidt Brewery against the plaintiff; the contention being that the only proper proof upon that point was a certified copy of the judgment itself. It is not necessary for us to consider the soundness of the legal proposition thus submitted, for the recovery of this judgment by the brewing company against the plaintiff was not a matter in controversy between the parties. It was averred by the plaintiff in his complaint, and was admitted by the defendant in his answer, and it is probably for this reason that counsel for the appellant in his brief states the recovery of this judgment as a fact. It is, of course, true that the amount of the judgment is not

shown by this transcript; but it was proved by the testimony of the plaintiff without objection, as was its payment in full by him.

[2] It is next argued that by the provision of assumption the defendant only became bound to pay the principal of the mortgage, and not the interest accrued and to accrue thereon. But this is not the extent of his legal obligation. The assumption by the grantee of a mortgage existing upon the premises conveyed is an agreement to assume and pay that mortgage, both principal and interest, notwithstanding the fact that the amount of the principal is recited in the assumption clause. The cases so holding are numerous, and no authority to the contrary is referred to by counsel for the appellant.

[3] It is further contended that the court erred in excluding a conversation between the parties, had at the time of the execution of the agreement, as to what part of the interest, if any, should be assumed and paid by the defendant. We think this testimony was properly excluded. The written contract is plain, and was an agreement on the part of the defendant to pay both the principal and the interest of the mortgage. Testimony offered for the purpose of proving a conversation had at the time of the execution and delivery of the agreement, which controverted the writing itself, is not admissible in the absence of fraud. No principle is more firmly imbedded in our law than that which declares that in the absence of fraud or illegality, where a written agreement is complete on its face, oral testimony will not be permitted either to contradict it, or to supply terms with respect to which the writing is silent. In such a case the writing must be accepted as a full expression of the agreement of the parties.

We are asked to reverse the judgment under review upon the further ground that the trial court erred in refusing to nonsuit the plaintiff at the close of his case. This motion was based upon the theory that the proof showed there had been an accord and satisfaction between the parties, the effect of which was to release the defendant from any further obligation with relation to the subject-matter of the present suit. A recital of the evidence upon which the defendant based his theory will serve no good purpose; it is sufficient to say that we have carefully examined it, and find nothing in it to support his contention. The motion to nonsuit was properly refused.

[4] The appellant further contends that the judgment is erroneous in its amount, because the respondent was improperly permitted to recover not only the interest on the Breidt Brewery Company mortgage, but also the costs which he incurred in the Breidt litigation. As this contention, however, is unsupported by any ground of appeal, it has not received consideration at our hands.

Other grounds of reversal are specified in the appellant's reasons for appeal; but, as they were none of them argued by counsel, we have treated them as having been abandoned.

The judgment under review will be affirmed.

WHITE, J., dissenting.

(89 N. J. Eq. 205)

KEMPSON v. KEMPSON et al. (No. 52.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

WILLS §865(1) — CONSTRUCTION — PARTIAL
INTESTACY.

The will of Peter Tertius Kempson consists of six paragraphs or items, numbered first, second, third, sixth, seventh, and ninth. After disposing of the residuary estate, this clause appears: "From all the provisions of the preceding clauses I except my interest in the Insurance Times newspaper, its good will," etc. *Held*, that Peter Tertius Kempson died intestate as to his interest in "the Insurance Times."

Appeal from Court of Chancery.

Suit by John Fraser Kempson against Grover C. Kempson and others. From a decree for complainant (102 Atl. 673), defendants appeal. Affirmed.

Smith, Mabon & Herr, of Hoboken, for appellants. Charles O. Truex, of Montclair, and Mark Townsend, Jr., of Jersey City, for Charles M. Van Cleve. John K. English, of Elizabeth, for administrator of Julia H. Kempson.

BLACK, J. A bill in this case was filed in the Court of Chancery for the construction of certain items of the will of Peter Tertius Kempson, who died September 25, 1890. The property affected is the estate or interest in certain personal property, consisting of a newspaper called the Insurance Times. The contest is over the one-third interest in the Insurance Times. The appellant's brother St. George Kempson, a son and legatee under the will of Peter Tertius Kempson, on the 30th day of December, 1893, assigned his one-third interest in the Insurance Times to his stepmother, Julia H. Kempson, and James A. Van Cleve. He died August 12, 1907, leaving a will in which he bequeathed his property to his wife and children. The question, therefore is whether the assignment made by St. George Kempson on the 30th day of December, 1893, is legal. That in turn depends upon the question whether Peter Tertius Kempson died intestate as to this item of the Insurance Times, because, if he did, then St. George Kempson had legal power to make the assignment of December 30, 1893.

The assignees and their heirs, the respondents, have a legal title. The Court of Chancery held that Peter Tertius Kempson died

intestate as to the Insurance Times, and that St. George Kempson made a valid assignment of all his interest in the Insurance Times. We think the Court of Chancery reached a right conclusion, and the decree of the Court of Chancery should be affirmed. The reason on which this conclusion is based, in brief, is this: The will of Peter Tertius Kempson consists of six paragraphs or items, numbered first, second, third, sixth, seventh, and ninth; the first five being single paragraphs, making specific bequests. The ninth paragraph is composed of eight distinct sections, although not numbered. The first four refer to the disposition of the residuary estate by the following clause:

"All the rest, residue and remainder of my estate, both real and personal, not hereinbefore disposed of, or hereinafter specified, to have and to hold the same, in trust," etc.

The last four relate specifically to the Insurance Times and the conduct of the business connected therewith. Then follows this clause:

"From all the provisions of the preceding clauses, I except my interest in the Insurance Times newspaper, its good will, etc."

From these clauses, read in connection with the entire will, we think the conclusion is irresistible that the testator's intention, as gathered from within the four corners of the will, to use a picturesque phrase in the law of wills, was to exclude the Insurance Times from the residuary clause; that Peter Tertius Kempson died intestate as to his interest in the Insurance Times. Failing to make subsequent provisions for its ultimate disposal, that the will must furnish the basis for construction is elemental. It can make no difference whether the testator through ignorance or inadvertence fails to dispose of all his estate. The courts cannot supply the omission. The province of the courts is to construe, not to make, wills. *Tyndale v. McLaughlin*, 84 N. J. Eq. 657, 95 Atl. 119.

The decree of the Court of Chancery is affirmed.

(89 N. J. Eq. 128)

DOLAN v. UNIVERSAL FIRE BRICK CO.
(No. 45/33.)

(Court of Chancery of New Jersey. June 12,
1918.)

(Syllabus by the Court.)

1. CORPORATIONS §684 — INSOLVENT FOREIGN CORPORATION — APPOINTMENT OF RECEIVER.

The court may, under the provisions of sections 65 and 66 of an act concerning corporations (2 Comp. St. 1910, p. 1640), appoint a receiver of a foreign corporation found to be insolvent notwithstanding the fact that no receiver had been appointed in the jurisdiction of the domicile of the corporation and that there are no proceedings there pending against it, and the procedure is substantially the same as if the corporation were domestic.

2. CASE DISTINGUISHED.

McDermott v. Woodhouse, 87 N.J.Eq. 617, 101 Atl. 375, distinguished upon the grounds indicated in Atwater v. Baskerville, 104 Atl. 310, 647.

Application by Patrick J. Dolan for the appointment of a receiver for the Universal Fire Brick Company. Application granted.

Michael J. Tansey, of Newark, for complainant. Clifford L. Newman and Edgar M. Tilt, both of Paterson, for defendant.

LANE, V. C. [1, 2] This is an application to appoint a receiver of a foreign corporation under the provisions of the sixty-fifth and sixty-sixth sections of the Corporation Act, 2 Comp. Statutes of N. J. p. 1640. The jurisdiction of the court is questioned upon the authority of McDermott v. Woodhouse, 87 N. J. Eq. 617, 101 Atl. 375. I considered that case in Atwater v. Baskerville, 104 Atl. 310, 647, not yet officially reported, and came to the conclusion that it is not an authority for the proposition that this court may not under the sixty-fifth and sixty-sixth sections of the statute appoint a receiver of a foreign corporation. This court may, where a foreign corporation is shown to be insolvent, appoint a receiver notwithstanding the fact that no receiver has been appointed in the domicile of the corporation and there are no proceedings there pending against it, and the procedure is substantially the same as if the corporation had been domestic.

(91 N. J. Law, 400)

LANNING v. COHEN et al.

(Supreme Court of New Jersey. June 7, 1918.)

(Syllabus by the Court.)

1. INNKEEPERS ~~§~~4—LICENSE—STABLING.

To authorize the court of common pleas to grant a license for an inn and tavern in a township, it is essential, among other things, that the applicant should be well provided with stabling and provender of hay and grain for four horses more than his own stock.

2. INNKEEPERS ~~§~~4—LICENSE—REVOCATION.

On certiorari, the grant of a license to keep an inn and tavern in a township will be reversed when it appears that the conclusion of the court on the disputed question of fact as to whether the applicant was well provided with stabling and provender was without competent evidence to support it.

Certiorari to Court of Common Pleas, Mercer County.

Certiorari by Wallace Lanning against Harry Cohen and others to review the granting of an innkeeper's license by the court of common pleas of Mercer county. Grant of license set aside.

Argued February term, 1918, before SWAYZE, TRENCHARD, and MINTURN, JJ.

Wilcoff & Lanning, of Trenton, for prosecutor. John H. Kafes and John A. Montgomery, both of Trenton, for respondent Cohen.

TRENCHARD, J. This writ brings up for review the grant of a license by the court of

common pleas of Mercer county to Harry Cohen to keep an inn and tavern in the township of Ewing pursuant to an application therefor under the inn and tavern act of 1846 (C. S. p. 2890). We are of the opinion that the court was without authority to grant the license, and that it must be set aside.

[1] On its face the application was sufficient and made out a prima facie case of authority in the court of common pleas to grant it. But that prima facie case was open to question before that court, and it was challenged by the prosecutor of this writ upon the ground, among others, stated in the remonstrance, that in fact the applicant "was not well provided with house room, stabling and provender." To authorize the court to grant the license, it was essential, among other things, that the applicant should be "well provided with house room, stabling and provender" (C. S. p. 2890, par. 2), and to be well provided with stabling and provender must have "stabling and provender of hay and grain for four horses more than his own stock." Paragraph 16. Accordingly, the court proceeded to inquire by evidence whether the facts existed without which its authority to grant the license would fall, and concluded to grant the license.

Of course, the jurisdiction of the court over such an investigation of facts is indisputable, and if its conclusions of fact thereon were legally warranted by the proofs adduced before it, those conclusions could not be reversed on certiorari. This being so, the sole province of the Supreme Court on these matters of fact is to examine the evidence offered in the court of common pleas, and decide whether on that evidence the court could lawfully determine that it had authority to grant the license. Dufford v. Nolan, 46 N. J. Law, 87; Houman v. Schulster, 60 N. J. Law, 132, 36 Atl. 776. Upon a careful examination of the evidence in the present case we think it could not.

[2] The house for which the applicant sought a license is in the township of Ewing, only 200 feet from the Trenton city line, in a manufacturing center. The whole lot on which it stands is only 32 by 86 feet. The building itself is 30 by 65 feet, leaving a back yard 21 by 32 feet. There is no stable or other accommodations for horses and wagons. On the first floor is the barroom, on the second floor are four bedrooms and a bath, on the third floor are two rooms, without beds, used as storerooms. The applicant, his wife, and two children, one ten years old and one five, live in the place. It is less than a mile from the center of Trenton, where are located all of Trenton's principal hotels, and is about 400 feet from the Johnson trolley line, running to the center of Trenton every 45 minutes, and about 1,400 feet from the Princeton avenue trolley, running to the center of Trenton on a 5 to 8 minute schedule. It is

situate on a "dead-end" street not used as a through route of travel. The physical conditions of the property suggest only a city saloon and not an inn and tavern. The testimony tends to confirm one's expectations of nothing but a saloon use. It seems to show that, while Cohen's place had been licensed for seven years, yet he kept no guest register, entertained no travelers except a few "friends," and furnished but few meals. In short, his business seems to have consisted mainly of entertaining members of the local community by furnishing sandwiches and liquid refreshments. There is much to be said, therefore, in support of the assertion that the place had the characteristics of a saloon only, rather than those of an inn and tavern, and there is of course a clear distinction between the two. The former cannot be licensed in townships by the court of common pleas and the latter may be if it be found necessary to accommodate and entertain travelers and strangers, to serve the public occasions of the county, and for the convenience of men meeting together to transact business. C. S. p. 2893, par. 13. Until the Legislature sees fit to modify the requirements of the inn and tavern act in its application to townships (as it has with respect to some particular municipalities and classes of municipalities), these requirements in townships must be observed.

But we shall not pursue this phase of the case. We rest our decision upon the fact that it conclusively appears that the applicant was not well provided with stabling and provender as defined and required by the inn and tavern act. He had neither stabling nor provender for horses on his premises. Probably the reason is that his place was not intended for an inn and tavern. He claims to have the privilege of a stable near by in the city of Trenton, but the evidence shows that he has no present control of it. Moreover that stable does not meet the requirements of the statute since it has only three stalls, and no provender is kept there.

The grant of license will be set aside, with costs.

(91 N. J. Law, 479)

STEVENSON CO. v. OPPENHEIMER.

(Supreme Court of New Jersey. June 6, 1918.)

1. BROKERS — 53 — COMPENSATION — WHEN EARNED — SPECIAL CONTRACTS.

The general rule that to earn his commissions a broker must be the procuring cause of the sale is subject to qualification by special agreement making the commission payable upon sale of the property.

2. BROKERS — 46 — COMPENSATION — CONTRACTS — CONSTRUCTION — SALE BY OWNER.

Under a contract constituting a broker the sole selling agent for land and providing for payment of commission "whenever the said property shall be sold" a sale by the owner renders him liable to the broker for the agreed commission.

Appeal from First District Court of City of Newark.

Action by the Stevenson Company against Edward Oppenheimer. Judgment for plaintiff and defendant appeals. Affirmed.

Argued before SWAYZE, TRENCHARD, and MINTURN, JJ.

Kellogg & Chance, of Jersey City, for appellant. Barrett & Barrett, of Newark, for appellee.

MINTURN, J. The allegation of the plaintiff, a domestic corporation, was that on April 23, 1917, the defendant contracted in writing with it whereby the plaintiff was authorized to sell a certain farm of the defendant for the sum of \$7,500, constituting plaintiff sole selling agent, and agreeing to pay a commission of 5 per cent. upon the selling price "whenever the said property should be sold."

The plaintiff, in pursuance of the contract, advertised the farm and expended money and time in negotiating for its sale. Without notice to the plaintiff, the defendant himself, within a month after the execution of the contract, sold the property for the sum of \$7,500, but refused to pay to the plaintiff the agreed commissions. The trial court found for the plaintiff, from which judgment this appeal was taken.

[1] While the general rule is that a broker to earn his commissions must be the procuring cause of the sale, the qualification has been imposed upon the rule by repeated adjudications in this state that the parties may by special agreement so limit the operation of the rule as to make its application depend upon the happening of some stated certain event. *Vreeland v. Vetterlein*, 33 N. J. Law, 247; *Hinds v. Henry*, 36 N. J. Law, 823; *Payne v. Twitchell*, 81 N. J. Law, 193, 81 Atl. 350; *Dresser v. Gilbert*, 81 N. J. Law, 358, 79 Atl. 1043. The last case cited presents an instance where the owner contracted to pay the stipulated commission to the agent upon a sale of the property "by him, me, or any other person," and this court held upon a sale of the property by the owner himself that the contingency presented by the contract thereby arose, and that the agent was entitled to his commission.

In that case we stated as *ratio decidendi* that the general rule governing the status between the parties was "a doctrine of public policy intended to effectuate justice between the parties, and is not intended to unmake an agreement which they deliberately executed, and which fixes the terms and conditions upon which compensation shall be made." The language presented by the contract in the case at bar is equally without qualification, and is emphatic and specific in statement.

[2] It promises to pay the agreed compensation to the plaintiff "whenever the said

property is sold." The defendant would add to this promise in effect the words "sold by the Stevenson Company." But we find no warrant in the contract for the application of such qualifying language, and we must assume that, if the defendant intended to so limit its operation, he would have caused the words of qualification to be added before the execution of the contract. His failure so to do leads us to conclude that the construction contended for by him was not within the contemplation of the parties, but that, on the contrary, a sale made by the owner which in practical effect prevented the sale intended by the agreement was within the contemplation of the parties when they employed the generic language contained in the contract. It is to be observed also that the contract was exclusive in its nature, and was intended to commit the sale of the property exclusively to the plaintiff.

If the construction of the defendant were to be accepted, the efforts of the plaintiff, even though they awakened into activity by advertisement, hearsay, or other indirect method of inquiry, the curiosity of the purchaser, and ultimately led to the sale, would still go unrewarded and unrecognized, a situation which was criticised adversely in *Vreeland v. Vetterlein*, supra, and *Weeks v. Smith*, 79 N. J. Law, 388, 75 Atl. 778.

By the construction we have put upon the contract sub judice, in accepting the plain language of the parties as indicative of their intent, such an inequitable result in this instance is rendered impossible.

We find no merit in the remaining contentions of the defendant, and conclude that the judgment should be affirmed, with costs.

APPLE v. ATLANTIC CITY.

(Supreme Court of New Jersey. March 27, 1917.)

1. MUNICIPAL CORPORATIONS § 185(5) — CHARGES AGAINST POLICE OFFICER — PROCEEDINGS.

Under P. L. 1915, p. 495, § 4, distributing judicial as well as executive and legislative powers, authority, and duties among the five city departments, the jurisdiction to try delinquent police officers is vested in commissioner of department of public safety.

2. MUNICIPAL CORPORATIONS § 185(5) — CHARGES AGAINST POLICE OFFICER — LEGALITY.

The board of commissioners having no jurisdiction, under P. L. 1915, p. 495, § 4, to hear and determine charges against a police officer, a conviction and order of dismissal in proceedings before such board will be set aside, although commissioner of public safety who had jurisdiction to try officer dismissed heard testimony and voted for conviction and dismissal.

Certiorari by Charles N. Apple against Atlantic City to review a conviction of conduct unbecoming an officer and a gentleman and subversive of good order and discipline of the police and for soliciting votes during

hours of duty, and an order dismissing him from the police department. Conviction and order of dismissal set aside.

Argued November term, 1916, before SWAYZE, MINTURN, and KALISCH, JJ.

O. L. Cole, of Atlantic City, for prosecutor. Harry Wooton and Joseph B. Perskie, both of Atlantic City, for defendant.

PER OURIAM. The prosecutor was a member of the police department of Atlantic City. Charges were preferred against him of conduct unbecoming an officer and a gentleman, and conduct subversive of good order and discipline of the police force, in violation of rules 16 and 17 of the rules and regulations adopted by the police department of Atlantic City, and also for the violation of a resolution passed by the board of commissioners on April 20, 1916, prohibiting any member or officer of the police department, during the hours of duty, from soliciting votes for or against any candidate for any election, etc. The prosecutor was tried on these charges by the full board of commissioners of Atlantic City, was found guilty, and dismissed from the police force.

The jurisdiction of the board of commissioners to hear and determine the charges against the prosecutor is challenged. Prior to the passage of the act of 1915 (P. L. 1915, p. 495, § 4), the power to try delinquents in the police department was vested in the board of commissioners. *Herbert v. Atlantic City*, 87 N. J. Law, 98, 93 Atl. 80. After that decision the Legislature amended section 4 so as to include within its terms the distribution of judicial powers, authority, and duties as well as those of executive, administrative, and legislative character among the five departments in cities under commission government having that number of departments.

[1] Atlantic City has five departments. Each department is under the direction and supervision of a commissioner. By virtue of section 4, as amended, of the act above referred to, the jurisdiction formerly vested in the full board of commissioners to try delinquents in the police department become vested in the commissioner of the department of public safety. *Crane, Pros., v. Mayor and Ald. of Jersey City et al.*, 103 Atl. 678, decided at June term, 1916, opinion not yet officially reported.

[2] It may be suggested that the accused suffered no harm in this instance because the statutory tribunal which tried him was composed of the full board of commissioners, among which was the commissioner of the department of public safety, which commissioner was vested with the statutory authority to try the accused, and who heard the testimony and voted for the conviction and dismissal of the prosecutor. But we do not think this is a valid reason for ignoring the behest of the statute. For while it may be

true that in the present case no particular harm was done to the prosecutor by the participation of the full board in his trial and conviction, we cannot overlook the serious result which would follow the countenancing of the legality of the action of an irregular and extrastatutory tribunal as this was. For among the many other good reasons which suggest themselves why the action of the board in the present case must be treated as a nullity is that to give the acts of such an extrastatutory tribunal legal effect necessarily enforces a recognition by this court of the power of such tribunal to retain or remove accused officers, after trial, etc., by a majority vote in which the commissioner of the department of public safety did not participate, or was in the minority; whereas the statute, in plain terms, casts the responsibility for the conduct of the department of public safety on the commissioner of such department of which he is the head.

For the reasons given, the conviction of the prosecutor and the order dismissing him from the police department must be set aside, with costs.

BRENNAN v. MAYOR AND ALDERMEN OF JERSEY CITY.

(Supreme Court of New Jersey. Nov. 8, 1916.)

1. MUNICIPAL CORPORATIONS §189(2)—SET-OFF AGAINST SALARY—POLICEMEN—FINES.

Where question is one of enabling city to enforce a fine imposed on its policeman for dereliction of duty, public policy does not require that compensation be exempt from judicial attack in view of P. L. 1915, p. 470, § 2.

2. MUNICIPAL CORPORATIONS §189(2)—POLICE OFFICERS—FINES—JURISDICTION.

In view of P. L. 1915, p. 495, as to appropriate commissioner acting alone, where a formal resolution delegating to the several commissioners, as directors of their respective departments, authority to try their subordinates, was duly passed by board, director of public safety had jurisdiction to try policeman and fine him for dereliction of duty.

3. MUNICIPAL CORPORATIONS §189(2)—POLICE OFFICER—FINE—JUDGMENT.

Judgment of director of public safety: "Patrolman John Brennan. Charge, not properly patrolling. Plea, N. G. Finding, G. Sentence, 60 days' pay"—was sufficient judgment imposing fine.

Appeal from District Court of Jersey City.

Suit by John Brennan against the Mayor and Aldermen of Jersey City. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued June term, 1916, before GARRISON, PARKER, and BERGEN, JJ.

Harry Lane, of Jersey City, for appellant. Thomas J. Brogan, of Jersey City, for appellee.

PER CURIAM. This was a suit to recover two months' salary as a patrolman on the Jersey City police force. The question arises out of a set-off claimed by the city, consisting of a fine of 60 days' pay imposed by the director of public safety for an offense

against the Police Code. The district court sustained the set-off, which was equal to the claim, and gave judgment for the city defendant. The appellant claims: (1) That it is unlawful to deprive him of the salary to which he is entitled by law, by setting off a claim against him; (2) that the director of public safety had no power to impose the fine; (3) that there is no legal proof of a conviction as a basis for said fine.

[1] As to the first point it is argued that the salary or compensation of a public officer is exempt as a matter of public policy from judicial attack. This is true as to a private creditor. *Spencer v. Morris*, 67 N. J. Law, 500, 51 Atl. 470. The recent change in that policy introduced by the Legislature is not precisely applicable, but worthy of note. P. L. 1915, p. 470, especially section 2. Apart from this, however, when the question is of enabling a city to enforce a fine imposed on one of its policemen for dereliction of duty, the public policy is plainly the other way, for discipline would be seriously impaired, to say the least, if an officer dependent solely on his pay could insist on the payment of his salary while refusing to recognize a fine imposed for a failure in a breach of the duties that he draws salary for performing.

[2] 2. With the claim that the director had no jurisdiction we find no difficulty. The general power of the police board under the charter to frame a Police Code was adequate to support the enactment of a system of reasonable fines for derelictions in duty. It is not urged that the fine was unreasonable. The powers of the police board passed upon the adoption of the Commission Government Act to the board of city commissioners. It was held in *Herbert v. Atlantic City*, 87 N. J. Law, 98, 93 Atl. 80, that the clause (section 4) of that act, as first enacted, relating to distribution of powers among the individual commissioners, did not include the judicial power, but this was amended in 1915 (P. L. p. 495) so that the appropriate commissioner may act alone, and it appears that a formal resolution delegating to the several commissioners as directors of their respective departments the judicial authority to try their subordinates was duly passed by the board. This resolution provided that the directors of the respective departments should, whenever charges should be preferred against any officer or employé of the city conduct the trial of said employé, and render judgment thereon, which judgment upon the filing of a memorandum thereon (sic) with the city clerk should become the judgment of the board, provided that the maximum penalty to be fixed by any director should not exceed the forfeiture of 90 days' pay. We consider that it endowed the director of public safety, as the head of the police department, with the necessary authority in the premises.

[3] Lastly it is urged that there was no legal evidence of the trial of plaintiff and

judgment imposing a fine on him. The director testified that he had tried plaintiff, found him guilty, and imposed a fine. He identified his own letter to the city clerk, reporting a sitting on a stated date for the trial of delinquent policemen, and annexed a memorandum of his judgments for the purpose of becoming the judgment of the board of commissioners. This is the language of the letter. The paper annexed included an entry reading thus: "Patrolman John Brennan. Charge, not properly patrolling. Plea, N. G. Finding, G. Sentence, 60 days' pay." If an explanation of the abbreviations were required, they were explained as meaning "Not guilty" and "Guilty," respectively.

Assuming that plaintiff may collaterally attack this judgment, which we think he cannot do, we consider it sufficient. It seems to be as explicit as the average police court record, and formality is not an essential. It is clearly before us that plaintiff was tried by his superior on a specified charge and sentenced, and that there was a plea and finding and any person of average intelligence can translate the abbreviations and confirm the translation by the context.

We think none of the points made is well taken. The judgment will be affirmed.

(91 N. J. Law, 594)

SPENCER HEATER CO. v. ABBOTT.

(Court of Errors and Appeals of New Jersey.
June 19, 1918.)

(Syllabus by the Court.)

1. SALES §441(2)—WARRANTY OF FITNESS—QUESTION FOR JURY.

Where the evidence tended to show that a manufacturer of steam heaters, at the request of a florist, sent his salesman to the florist's greenhouse for a consultation as to the number and sizes of heaters required for the florist's purposes, and the salesman examined the premises, took measurements, and told the florist, who disclaimed any knowledge of the number and sizes required, that a No. 11 and a No. 12 would supply the heat required, and agreed to furnish them, it was open to the jury to find that there was a warranty of the fitness of the heaters for the purposes contemplated.

2. SALES §261(1, 5)—WARRANTY—TEST.

The question whether or not a statement or affirmation accompanying a sale is a warranty depends upon whether the conditions were such that the vendee had a right to understand, and did understand, that what was said by the vendor was meant as a warranty. A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not.

3. PRINCIPAL AND AGENT §164(1)—AGENT'S UNAUTHORIZED WARRANTY—RATIFICATION. A principal may ratify his agent's unauthorized warranty, and if, with full knowledge of all the facts and circumstances attending the transaction, he does so, he is bound thereby.

4. PRINCIPAL AND AGENT §174—ACT OF SALES AGENT—WARRANTY—RATIFICATION.

When the evidence tended to show that a manufacturer of steam heaters, which failed to do the work that they were warranted by his agent to do, with full knowledge of all the facts and circumstances of the transaction, acknowledged that the trouble was due to the mistake of his agent, offered to pay the expense of a temporary makeshift, proceeded to install adequate heaters, and all without any repudiation of the acts of his agent, it was open to the jury to find that thereby he ratified the warranty of his agent.

5. SALES §418(11)—BREACH OF WARRANTY—DAMAGES.

For the failure to fulfill a contract to furnish steam heaters adequate to heat a greenhouse sufficiently to force plants for the winter and early spring markets, the measure of damage is the difference between the market value of such plants in the winter and early spring markets and their market value when they were in fact matured.

Appeal from Circuit Court, Mercer County.

Action by the Spencer Heater Company against Randolph Abbott, trading, etc., as the Park Floral Company. Judgment for defendant, and plaintiff appeals. Reversed, and venire de novo awarded, and new trial limited to certain issue.

Joseph L. Bodine, of Trenton, for appellant. Richard S. Wilson and W. Holt Aggar, both of Trenton, for appellee.

TRENCHARD, J. This action was brought on a mechanics' lien claim to recover the price of certain Spencer steam heaters furnished to the defendant, together with some smaller items of labor and expense. The defendant is a florist. He admitted that the claim was unpaid, and, with his answer, filed a counterclaim for loss of profits on plants, and for expenses, caused by the alleged failure of the plaintiff to perform its contract to furnish heaters adequate to heat the defendant's greenhouses. The jury rendered a verdict for the defendant, and the plaintiff appealed from the consequent judgment.

We are of the opinion that the judgment must be reversed, and a new trial awarded, to be limited as herein stated.

[1] We think that the motion for a direction of a verdict in favor of the plaintiff was properly denied. The motion seems to have been based mainly upon the contention that there was no legal evidence of an express warranty of the fitness of the heaters to do the work required by the defendant, and that under the contract no warranty could be implied. It may be assumed that no such warranty could be implied from the contract which would have grown out of the original order for No. 13 heaters, which was in writing, and contained a reservation with warranties, if it had been accepted, but it was not accepted, and such heaters were not delivered.

[2] The evidence tended to show that what then occurred was this: After receiving such

order, the plaintiff, at the request of the defendant, sent its salesman to the defendant's place for a consultation as to the number and sizes of heaters required for the defendant's purposes. The salesman went there, examined the premises, took measurements, and told the defendant, who disclaimed any knowledge of the number and sizes required, that a No. 11 and a No. 12 would supply the heat required, and agreed to furnish them. Now the question whether or not a statement or affirmation accompanying a sale is a warranty depends upon whether the conditions were such that the vendee had a right to understand, and did understand, that what was said by the vendor was meant as a warranty. A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not. *Wolcott v. Mount*, 38 N. J. Law, 496, 20 Am. Rep. 425. Tested by that rule, it was open to the jury to find, as they did, that the plaintiff warranted the heaters to do the work the defendant required.

[3, 4] The plaintiff, however, contends that its salesman had no authority to warrant the heaters. In view of the evidence, we doubt if there is any merit in this contention. But whether so or not is immaterial. A principal may ratify his agent's unauthorized warranty, and if with full knowledge of all the facts and circumstances attending the transaction, he does so, he is bound thereby. *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728. In the present case the evidence tends to show that after the heaters furnished had failed to do the work, the facts and circumstances were brought to the attention of the manager of the plaintiff, who had ample authority. He acknowledged that the trouble was due to the mistake of their agent, offered to pay the expense of a temporary makeshift, proceeded to install adequate heaters, and all without any repudiation of the acts of their salesman. We think, therefore, that the motion for a direction was properly denied.

[5] But we think the learned trial judge erred in his charge respecting the measure of damages. It was a part of defendant's business to force plants into bloom to make them ready for the winter and early spring markets, and for that purpose he required heat in his greenhouse of a certain temperature. It was open to the jury to find that the plaintiff knew this, and contracted to furnish heaters for that purpose, and failed in the performance of that contract. The trial judge directed the jury to consider the retail price of the flowers, what it would

cost to replace them, and all the surrounding circumstances. But we think that was an inaccurate and misleading statement of the measure of damages in a case of the retardation in the development of plants for a particular market. The true measure of damage was the difference between the market value of such plants in the winter and early spring markets and their market value when they were in fact matured. *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438.

The judgment will be reversed and a venire de novo awarded. Since the only question with respect to which judgment is wrong is the measure of damages, and since that question is here separable, the new trial will be limited thereto, pursuant to rule 131 of the Supreme Court made applicable to appeals by rule 147.

(90 N. J. Eq. 605)

GLOBE TICKET CO. v. INTERNATIONAL TICKET CO. et al. (No. 54/362.)

(Court of Chancery of New Jersey. May 9, 1918.)

1. INJUNCTION ¶113—DISCLOSING TRADE SECRET—LACHES.

Where complainant had sufficient information for suit three years before seeking to enjoin a competitor's use of a mechanical device claimed to be a trade secret and also complainant's former employes disclosure of the same, complainant was guilty of laches precluding injunction.

2. INJUNCTION ¶21—DISCLOSING AND USE OF TRADE SECRETS—ACQUIESCENCE—ESTOPPEL TO ENJOIN.

Where complainant had knowledge or the means of knowledge that a competing company, now absorbed by the defendant company, was regularly using a device claimed by complainant as a trade secret, and did not seek to restrain the same for three years, there was such acquiescence as to estop complainant from enjoining defendant.

Suit by the Globe Ticket Company against the International Ticket Company and others. Decree advised dismissing the bill.

Lindabury, Depue & Faulks and J. Edward Ashmead, all of Newark, and Frank Smith, of Philadelphia, Pa., for complainant. Eugene W. Leake, of Jersey City, and Breed, Abbott & Morgan and Louis F. Dodd, all of New York City, for defendants.

LANE, V. C. Suit is brought to obtain an injunction restraining defendants from using, or imparting information with respect to, a device alleged to be the exclusive property of complainant by reason of its being a trade secret.

It is called a barrel numbering head, and is used for the purpose of successive numbering of coupon tickets. While no new mechanical principle and no new mechanical appliances were used, there was a novel use of familiar principles and appliances which resulted in the perfection of a head which might be used in connection with a rotary press for the continuous successive number-

ing of tickets. The evidence is that up to the time of the perfection of this device there had not been in existence any apparatus which could be used upon a rotary press for such purpose. The invention permitted an enormous increase in production. It was admittedly an improvement upon anything that had gone before. Its use contributed largely to the successful building up of the business of the Globe Ticket Company. It was used exclusively by the Globe Ticket Company until October, 1913. No attempt was ever made to patent it; the explanation being given that its owners considered a "padlock better than a patent." The Globe Company undoubtedly was adverse to the details of the construction of this device being disclosed to a competitor. It was, however used on a machine in the open shop, where it might be seen by any of the employes or visitors. It was of such construction, however, that a mere casual inspection would not, I think, suffice to impart sufficient information to any one so that it might be reproduced.

Certain employes connected with the machine shop were assigned to the duty of cleaning the heads when necessary and of taking them down and repairing them. These men were ordinary mechanics employed at ordinary mechanics' wages. There was no definite contract entered into between the company and any of its employes which would forbid the disclosure of the alleged secret, nor is there sufficient evidence to permit me to find that any of the employes were definitely instructed that they were not to disclose any information they might acquire. The defendant Titus was employed by the concern some 23 years ago as an apprentice. He left in March, 1913. For some years prior to his leaving he had worked on the barrel head, had taken it apart and reassembled it. While he testifies that he was never instructed that the device was of secret construction, and I find no evidence upon which I can base a conclusion that he was, yet he and the other mechanics unquestionably knew that the complainant did not desire that the details of the construction should be disclosed. It chose to rest upon its ability to hold its employes in its employ, or upon the chance that none of its employes would have the necessary mechanical ability to reproduce the machine even if they were permitted to examine the interior construction.

In the year 1913 there was considerable dissension in the plant of the complainant. The morale of its officers seems to have broken down. Employes were leaving right and left. There was in existence in Providence, R. I., a concern known as the Sun Ticket Company, of which one Manshel was president and general manager. On February 22, 1913, Titus applied to Manshel for a position with that concern. He represented to Manshel that he had had 17 years' experience with the Globe Ticket Company, and I am forced to conclude that his experience with

the barrel numbering device was referred to; for immediately after this employment with the concern on March 10, 1913, he started to build such a machine. Manshel denies that at the time he knew that the device was considered by the Globe Company as its exclusive property, or that he knew that Titus was under obligation not to use, in the interest of the Sun Ticket Company, the information which he had acquired at the Globe Company's plant. Titus denies that he considered that he was under any obligation to refrain from using information that he had acquired at the plant of the Globe Company. In view of the action of the officers of the complainant, which will be hereafter adverted to, it seems to me that, while Titus and Manshel knew that the Globe Company was adverse to this barrel numbering head being used by a competitor, yet they considered that they were under no legal or moral obligation, the one not to impart, and the other not to use, information acquired by Titus while in the employ of complainant. It is significant that when Titus went to Manshel he received no compensation for the information that he had obtained at the plant of the Globe Company. On the contrary, he was paid a dollar less a week wages. If he thought that he had a tremendous secret to disclose it would seem as if he would have bargained for more than mechanic's wages.

The machine built under the supervision of Titus was completed in October, 1913. While it is somewhat different in its construction and operation than the device used by complainant, the basic idea is the same. It is an improvement upon the device of complainant, but not so different in construction and operation as to make it a new device. It is conceded by Titus that, if he had not had the information acquired at the Globe Company's plant, he would never have thought of what he calls his own device. In this respect this case is within *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 108 Am. St. Rep. 794.

[1, 2] We come now to the action, or lack of action by complainant, after Titus left, upon which I think the case depends. Titus made no secret of his intention to leave and become connected with the Sun Ticket Company. The officers of the complainant knew that Titus had the information necessary for him to have to reproduce the barrel numbering head. In 1914 the Sun Ticket Company began printing coupon theater tickets, and it was apparent to the officers of the complainant that they had been printed upon a device which performed the same function as the barrel numbering head of complainant.

It is perfectly apparent from an inspection of the various strips of tickets that have been put in evidence here that it is not difficult to determine whether the strips have been printed upon a flat press or upon some machine by which the figures are put on at

different times rather than by one impression. The irregularities which appear upon the tickets printed upon the flat press or band machine as described by Mr. Keen, if there are any, are regular, whereas the irregularities which appear upon the tickets made by the barrel head device are irregular. It is perfectly clear to me that the complainant well knew in 1914 that Titus had made use of the information which he had acquired at the complainant's plant, and that the Sun Ticket Company was using that information. In 1914 competition on the part of the Sun Ticket Company increased. Herring admits that the Sun Ticket Company could not have produced the article it did without using a device performing the same functions as the barrel numbering head. The complainant knew that another of its employes possessing information with respect to this device was associated with the Sun Ticket Company. In February and March, 1915, there was brought to the attention of the complainant letters written by Titus to a concern in Chicago offering to build for that concern an apparatus which would contain this barrel numbering head. Competition had steadily increased. In June, 1915, Manshel visited the vice president and general manager of the complainant with the idea of offering to complainant the plant of the Sun Ticket Company for sale. In that conversation Pope, vice president and general manager of complainant, charged Manshel with being a business crook, with having enticed away employes of complainant. Titus must have been referred to specifically for Keen, the secretary, was sent for to attend the conference to verify a statement made by Pope to Manshel that Titus had offered to sell to the Chicago concern the barrel numbering head device.

There is no doubt I think but that at this conversation the facts that Titus had given to the Sun Ticket Company information which he had acquired at the Globe Ticket Company plant, and that the Sun Ticket Company was using this information and was numbering tickets with the barrel numbering head device, were referred to. Manshel denied none of the statements of Pope. Indeed, I think it clear that his possession of this information was used by him as a reason why the complainant should purchase the plant of the Sun Ticket Company. It is not asserted that at the conference any official of the complainant made any claim of exclusive right to the device. The most that Pope claimed was that Manshel had not acted in accordance with good business ethics. Manshel unquestionably left the conference with the idea that Pope considered that he (Manshel) had acted in a way that was unfair so far as business ethics were concerned, but certainly with no idea that Pope or the complainant considered that Titus had violated any legal right of complainant. Indeed, the conversation so far as Pope is con-

cerned may be summed up in this that he practically said to Manshel, "You got this information, you are using it; I cannot stop you, but you are a crook for doing it." After consideration, the offer of the Sun Ticket Company to sell out was declined. While there is no evidence that at the board of directors' meeting there was discussed the fact that the Sun Ticket Company was using this barrel head device, there is evidence that almost everything else was discussed. There is evidence that the possession by the Sun Ticket Company of the alleged secret was of the utmost importance, and was thought one of the important factors to be considered in the sale, and it is hard to escape the conclusion that there was discussion with respect to this matter. During 1915 and 1916 competition between the Sun Ticket Company and the complainant became more bitter. In February, 1917, the International Ticket Company was formed. That concern was a consolidation of the Sun Ticket Company, the Rockwell Machine Company, and the Manshel Machine Company. The assets of the three concerns were conveyed to the International Company, and the stock of the International Company issued in payment therefor. So far as the Rockwell Machine Company stockholders are concerned there is no evidence whatever that any of them had anything to do with Manshel, or with the Sun Ticket Company, or with Titus, or had any knowledge that the Sun Ticket Company was using or might be charged with using the secret device of the Globe Company. There can be no doubt but that the ability of the Sun Ticket Company to number tickets by this barrel numbering device entered materially into the price fixed upon the assets of the Sun Ticket Company. It seems to me that the intervention of the International Ticket Company created a complete change of conditions. The International Ticket Company used the barrel numbering head device, and complainant permitted it to. Nothing whatever was done by complainant until August, 1917. It then sent an operative to the plant of the International Ticket Company, who obtained employment and made photographs of the device used by the International Company. Her report came in a few weeks, but it was not until the 26th day of December, 1917, that the bill in the present case was filed. From June, 1915, to August, 1917, no additional information came to complainant indicating that the Sun Ticket Company or the International Ticket Company was using this device. Whatever information complainant had it had by June, 1915. Indeed, during the year 1914 it had information upon which it might have acted. It certainly had in 1915. I do not believe that the complainant had any intention of endeavoring to prevent either the Sun Ticket Company or the International Ticket Company from using this device until competition became so

keen in 1917 that it began to look around for some possible means of preventing it.

I think both upon the ground of acquiescence and laches the bill should be dismissed. It is true that the defenses of laches and acquiescence, while cognate, are not correlative. Mere delay may constitute laches which will prevent relief, if conditions have changed. Acquiescence implies assent. And it is true that action, or lack of action, occurring during the commission of a wrong may constitute acquiescence or estoppel which would not have the same effect if occurring after the performance of the wrong. *De Bussche v. Alt*, 8 Chan. Div. 286, 314. In this case, however, the wrong was a continuing wrong. Complainant is entitled to the benefit of its secret device so long only as it preserves its secrecy.

It will have the aid and assistance of the court under certain circumstances in preserving secrecy. Consent to a disclosure or the use by another bars relief. Delay in applying for relief with knowledge of the circumstances may be considered as an element of evidence in determining whether or not there has been acquiescence. The distinction between laches and conduct evidence which may show acquiescence or election is clearly made in the case of *Faulkner v. Wassmer*, 77 N. J. Eq. 537, 77 Atl. 341, 30 L. R. A. (N. S.) 872, citing *Dennis v. Woglom*, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899, and *Clampitt v. Doyle*, 73 N. J. Eq. 678, 70 Atl. 129.

Considering all of the testimony, I find complainant acquiesced in the continued use of this alleged secret device by the Sun Ticket Company and the International Ticket Company. With respect to laches the rule is well settled that, while under ordinary circumstances a court of equity follows the statute of limitations, yet when extraordinary circumstances intervene the court will disregard the statute and determine the case upon equitable principles. In this case, with knowledge, as I have found, of facts sufficient to charge it with knowledge that Titus was disclosing the alleged secret, and that the Sun Ticket Company was using it, and with knowledge imputed to it of the fact that under the law it was necessary, to protect its right, to preserve the secrecy of the alleged device, complainant failed to act until December, 1917. In the meantime the building up of a prosperous business by the Sun Ticket Company had been permitted, and the International Ticket Company had intervened and purchased the assets of the Sun Ticket Company, into the value of which undoubtedly entered the right of the Sun Ticket Company to use this device. Under the circumstances, I think the doctrine of laches applies.

Upon the main issue I have considered the cases of *Salomon v. Hertz*, 40 N. J. Eq. 400,

2 Atl. 379; *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 108 Am. St. Rep. 794; *Fleckenstein Bros. v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1025; *Vulcan Detinning Company v. American Can Co.*, 70 N. J. Eq. 588, 62 Atl. 881; 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698; *Taylor Iron and Steel Co. v. Nichols*, 70 N. J. Eq. 541, 61 Atl. 946.

I will advise a decree dismissing the bill with costs. Let decree be settled on two days' notice.

(93 N. J. Law, 99)

PAULSEN v. KLINGE.

(Supreme Court of New Jersey. June 17, 1918.)

1. MUNICIPAL CORPORATIONS ☞705(2) — STREETS—RIGHT OF WAY.

Right of automobile driver who has right of way is not exclusive, but at all times relative, and subject to fundamental common-law doctrine that he must use his right so as not to injure another.

2. MUNICIPAL CORPORATIONS ☞705(2) — STREETS—RIGHT OF WAY—INTERSECTION—TRAFFIC ACT.

By the Traffic Act, providing driver of vehicle approaching intersection of streets shall grant right of way to vehicle approaching from right, Legislature did not confer monopoly of way ad libitum on person so approaching, regardless of existing conditions and distance from intersecting street.

3. MUNICIPAL CORPORATIONS ☞705(2) — STREETS—INTERSECTION—DUTY OF DRIVER WITH RIGHT OF WAY.

Where automobile driver, having right of way at crossing under the Traffic Act, saw approaching on intersecting street, at least a block away, another driver, who held out hand as statutory indication of intention to turn, first driver was under duty to observe conditions, and drive accordingly.

4. MUNICIPAL CORPORATIONS ☞705(2) — STREETS—INTERSECTION—RIGHT OF WAY.

The Traffic Act, providing driver of vehicle approaching intersection shall grant right of way to vehicle approaching from right, merely adds factor to common-law rules, whereby negligence may be measured between conflicting claimants exercising common right.

Appeal from District Court, Bergen County.

Action by Neillsimine Paulsen against Gustave A. Klinge, Jr. From judgment for plaintiff, defendant appeals. Affirmed.

Argued November Term, 1917, before SWAYZE, TRENCHARD, and MINTURN, JJ.

Robert W. Thompson, of Morsemere, for appellant. James O. Agnew, of Town of Union, for appellee.

MINTURN, J. The case was tried before the court without a jury, and the court found the facts in favor of the plaintiff. The action was for damages caused by a collision between plaintiff's and defendant's automobile, on Main street in Ft. Lee, at the intersection of Anderson avenue. The plaintiff's

version of the accident was that desiring to turn into Anderson avenue, she put out her hand in that direction and blew her horn; defendant was approaching in the opposite direction about a block distant, at a speed of 25 to 35 miles an hour. Plaintiff's car was followed by others immediately behind. Defendant failed to reduce his speed as he approached, although he knew the intersection to be dangerous, and the collision inevitably resulted. We think there was evidence in the case sufficient to warrant the trial court in finding that the plaintiff was not guilty of contributory negligence, and that defendant was guilty of negligence. Chapter 156 of the Laws of 1915, known as the Traffic Act, was invoked by defendant for the purpose of conceding to him a right of way under the circumstances. The section is as follows:

"On all public roads, streets, highways or turnpikes, the following rules and regulations shall be in force:

"1. Every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from his right."

[1-3] If we assume that the defendant had the right of way, the conditions must be such as to justify him in the absolute exercise of the right. In any event his right upon the highway is not exclusive, but at all times relative and still subject to the fundamental common-law doctrine, "*Sic utere tuo ut alienum non laedas*." Nor was his right of way exclusive because he was on the right side of the road, as required by the traffic statute. The Legislature did not contemplate by this enactment to confer a monopoly of way *ad libitum* upon a person in the posture of the defendant, regardless of existing conditions and the distance he was from the intersecting street into which others were proceeding. The plaintiff complied with the provisions of the same act when approaching the intersection while the defendant was at least a block away. She held out her hand as the statutory indication of her intention to turn into the intersecting street. It was the duty of the defendant at that time to observe the conditions and guide his machine accordingly. 2 R. O. L. 1184, and cases cited. The legislative act was not intended to provide an exclusively hard and fast rule, applicable to all hazards and in all situations, regardless of actual conditions, and thus liberate from responsibility one who by fortuitously adhering to the regulation may be otherwise reckless and indifferent to the situation of others lawfully exercising equal rights upon the highway, but who may be subject to untoward and unlooked for situations beyond their control.

[4] Such a construction would tend to encourage rather than diminish and obviate the dangerous situations this legislation was conceived to remedy. The common-law rules

applicable to negligence have not been abolished by the enactment. Its existence but adds an additional factor to be considered in given situations by which negligence may be measured and determined between conflicting claimants exercising a common right. The situation contemplated by the Legislature must be present in fact in order to invoke the legislative regulation as an exclusive element to be considered in weighing the comparative tort-feasance of the parties; and in any event, as the Court of Errors and Appeals has determined at the present term in the case of *Winch v. Johnson*, 104 Atl. 81 (not yet officially reported), not unlike the case at bar in material particulars, the negligence of the defendant is to be determined upon all the facts and circumstances of the situation, and therefore the conceded violation of the statutory regulation, by a defendant, does not per se warrant the trial court in directing a verdict for the plaintiff.

We have examined the testimony as to the damage suffered by the plaintiff, in view of the defendant's contention that some of it was too remote and was not the proximate and natural result of the accident. We think there was sufficient testimony in the case to warrant the trial court in finding that it was neither too remote nor so disconnected from the injurious result of the collision as to render it an improper element of damage.

The judgment will be affirmed, with costs.

(20 N. J. Eq. 189)

FEICK v. HILL BREAD CO. (No. 38.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

1. BILLS AND NOTES §—306—RIGHTS AND LIABILITIES OF INDORSEE.

The indorser on a note is entitled to be reimbursed for what he has been required to pay in discharge of the note, in the absence of any equities.

2. BILLS AND NOTES §—518(1) — PAYMENT — EVIDENCE.

Evidence held to show that money given to an indorser of a note was consideration for a new note, and was not given to pay the first note.

Appeal from Court of Chancery.

Bill by Bertha E. Feick, executrix of Charles A. Feick, against the Hill Bread Company. From a decree (99 Atl. 851) in favor of plaintiff, defendant appeals. Affirmed.

Frank E. Bradner, of Newark, for appellant. Waldron M. Ward and Pitney, Hardin & Skinner, all of Newark, for appellee.

SWAYZE, J. [1, 2] Such difficulty, if any, as there may be in this case, disappears when the facts are clearly apprehended. The situation is this: Feick's estate has been decreed to be insolvent. Among the claims filed with

the executrix, which, by the adjudication of the orphans' court, are to be held and deemed as justly due (3 C. S. 1910, p. 8350, pl. 104), are a claim by the Union National Bank and a claim by the Hill Bread Company. The claim of the bank includes a claim for the amount due on notes of the Hill Bread Company, indorsed by Feick, amounting to \$10,500. The rest of the bank's claim is not material to the present controversy. The claim of the Bread Company includes a claim on a note of \$10,000 made by Feick, which is subject to a set-off of \$2,500 due from the Bread Company to Feick, leaving \$7,500 due, besides some interest. The rest of the Bread Company's claim is not material to the present controversy. On the face of the papers, the Bread Company is primarily liable on the notes held by the bank; Feick's estate is liable to the Bread Company for the balance due on the \$10,000 note after crediting the \$2,500 set off. The orphans' court decreed a dividend of 45 per cent. on each claim. The executrix paid the dividend to the bank, but refused to pay the dividend to the Bread Company, on the ground that she was entitled to be reimbursed for what she had paid the bank in discharge of the Bread Company's primary liability. In this she was clearly right, unless the equitable situation is not that shown on the face of the papers. The defendant undertook to prove this proposition. The claim is that the Bread Company paid Feick \$10,000 in cash on account of its notes; that in equity he was bound to apply the money to that purpose; that his failure to do so altered the equitable situation as between themselves, and made Feick in equity the primary debtor. Since the \$10,000 cash was the only consideration for Feick's note to the Bread Company, that note would not be enforceable as between them, if in fact the \$10,000 was not a loan to Feick but was payment of the Bread Company's own obligation. The same money could not do double duty as payment of a debt and as the consideration of a new note. The disputed fact therefore is whether the money was a payment or a loan. On the evidence the Vice Chancellor could not help finding that it was a loan.

(1) It was so treated by the parties at the time. We cannot conceive that Feick would have given a note rather than a receipt if the intent of the Bread Company had in fact

been to make payment; and although his failure to return the notes which had been made by the Bread Company to his order is susceptible of the explanation that they were then held under discount by the bank, it would nevertheless have been just as easy to have given a receipt and agreement to return the notes as to give the new note.

(2) Both Feick and the president of the Bread Company continued for some time, and until Feick's death, to treat both the set of notes indorsed by Feick and the note of which he was maker as outstanding obligations. Interest was paid and notes given in renewal. There is no adequate explanation, hardly what can be called an attempt at explanation of conduct so unusual, if the defendant's view of the transaction be accepted.

(3) The defendant filed a sworn claim with the executrix on the note. This could not be rightfully done if the \$10,000 had been in fact payment of the other notes. This claim is now in the form of an adjudication of the orphans' court, final so far as the settlement of the estate is concerned; and the defendant claims its dividend thereon. It is said that the president of the Bread Company had no authority to file the claim with the executrix. We need not consider this question. It is enough to say that the defendant's case rests on his testimony, and, in considering its value, his own affidavit to the claim is weighty evidence against the construction he seeks to give the transaction by his testimony at the hearing. It was incumbent on the defendant to prove an equitable situation different from what was shown on the face of the papers. It has failed to do so. The complainant is therefore entitled to set off, against the dividend she owes the defendant, the amount she has already paid the bank as a dividend on what the defendant was primarily obligated to pay. The defendant's dividend was less than that which the complainant paid the bank. The same reasoning requires that the balance be charged upon any future dividends to which the defendant may be entitled; and it was of course proper to provide that she might apply on the foot of the decree for an execution to secure any balance that might still remain unpaid.

The Vice Chancellor advised such a decree. It is affirmed, with costs.

(89 N. J. Eq. 86)

**UNITED NEW JERSEY R. & CANAL CO.
et al. v. FREEHOLDERS OF HUDSON
& ESSEX. (No. 44/576.)**

(Court of Chancery of New Jersey. May 28, 1918.)

**1. RAILROADS §94(1) — RIGHT TO BRIDGE
ROAD—CONSENT.**

Right of railroads to build road and carry it across public plank road by overhead bridge is absolute, and consent of municipal authorities is necessary only when it is desired to cross at grade, which consent must be obtained from municipality even in crossing county road.

2. RAILROADS §94(6)—INJUNCTION—IRREPARABLE INJURY.

Railroads having absolute right to bridge public plank road to connect lines will suffer irreparable injury, entitling them to injunction against county authorities interfering with work, if, with railroad partly constructed up to roadway, use is delayed for want of bridge.

3. INJUNCTION §89—LACK OF IRREPARABLE INJURY—PUBLIC NECESSITY.

Even if railroads, desiring to construct bridge to connect lines across public plank road, could not show irreparable injury in suit for injunction to restrain county authorities from interfering, court should see public work for government, proposed bridge being necessary for industrial works aiding prosecution of war, is not hampered.

**4. RAILROADS §94(1) — RIGHT TO BRIDGE
HIGHWAY—TEMPORARY BRIDGE.**

Where railroads have right to bridge public plank road to connect lines, and, though having right, under Railroad Act, § 27, to place abutments of bridge within road, nevertheless propose to place them outside, they have right to construct temporary bridge with abutments inside road.

**5. RAILROADS §94(6)—BRIDGING HIGHWAY
—SUIT AGAINST COUNTY AUTHORITIES—
TECHNICAL OBJECTION.**

Where railroads, in exercise of right, proceeded to bridge public plank road, and county superintendent of road caused arrest of engineer who has prior thereto been suspended in railroads' suit against county authorities to enjoin interference with construction, it being plain that what superintendent did accorded with authorities' views, objection superintendent's action was not that of county authorities is purely technical.

Suit by the United New Jersey Railroad and Canal Company and others against the Freeholders of Hudson and Essex. Order for complainants directed to be submitted.

Vredenburg, Wall & Carey, of Jersey City, for complainants. John J. Fallon, of Hoboken, for Freeholders of Hudson. H. W. Taylor, of Newark, for Freeholders of Essex.

GRIFFIN, V. O. The bill in this cause is filed by the complainants against the joint boards of Hudson and Essex counties to restrain interference with the complainants in the construction of a bridge across the Newark plank road (now called Lincoln Highway), forming a connecting link in a railroad duly laid out on both sides thereof. The joint boards are in possession of the plank road at the point in question. The history of the road and the title of the two counties may be found in *Re Newark Plank Road & Bridges*, 63 N. J. Eq. 710, 53 Atl. 5. The road

is in the township of Kearny. A petition was presented to the boards by the complainants to build this bridge. The Essex board granted the permission, subject to the approval of the Hudson board. The Hudson board denied the request. Thereupon notice was given by the counsel of the complainants to the Hudson board that on the 25th of February, 1918, they would commence the construction of the bridge. On that day they entered on the road for this purpose. The bill charges that one Dugan, the superintendent of the Newark plank road and bridges, an appointee of the joint boards, caused the arrest of the complainants' engineer to stop the work; hence this bill is filed. The Hudson board alleges that Dugan had been suspended as such superintendent, and had no authority to act in the premises. The Essex board does not appear to oppose the action of the complainants; on the hearing its counsel merely read the resolution passed by his board, granting the permission, subject to approval by the Hudson board, and rested. The exigencies of the case are such that no time should be lost in disposing of the matter. On the Hackensack meadows, between the two rivers, and on both sides of this plank road, shipbuilding and other industries, employing many thousands of men, have been recently established to aid the government in prosecuting the war. Adequate transportation for men and materials is of prime importance, without which works of great public necessity will be greatly retarded. The Hudson board opposes the granting of the injunction on the following grounds: (1) That no irreparable injury will be suffered by the complainants if the case be delayed until final hearing; (2) that the complainants desire to build a temporary bridge until they can procure the girders for the permanent bridge. (These girders are to be 106 feet in length. The supporting abutments are to be constructed outside of the lines of the road. To procure these girders will take several months.) In erecting the temporary bridge, the abutments will be placed inside the curb line, in compliance with the Railroad Act (3 Comp. Stat. p. 4232, § 27).

[1-3] 1. Will the complainants suffer irreparable injury? The right of the complainants to build the road and carry it across the plank road with an overhead bridge is absolute. No consent of the municipal or county authorities is necessary. It is only when it desires to cross at grade that a consent becomes necessary, and that consent must be obtained from the municipality, and not from the county, even when crossing a county road. *Freeholders v. Railroad Co.*, 68 N. J. Eq. 500, 59 Atl. 303; affirmed 70 N. J. Eq. 806, 65 Atl. 1117. This counsel for the Hudson board concedes. It is therefore apparent that the complainants will suffer an irreparable injury if, with their right clear, with the railroad partly constructed up to the roadway,

the use of it is delayed for want of a bridge. But, in addition to this, if the complainants would not suffer an injury which might be said to be irreparable, the public necessity at the present time is paramount, and should outweigh questions of private consideration; and the court should see to it that public work for the government, in its aid, is not hampered nor impeded. Especially is this so in this case, where the right of the complainants is clear, and the injury defendants will suffer, if any, is trifling, and is injury, if any, that is not legal, affording them any right, because it is occasioned by operation of the law.

[4] 2. Counsel for the Hudson board, however, makes a distinction between a permanent and temporary bridge. He cites no authority to support his view. I am at a loss to follow his reasoning, considering that the temporary bridge is an added expense, incurred only to accommodate transportation pending the construction of the permanent structure. If his theory is correct, it would lead to very dangerous results. It is common practice, in replacing old bridges with new, to provide in the contracts for the erection of a temporary bridge pending the construction of the new one, as an incident; and the cost of such temporary bridge is charged against the cost of the new structure, without the statute particularly specifying that it might provide for the erection of the temporary bridge. If such power does not exist, whenever the county desired to replace an old with a new bridge, all traffic on the highway would be cut off for a long period, to the great detriment of the public. But, apart from this, the complainants, if they desired, might, under section 27 of the Railroad Act, supra, treat this temporary structure as permanent, to the detriment of the road. Instead, they do not desire to take advantage of the benefit conferred by the act to maintain their abutments within the road, but propose, at an additional expense, to replace the temporary structure with one, the abutments of which shall be outside of the lines of the road.

[5] 3. The third objection is purely technical. The complainants believed, when they filed their bill, that Dugan, as superintendent, was acting under the orders of the officers of the boards. The Hudson board does not disclaim an intent to stop the erection of this bridge. It says that, if another petition is presented, it is willing to permit the construction of a temporary bridge over the Lincoln Highway (the Newark plank road), and the maintenance thereof during the period of the war, upon such reasonable terms and conditions as might be agreed upon. This expression of views, coupled with the attitude of counsel with respect to the temporary bridge, clearly indicates the opposition of the Hudson board to the crossing of the highway,

and plainly indicates that what Dugan did accords with their views, whether or not he had been suspended.

No criticism can be made of the Hudson board for its action. It is doing what it conceives to be its duty in the protection of the public highway; but, believing, as I do, that there is an absolute right, without its consent, to erect this bridge, and owing to the existing state of war rendering it necessary that these works should as early as possible, have the most adequate railway facilities, I will advise an order that the joint boards be enjoined from interfering with the complainants in the construction of the temporary bridge.

The order of restraint, however, must specifically provide that the joint counties, through their engineers, shall supervise the work, with power to see that no unnecessary damage is done to the road, that, upon completion of the temporary structure, the road at the point in question be placed in suitable condition for public travel and so maintained during the existence of the temporary bridge, and, upon its replacement by the permanent structure, that the road be placed in as good condition as it was before the surface was broken.

Counsel may present the order to me at the chancery chambers at Jersey City on Monday morning next, March 18th, at 10 o'clock a. m.

(32 Vt. 353)

BRIGHTLOOK HOSPITAL ASS'N v. GARFIELD.

(Supreme Court of Vermont. Caledonia. May 16, 1918.)

1. CONTRACTS ~~§~~349(3)—EXPRESS CONTRACT—EVIDENCE ADMISSIBLE.

In suit on implied contract for service rendered by plaintiff hospital in caring for defendant after he had been injured while working for a company, evidence, as to an agreement of manager of company to pay hospital expenses, held admissible to show an express promise to pay plaintiff; it being immaterial whether manager had authority to bind company, since if he did not, he would bind himself.

2. APPEAL AND ERROR ~~§~~997(3) — DIRECTED VERDICT—REVIEW.

Where neither party wished to go to jury on any issue, directed verdict will be affirmed, if there is any evidence to sustain it.

3. WORK AND LABOR ~~§~~9—IMPLIED PROMISE.

Express promise of telephone company's manager to pay plaintiff hospital for caring for defendant, injured employé of company, being shown no promise implied in law, arises on the part of defendant.

Appeal from Caledonia County Court; Stanley C. Wilson, Judge.

Action by the Brightlook Hospital Association against Stanley F. Garfield. Directed verdict for defendant, and plaintiff appeals. Judgment affirmed.

Argued before WATSON, C. J., and POWERS, TAYLOR, and MILES, JJ.

Dunnett, Shields & Conant, of St. Johnsbury, for appellant. Porter, Witters & Harvey, of St. Johnsbury, for appellee.

MILES, J. On the 22d day of August, 1913, the defendant, while working for the New England Telephone Company, was severely injured and taken to the plaintiff's hospital in St. Johnsbury, where he was treated and cared for until November 3, 1913, incurring an expense in the sum of \$167.19. This suit in contract, in the common counts, is brought to recover that sum. It is conceded by the defendant that, if the plaintiff is entitled to recover, it is entitled to recover that sum, with interest on the same from November 3, 1913, to the date of judgment. The general issue was pleaded and the case was tried by jury at the December term of the Caledonia county court, 1917. The plaintiff seeks to recover on a promise implied by law. The defendant defends on the ground that the liability was incurred by the New England Company or by its general manager, C. F. Merrill, under an express contract between Merrill and the plaintiff, with the understanding of the plaintiff, defendant, and the New England Telephone Company, through its general manager, at the time the defendant was taken to the hospital, that the telephone company was to pay the expense for the care and nursing of the defendant while at plaintiff's hospital.

[1] The first exception taken and relied upon by the plaintiff was to the testimony tending to show the contract claimed by the defendant to have been made by Merrill, on behalf of the telephone company, with Mrs. Flora Lovejoy, matron of plaintiff's hospital, on behalf of the plaintiff, in which it was agreed that the telephone company should bear the expense incurred by the plaintiff in the care of the defendant, and that this contract was made in accordance with the understanding of the defendant, Merrill, and Mrs. Lovejoy, Merrill acting on behalf of the telephone company and Mrs. Lovejoy on behalf of the plaintiff. The objection to this evidence was based upon the ground that Merrill had no authority to bind the telephone company, and that the defendant, having received the benefit, with full knowledge of the same, a promise implied in law created a liability on his part, and that the promise of the telephone company, if one was made, was collateral, and did not extinguish the original liability of the defendant.

It is immaterial whether Merrill had authority to bind the telephone company; in other words, it is of no importance whether the contract, which the defendant relies upon, was with the telephone company or with Merrill. If such a contract was made, allowing that Merrill had no authority to bind the telephone company, he would bind himself. *Clark v. Foster*, 8 Vt. 98; *Roberts v.*

Button, 14 Vt. 195; *Royce v. Allen*, 28 Vt. 234; *Clay v. Wright*, 44 Vt. 538; *Hinsdale v. Partridge*, 14 Vt. 547. The testimony was therefore admissible as tending to show an express promise to pay the plaintiff for the expenditures on behalf of the defendant which was accepted by the plaintiff and charged by the plaintiff against the telephone company. This holding is not in conflict with *Sias v. Consolidated Lighting*, 73 Vt. 35, 50 Atl. 554; *Whitwell et al. v. Warner et al.*, 20 Vt. 426; *Roben v. Ryegate Light & Power Co.*, 91 Vt. 402, 100 Atl. 768; *Lyndon Mill Co. v. Lyndon Literary & Biblical Institution*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

[2] The remaining exception to be considered is to the court's refusal to direct a verdict for the plaintiff and to its direction of a verdict for the defendant. Since it affirmatively appeared from the record that neither party wished to go to the jury on any issue of fact, it was for the court to direct a verdict for one party or the other on such a state of the facts as it regarded proved by the evidence, and the verdict will be upheld if there was any evidence to sustain it. *Lowe v. Vermont Savings Bank*, 90 Vt. 532, 98 Atl. 1023. An examination of the transcript, referred to in the bill of exceptions, discloses that there was substantial evidence sustaining it. The evidence was clear that Merrill promised to pay the plaintiff for the care and nursing of the defendant while at its hospital, and that promise was original and not collateral, and that it was so understood by the defendant and by Merrill and Mrs. Lovejoy.

[3] The express promise of Merrill being shown, no promise implied in law arises on the part of the defendant. *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865. The plaintiff's claim that Merrill's promise was collateral cannot be sustained, for there was no evidence in the case tending to support it. If the promise was made by Merrill, as the evidence tends to show, and as the court must have found, it was original, and he or the telephone company, to whom the credit was given, is liable on that promise.

Judgment affirmed.

(92 Vt. 362)

In re MARTIN'S WILL.

(Supreme Court of Vermont. Windsor, May 16, 1918.)

1. WILLS §322—CONTESTS—MENTAL INCOMPETENCY—EVIDENCE—DISCRETION OF COURT.

In a will contest on ground of testator's mental incompetency, the range of time before and after the execution of the will within which evidence as to his mental condition is admissible is discretionary with court.

2. WITNESSES §322—CROSS-EXAMINATION—WITNESS WHOM PARTY IS COMPELLED TO CALL.

In a will contest, it is within the discretion of the court to allow cross-examination of a witness which proponent is obliged to introduce.

3. APPEAL AND ERROR ¶1048(6)—HARMLESS ERROR—CROSS-EXAMINATION.

Error is not shown in allowing contestant in will contest to take answers from witnesses not in the line of strict cross-examination, where the admission of such testimony did not result in surprise or prejudice to proponent's case.

4. WITNESSES ¶240(2)—LEADING QUESTIONS—DISCRETION.

It is within court's discretion to allow leading and suggestive questions to witnesses in a will contest.

5. EVIDENCE ¶474(4)—OPINION—MENTAL INCOMPETENCY.

On issue of mental incompetency of decedent, opinion of a trained nurse who took care of decedent until his death was admissible, though she had not previously known decedent.

6. APPEAL AND ERROR ¶926(3)—REVIEW—PRESUMPTIONS.

Where the record does not show that a foundation is not laid for a question asked at the trial, it will be assumed that such foundation was laid.

7. EVIDENCE ¶471(2)—OPINION—WHAT CONSTITUTES.

In a will contest, based on decedent's mental incapacity, it was not error to ask proponent whether at the time the will was drawn her conduct was such that the scrivener was justified in asking for a separate room wherein to draw the will, such evidence not constituting an opinion on propriety of scrivener's action.

8. APPEAL AND ERROR ¶232(2)—OBJECTIONS BELOW—NECESSITY.

In a will contest, where evidence by decedent's widow as to a contract with decedent was objected to below on the ground that a party to the contract was dead, but the objection on appeal was that the statute did not allow one spouse to testify to a conversation with the other, neither point will be considered.

9. TRIAL ¶133(6)—CONDUCT OF COUNSEL—INSTRUCTIONS.

In a will contest, where proponent's counsel asked her a question which was objected to and then explained his position, whereupon the court ruled the question out, a further explanation of counsel's purpose, made in good faith, was not improper, and did not need to be withdrawn, the court instructing the jury to disregard it.

10. WILLS ¶53(1)—CONTEST—EVIDENCE—ADMISSIBILITY.

In a will contest, based on decedent's mental incapacity, evidence that decedent formerly had confidence in the business ability of proponent's sister, and that such confidence changed, was admissible as showing failing mentality.

11. APPEAL AND ERROR ¶690(3)—RECORD—REVIEW.

In a will contest, where the record fails to show enough facts to determine whether testimony admitted was admissible or inadmissible, an exception thereto will not be sustained where no harm is shown.

12. APPEAL AND ERROR ¶926(5)—REVIEW—PRESUMPTIONS.

In a will contest, where transcript of a witness' testimony before the probate court was received below on the ground that witness was unable to attend, it will be presumed that he was too ill to do so.

13. APPEAL AND ERROR ¶926(3)—REVIEW—PRESUMPTIONS.

In a will contest, where complimentary statements by witness as to contestant's care of decedent were admitted, it will be assumed that such testimony was made admissible by evidence not shown, the record not showing such evidence to have been erroneous.

14. WILLS ¶322—CONTEST—EVIDENCE—DISCRETION OF COURT.

In a will contest, where evidence was admitted, but was objected to too late, and the court treated it as a motion to strike out, it was within the court's discretion to hold the proponent to the waiver, or to strike the testimony out.

15. EVIDENCE ¶550(2)—EXPERT TESTIMONY—SANITY.

In a will contest, it was prejudicial error to allow a doctor to predicate an opinion of decedent's sanity on all the evidence he had heard in the case, where such evidence was conflicting.

16. APPEAL AND ERROR ¶1048(3)—HARMLESS ERROR—OPINION OF EXPERT.

Allowing doctor to predicate an opinion of decedent's sanity on all the evidence he had heard in the case, where such evidence was conflicting, was necessarily harmful.

17. TRIAL ¶110—CONDUCT OF COUNSEL.

In a will contest, counsel's statement when a question was objected to that there was a disposition on the part of the other side to interfere with the examination was error.

18. WILLS ¶53(9)—CONTEST—EVIDENCE.

In a will contest, the naturalness or unnaturalness of the will may be considered in determining the testator's mental capacity.

19. APPEAL AND ERROR ¶232(2)—OBJECTIONS BELOW—SCOPE.

Where a specific objection is taken below to the admission of evidence, such objection cannot be extended on appeal.

Exceptions from Windsor County Court; Zed S. Stanton, Judge.

Proceedings to probate the will of Alonzo A. Martin. Verdict for contestant, and proponent excepts. Reversed and remanded.

Davis & Davis, of Windsor, and Pingree & Pingree, of White River Junction, for proponent. W. Batchelder, of Woodstock, C. Batchelder, of Bethel, and Frank Plumley, of Northfield, for contestant.

POWERS, J. On January 26, 1916, Alonzo A. Martin executed an instrument purporting to be his last will and testament. The validity of this instrument is here in question, and the only ground of contest is that he was then of unsound mind and incompetent to make a will. The trial below was by jury and resulted in a verdict against the instrument. The case comes up on exceptions saved by the proponent.

[1] Witnesses for the contestant were allowed, subject to the proponent's exception, to relate facts and observations covering an extended period prior to the execution of the instrument in question, and subsequent thereto down to Mr. Martin's death, and thereon to predicate opinions that he was not of sound mind. We cannot say that such evidence was not material. The factum probandum was, of course, his mental condition on January 26, 1916. But when the issue of testamentary capacity is raised, the inquiry is conducted under liberal rules of procedure (In re Esterbrook's Will, 83 Vt. 229, 75 Atl. 1), and it is competent, as bearing on this question, to show the person's mental condition at any reasonable time before or after the

testamentary act (In re Wheelock's Will, 76 Vt. 235, 56 Atl. 1013). Just how wide a range is permissible in a given case depends upon the character of the alleged unsoundness and other circumstances, and rests largely in the discretion of the trial court. 3 Elliott, Ev. § 2692. We are not convinced that too much latitude was here allowed.

[2] One of these witnesses was E. D. Ainsworth, one of the subscribing witnesses to the will, and it is claimed by the proponent that the contestant was allowed to examine him under the rules governing a cross-examination, and it is insisted that this was error. The argument is that the law required the proponent to introduce this witness, and that such a witness is not vouched for by the party introducing him; that there is no cross-examination of such a witness in the ordinary sense of the term; and that it was unfair and prejudicial to allow it in this case. It is plain from the record that the court treated the matter as a cross-examination, but it is equally plain that it allowed it to thus proceed as a matter of discretion. So if any wrong ground was suggested for the ruling, the ruling itself was right, and no error appears. Fairbanks v. Stowe, 83 Vt. 155, 74 Atl. 1006, 138 Am. St. Rep. 1074.

[3] The contestant was allowed to take answers from some of the witnesses which were not in the line of strict cross-examination, and the proponent excepted. But no error is shown. It is not made manifest that the admission of this testimony in this way resulted in any surprise, or prejudice to the proponent's case, and it was therefore within the discretion of the court to allow it. Slack v. Bragg, 83 Vt. 414, 76 Atl. 148; State v. Pierce, 87 Vt. 144, 88 Atl. 740. The fact that in some respects this was to anticipate the contestant's case is of no consequence. In re Mason's Will, 82 Vt. 160, 72 Atl. 329.

[4] The contestant was allowed, subject to exception, to ask leading and suggestive questions to certain witnesses. This, too, was within the discretion of the trial court. Berry v. Doolittle, 82 Vt. 471, 74 Atl. 97.

[5] The opinion of the decedent's mental condition given by Mary Hope, the trained nurse who took care of him from February 15, 1916, to his death on March 6th of the same year, was not inadmissible. It is true that the witness had not previously known the decedent, and that he was then very weak and sick; but these facts only affected the weight of her testimony, and not its admissibility. Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253. Here, again, the law does not lay down a hard and fast rule, and the question whether the witness has had an adequate opportunity of observation, in circumstances calculated to result in an inference helpful to the jury, is largely one of administration, and within the discretion of the trial court. 3 Chamb. Ev. § 1912.

[6] Mrs. Martin, the widow of the decedent

and the real contestant, was a witness. In her direct examination she was asked by her counsel if there came a time when it appeared to her that her husband became suspicious that she was trying to beat him in money matters. Subject to exception, she replied in substance that there did come such a time, and that it was in 1915. The only point now made in support of this exception is that no foundation was laid by showing the particular facts from which this inference was drawn. A sufficient answer is that the record does not show that such a foundation was not laid, and therefore we will assume that it was. Sargent v. Burton, 74 Vt. 24, 52 Atl. 72.

[7] It appears that Gov. Pingree drew the will in question, and went to the decedent's residence for that purpose. He testified that while he was there, Mrs. Martin's conduct was so strenuous and the scene she made so stormy that he asked for a room where he could have Mr. Martin alone to complete the business. When Mrs. Martin was on the stand, her counsel asked her if her conduct on that occasion was such that there was any reason for Gov. Pingree's asking for a separate room. To this the proponent objected; and, subject to exception, the witness was allowed to answer that she might have been a little bit excited, but that she was not strenuous, nor loud, nor quarrelsome. The argument of the proponent assumes that the witness was allowed to express an opinion on the propriety of Gov. Pingree's action. But this is not what the witness did; she simply stated the facts as she claimed them to be. This is just what counsel then said they were willing she should do, and just what she could properly do.

[8] Mrs. Martin was allowed to testify to a conversation had with her husband in the fall of 1897, which resulted in an arrangement whereby she took on the management of the business at Martinsville. To this the proponent excepted. The objection below was specific. It was that Mr. Martin being dead, the living party "shouldn't be allowed to come in here and swear contracts onto the dead one." The only point here made is that the statute does not allow one spouse to testify to a conversation with the other, and that the death of the latter does not affect the question. Here, then, is a new objection not made below. In these circumstances neither point is considered. Jewell v. Hoosac, etc., R. Co., 85 Vt. 64, 81 Atl. 238; Goslant v. Calais, 90 Vt. 114, 96 Atl. 751. Exactly the same situation exists regarding the conversation about the keys to the box of securities, and for the same reason the exception is overruled.

[9] During Mrs. Martin's examination, her counsel asked her a question which was objected to. Thereupon counsel explained his position in regard to the question, and the court ruled it out. Contestant's counsel then (apparently in good faith) made a further explanation of his purpose, but the ruling

was adhered to. The proponents claimed an exception to this further explanation, unless it was withdrawn. Counsel refused to withdraw it and an exception was allowed. The court then turned to the jury and cautioned them against trying the case upon statements by counsel, and admonished them to be guided only by the evidence admitted. The exception is not sustained. However it might have been if the record showed that counsel had attempted to get something improper before the jury by his statement to the court; or, however it might have been if the matter had not been adequately handled by the court, it must be held on this record that the remarks were not improper, and that there was no obligation to withdraw them.

[10, 11] Clara Dole, a sister of Mrs. Martin, was a witness for the contestant. She gave testimony tending to show that formerly Mr. Martin had confidence in her business ability and intrusted certain business matters to her charge, but that from and after the winter of 1914-15 his opinion of and mental attitude toward her business ability materially changed. This evidence was properly admitted. It was the theory of the contestant, and her evidence tended to show that a decided change came over Mr. Martin at or about this time. That such a change is evidence of failing mentality is well recognized. The testimony of Mrs. Dole was confirmatory of this claim and admissible as a manifestation of the change referred to. This witness also testified that when she was at the Martin place there was money in the purse. There is not enough shown by the record to make this testimony admissible, nor is there enough shown to make it inadmissible. No harm is shown and the exception is not sustained.

[12] Michael Ryan was a witness before the probate court when the issue here was there tried out, and his testimony was taken by a stenographer. A transcript of that testimony was offered below, and the only objection made to its admission was that Mr. Ryan was then in the state, and that it was only when the witness had gone out of the jurisdiction that such evidence was admissible. The court found the fact to be that Mr. Ryan was within the state, but unable to attend court as a witness or to give a deposition. The rule regulating the use of the former testimony of an unavailable witness differs in different jurisdictions. The one generally obtaining is that in a civil case, the testimony of a witness given at a former trial between the same parties may be introduced if the witness has since died or become insane, is sick and unable to testify, is out of the jurisdiction, or has been kept away by the other party. Some well-recognized rules are laid down for the guidance of the trial court in determining the preliminary questions of fact, and in the absence of any showing to the contrary we assume that these were duly observed. So, too, we assume that the finding that this witness was "unable" to attend court or give a deposition means

that he was too ill to do so. This afforded a sufficient reason for admitting his former testimony. 10 R. C. L. 986; 2 Chamb. Ev. § 1846; 2 Wig. Ev. § 1406; Stephen's Dig. 159 et seq; Chase v. Springvale Mills Co., 75 Me. 156; Perrin v. Wells, 155 Pa. 299, 26 Atl. 543.

[13] When the transcript of Mr. Ryan's testimony was presented, certain questions and answers were stricken out by agreement of counsel, and the remainder was read to the jury. The proponent excepted to the failure of the court to strike out certain statements therein made by the witness complimentary to the contestant and her care of the decedent. It is quite probable that the admission of these statements violated the rule laid down in *Turner v. Howard*, 91 Vt. 49, 99 Atl. 236, and *Adams v. Cook*, 91 Vt. 281, 100 Atl. 42, but the record before us is too incomplete to show it. As we have seen, the testimony is not before us. All intendments are in favor of the ruling. We cannot say that this testimony could not be admissible in any state of the evidence, and we must, therefore, assume that it was made admissible by evidence not here shown. *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659. Nor can we say that the statement of Mary A. Durphy as to a conversation between W. D. Martin and the decedent was inadmissible. There is not enough shown to make error appear. What W. D. Martin said, standing alone, may not have been important; but the fact that his remark brought no reply from the decedent may have been of significance. The record is too meager to warrant sustaining the exception.

[14] Mrs. Durphy testified to a conversation between Mr. and Mrs. Martin, which we understand to have taken place at the Lake Sunapee camp. She was asked if she said anything, and replied that she did; she was asked what she said, and replied that she told Mrs. Martin that she had better go home and stay for a while, for "it was getting on her nerves so that she was going to break down under it." Then she was asked if, in pursuance to this talk, she (Mrs. Martin) did go home, and at this point objection was made. The court recognized the fact that the objection came too late, treated it as a motion to strike out, allowed the testimony to stand, and gave the proponent an exception. The evidence came in without objection, and all right of objection was waived. It was within the discretion of the court whether to hold the proponent to this waiver or strike out the testimony.

[15, 16] Dr. Grout was a witness for the contestant. He had heard all the evidence in the case and was allowed to predicate an opinion of Mr. Martin's sanity thereon. This was excepted to on the ground that there was a conflict in the testimony given by the witnesses, and that the witness was allowed to consider the opinions expressed by them. If there was no conflict in the evidence as to any of the material facts detailed by the

witnesses, and the opinions were excluded, the course taken with Dr. Grout was permissible. *State v. Hayden*, 51 Vt. 296. But we think that it sufficiently appears from the record that there was such a conflict. It is true that the transcript is not referred to, and we can only consider what expressly appears in the bill of exceptions. But when the ruling was made, counsel for the proponent strenuously insisted that there was such a conflict, and this does not appear to have been disputed by the contestant. Moreover, it appears that witnesses for the proponent gave evidence of Martin's "actions, doings and sayings," and predicated thereon opinions that he was sane; while witnesses for the contestant gave similar evidence, and predicated thereon opinions that he was insane, and that some of such evidence related to the same occasions. It would be hardly possible that such evidence would be entirely free from conflict; and the only fair inference from the record is that each group of witnesses testified to facts supporting his opinion. So, when the evidence related to the same occasions it must have been conflicting; otherwise it would not have tended to support the conflicting opinions. Besides, the witness was allowed to take into consideration all that the witness had said "of and concerning" the acts and sayings of the decedent, which must have left him free to consider what was said "concerning" such acts as indication of sanity or insanity. And finally the court itself in making the ruling recognized the existence of such a conflict by suggesting that the question asked did not eliminate the conflicting testimony, but included it all. From the whole record it is plain that the court appreciated that there was a conflict such as the proponent claimed, and understandingly admitted Dr. Grout's opinion based in part upon the opinions expressed by the witnesses who had preceded him. This was error, and was necessarily harmful, and requires a reversal.

[17] Dr. Keyes was a witness for the contestant. In his direct examination he was asked a question to which the proponent's counsel objected. Thereupon counsel for the contestant remarked, "I'll put a new question, inasmuch as there's a disposition on the part of the other side to interfere with the examination." To this the proponent excepted. The remark was unwarranted, and to allow it to go unwithdrawn and unrebuked was error. But in view of the fact that the case is to be reversed on another point, it is unnecessary to determine whether it was prejudicial or not.

[18, 19] The court charged the jury that it might consider the naturalness or unnaturalness of the will in determining the question of mental capacity. To this the proponent excepted. There was no error in this instruction. *Fairchild v. Bascomb*, 35 Vt. 398;

Crocker v. Chase, 57 Vt. 413. The proponent complains that no definition of the term "naturalness" was given the jury. But that was not the point made below. The exception taken was specific, and cannot here be extended beyond the precise point there made. *Graves v. Waitsfield*, 81 Vt. 84, 69 Atl. 137.

Judgment reversed, and cause remanded.

(92 Vt. 338)

GLOBE GRANITE CO. v. CLEMENTS.

(Supreme Court of Vermont. Washington.
May 17, 1918.)

1. PLEADING \S 238(4)—AMENDMENT OF PLEA.

On hearing on referee's report, the transcript being referred to, court had right to avail itself of that in determining whether defendant's offered amendment to his plea was allowable, and had a general right to inquire dehors the record to ascertain the real counterclaim sought to be established by the amended plea in offset.

2. PLEADING \S 259—ACTION FOR PRICE—AMENDMENT OF PLEA—BREACH OF WARRANTY.

In action for price of monument, though defendant nowhere designated claim in offset as for breach of warranty, but had stated it so that plaintiff recognized its character, and twice applied to it its technical name, court properly permitted defendant to amend plea, by adding averments of express warranty.

3. REFERENCE \S 58—PLEADINGS—AMENDMENT.

When cause is referred, pleadings are to be treated as adapted to facts found, when no new cause of action is thereby brought in, and formal pleadings may be treated as amended or may be actually amended accordingly before judgment.

4. ASSUMPSIT, ACTION OF \S 19—SPECIAL COUNT—GENERAL OR COMMON COUNT.

A special count in assumpsit may be for the same cause of action as a general or common count.

5. SALES \S 442(6, 7)—REMEDIES OF BUYER—BREACH OF WARRANTY—DAMAGES—EVIDENCE.

Though in general buyer's damages for breach of warranty are difference between value of goods as they were and as they were warranted, price paid for monument discovered to be cracked might properly have been taken as evidence of value of monument, had it been as warranted, and cost of making it as warranted would be evidence to show how much its value fell short of value as warranted.

6. SALES \S 445(2)—EXPRESS WARRANTY—WRITTEN CONTRACT—QUESTION FOR COURT.

Where instrument evidencing contract of sale is in writing, question whether it embodied express warranty is one of construction for the court.

7. SALES \S 261(4)—EXPRESS WARRANTY.

Written contract for sale of a monument for the dead, providing it should be sound and free from cracks, carried an express warranty against specific defects, and was not a mere description of the monument to be furnished.

8. SALES \S 428—REMEDIES OF BUYER—BREACH OF WARRANTY.

Warranty of goods sold being express and absolute, buyer had right of action for breach, which he could assert, in independent suit or by way of offset in any action on contract of sale brought against him by seller, by proving warranty and breach, without more.

Exceptions from Washington County Court; Stanley C. Wilson, Judge.

Action by the Globe Granite Company against Charles Clements. To a judgment for plaintiff in the larger of two amounts alternatively found by the referee, defendant excepts. Judgment for the larger sum reversed, and judgment ordered for plaintiff.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Theriault & Hunt, of Montpelier, for plaintiff. John W. Gordon, of Barre, for defendant.

HASELTON, J. This is an action of contract, in the form of general assumpsit. The plaintiff filed a specification, of a skeleton character, referring to various contracts for monuments, and claiming a balance of \$449. The defendant, among other pleas, filed a plea in offset in the general counts in assumpsit, and the cause was referred. Before the referee the defendant filed a specification under his plea in offset. This specification was also of a skeleton character. It contained a claim with reference to a certain contract 39888, so called, not one of the contracts to which the plaintiff's specification related. On hearing before the referee, the plaintiff's specification was conceded to be correct, and the entire controversy was over the defendant's claim in offset with reference to contract 39888, which was a contract for a granite monument. The defendant ordered this monument of the plaintiff, and the order specified that it should be from sound stock and free from cracks. The plaintiff accepted the order and constructed and forwarded the monument. Before the defendant had opportunity to inspect the monument, he, at the request of the plaintiff, sent a check in payment therefor. In a letter accompanying the check, the defendant said that the check was sent with the understanding that the work was according to agreement.

The defendant was a dealer in monuments, and sold the work in question to Williams & Bowers of Cortland, N. Y., who procured it for a customer there, one Rowley. The monument was set up in a cemetery, and afterwards, when lettering was being done, a crack was discovered, upon the die, extending across the lettering. This crack had until then been invisible to and undetected by any one who had inspected the monument or had to do with setting it up. The crack in fact existed in the die when the stone was shipped by the plaintiff. It was caused by a blast when the stone was quarried. There is no room for doubt, on the facts reported, that, in view of the nature of the work as a monument to the dead, the crack constituted a substantial defect, and rendered the die worthless for the purpose for which it had been furnished. Williams & Bowers had giv-

en their note to the defendant in payment for the monument, but on account of the defect refused payment of the note. The defendant insisted that the plaintiff furnish a new die, but the plaintiff claimed that the die already furnished complied with the contract and was perfect, and refused to replace it, and never consented that it should be replaced at its expense. Finally the defendant replaced the die at an expense of \$340.26. The referee reported to the court in the alternative, making the amount recoverable by the plaintiff to depend upon the allowance of the above sum as an offset to the balance otherwise due the plaintiff.

At the hearing on the referee's report, and before judgment, the defendant obtained leave of court to file, and did file, an amendment to his plea in offset, by adding thereto averments of an express warranty in the contract in question and of a breach of such warranty in consequence of the crack in the die by reason of which the defendant was damaged to the amount of the offset conditionally reported by the referee. To the action of the court in allowing this amendment the plaintiff objected, and excepted on the ground that the amendment "introduced a new and different cause of action and claim in offset, distinct from and inconsistent with the claim in offset tried before the referee."

[1, 2] The transcript was referred to, and the court had a right to avail itself of that in determining whether the amendment offered was allowable, and had a general right to inquire dehors the record to ascertain the real counterclaim sought to be established by the plea in offset, and we think that the ruling of the court allowing the amendment should be sustained. From the transcript it appeared that, while the defendant had nowhere designated his claim in offset as for a breach of warranty, he had, practically at the outset, stated his claim in such a way that the plaintiff recognized its character, and twice applied to it its technical name. The court had ample ground for the finding which it impliedly made that the right to an offset for a breach of warranty was tried out before the referee, and was in effect the counterclaim of which the defendant sought to avail himself by pleading in offset in the common counts in assumpsit.

[3, 4] When a cause is referred the pleadings are to be treated as adapted to the facts found when no new cause of action is thereby brought in, and the formal pleadings may be treated as amended, or as here may be actually amended, accordingly before judgment. *McDonald v. Place*, 88 Vt. 80, 85, 90 Atl. 948; *Camp v. Barker*, 87 Vt. 235, 237, 238, 88 Atl. 812, Ann. Cas. 1917A, 451; *Van Dyke v. Grand Trunk Ry. Co.*, 84 Vt. 212, 78 Atl. 958, Ann. Cas. 1913A, 640; *Gordon's Adm'r v. Hotchkiss*, 82 Vt. 479, 74 Atl. 74. The plaintiff argues, in effect, that, as assumpsit in the common counts will not lie

for a breach of warranty, the amendment to the defendant's counterclaim necessarily brought in a new cause of action. But our best-considered cases prior to the practice act indicate that this claim is unfounded, show that a special count may be for the same cause of action as a general or common count. *Patterson's Adm'r v. Modern Woodmen of America*, 89 Vt. 305, 95 Atl. 692; *Lamb v. Zundell*, 78 Vt. 232, 62 Atl. 33; *Lyndon Granite Co. v. Farrar*, 53 Vt. 585; *Dana v. McClure*, 39 Vt. 197. And under the practice act the fallacy of the plaintiff's claim in the respect under consideration is obvious.

[5-8] On the question of the scope of the real issue tried by the referee the plaintiff calls attention to the fact that the amount found conditionally for the defendant was simply the cost of replacing the cracked die, and says that from this it appears that no issue of breach of warranty was made, since in the case the damages must have been the difference between the value of the monument as it was and the value it would have had, if it had been as warranted. Let it be assumed that this general rule applies to a case of this sort. Nevertheless, in the absence of a showing to the contrary, the price paid for the monument might properly have been taken as evidence of its value had it been as warranted, and then the cost of making it as warranted would be evidence tending to show how much its actual value fell short of the value of the warranted monument. *Houghton v. Carpenter*, 40 Vt. 588, 596; *Melby v. Osborne*, 33 Minn. 492, 24 N. W. 253; *Wheeler, etc., Mfg. Co. v. Thompson*, 33 Kan. 491, 6 Pac. 902; *Showen v. Owens Co.*, 182 Mich. 264, 148 N. W. 686. With the claim of an express warranty in the case as a claim in offset, the court disallowed the claimed offset and rendered judgment for the plaintiff to recover the larger sum reported by the referee. To this judgment the defendant excepted, on the ground that the offset should have been allowed and judgment rendered for the smaller sum reported. Under this exception the substantial question raised and argued is whether there was in the contract in question an express warranty surviving such acceptance as the report here shows. That the contract was by way of an undertaking to comply with a written order is here immaterial. And, since the instrument evidencing the contract is in writing, the question of whether it embodied an express warranty is one of construction for the court. *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Unadilla Silo Co. v. Hull*, 90 Vt. 134, 96 Atl. 535. Now, considering the subject-matter of this contract, it cannot be said that the positive provision that the monument should be sound and free from cracks was merely descriptive of the kind of a monument to be furnished. This positive provision was an

express warranty against specific defects, as much so as a sale of a horse, with a positive representation that it is without a spavin, embodies an express warranty that the horse is without such unsoundness. *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Franklin & Co. v. Lamson & Co.*, 189 Mass. 344, 75 N. E. 624; *Unadilla Silo Co. v. Hull*, 90 Vt. 134, 96 Atl. 535. Since here was an express warranty, the discussion by counsel of an implied warranty, its character and incidents, need not be noticed. And since the warranty was express and absolute, the defendant had a right of action which he could assert in an independent suit, or by way of offset to any action founded on contract brought against him by the plaintiff, by proving the warranty and the breach, without more. *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Pennock v. Stygles*, 54 Vt. 226; *Richardson v. Grandy*, 49 Vt. 22; *Pinney v. Andrews*, 41 Vt. 631; *G. L. 1806*.

The offset should have been allowed, but the case requires no remand. The referee's report furnishes the necessary basis for a judgment adjusting the entire controversy here, such judgment as the trial court should have rendered by way of giving effect to the salutary principles underlying the whole law of offsets. *Stewart v. Knight*, 83 Vt. 201, 203, 75 Atl. 12. As the plaintiff points out, had judgment been rendered for the plaintiff for the smaller sum reported by the referee, interest thereon should have been brought down to the date of the judgment, which was August 3, 1917, making the amount that the plaintiff was entitled to recover as of that date \$176.00.

Judgment for the larger sum reported reversed, and judgment for the plaintiff to recover as of August 3, 1917, the sum of \$176.00, with costs below. Let the defendant's costs in this court be deducted.

(92 Vt. 396)

RAYMOND v. SHELDON'S ESTATE.

(Supreme Court of Vermont. Rutland. Opinion Filed June 21, 1918.)

1. CONTRACTS ¶4—IMPLIED CONTRACTS.

An implied contract must contain all the elements of an express contract and only differs from an express contract in its proof.

2. CONTRACTS ¶29 — IMPLIED CONTRACTS — QUESTION FOR JURY.

In an action on implied contract, each element depending upon questions of fact, if there is any substantial evidence fairly and reasonably tending to establish such contract, question must be submitted to jury.

3. APPEAL AND ERROR ¶927(7) — MOTION FOR DIRECTED VERDICT—REVIEW.

In reviewing denial of defendant's motion for a directed verdict, evidence must be viewed in light most favorable to plaintiff.

4. EXECUTORS AND ADMINISTRATORS ¶256(7) — IMPLIED CONTRACTS—QUESTION FOR JURY.

In action against estate on implied contract to pay for services rendered deceased, whether

valuable services were rendered under such a contract held for jury.

5. EXECUTORS AND ADMINISTRATORS ¶256(7) —IMPLIED CONTRACT—EVIDENCE.

In action against estate for services rendered deceased, testimony of a witness that he had seen plaintiff go to deceased's house very frequently was admissible; it being claimed that directions were given and part of services were performed at the house.

6. EXECUTORS AND ADMINISTRATORS ¶256(7) —EVIDENCE.

In action against estate of deceased for services rendered deceased in going on errands, among other things, testimony by witness that she saw plaintiff buy postal cards and gifts for deceased's children and some little lace and ribbons, was competent as bearing upon extent of services performed.

7. APPEAL AND ERROR ¶992—EXPERT TESTIMONY—REVIEW.

Where testimony of witness tended to show that she had some means of knowing and did know what price was for services rendered in shopping for another, a ruling of court admitting an opinion of the witness as to value of certain services in that line is not revisable on appeal.

8. APPEAL AND ERROR ¶1048(5)—HARMLESS ERROR—EVIDENCE.

An exception to a question which was not answered is not available on appeal.

9. NEW TRIAL ¶76(1)—EXCESSIVE VERDICT.

Motion to set aside a verdict as excessive is addressed to the sound discretion of the trial court.

10. APPEAL AND ERROR ¶979(5)—MATTERS REVIEWABLE—DISCRETION.

Motion to set aside a verdict as excessive is not reviewable, unless trial court failed to exercise its discretion, or abused it.

Exceptions from Rutland County Court; Stanley O. Wilson, Judge.

Claim by Emma Raymond against the Estate of Caroline E. Sheldon, deceased. Judgment on appeal to the county court in favor of complainant, and defendant brings exceptions. Affirmed and cause ordered certified to the probate court.

Argued before WATSON, O. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Webber & Leamy, of Rutland, for defendant. Lawrence, Lawrence & Stafford, of Rutland, for plaintiff.

MILES, J. This case came to the county court on an appeal by the plaintiff from the disallowance of her claim against the estate of Caroline E. Sheldon, and it comes here upon the defendant's exception to the refusal of the trial court to direct a verdict in his favor, to the reception of certain evidence, and to certain portions of the court's charge.

[1, 2] The ground of the exception to the court's refusal to direct a verdict in the defendant's favor is that there was no evidence in the case tending to prove a promise implied in fact on the part of Mrs. Sheldon. It is true, as argued by the defendant, that the implied contract, such as here un-

der consideration, must contain all the elements of an express contract, and that it only differs from an express contract in its proof. 6 R. C. L. 587, p. 6. Each depends upon questions of fact, and if there is any substantial evidence fairly and reasonably tending to establish such contract, that question must be submitted to the jury. *Fitzsimons v. Richardson*, 86 Vt. 229, 84 Atl. 811; *McGaffey v. Mathie*, 68 Vt. 403, 35 Atl. 334; *Kelton v. Leonard*, 54 Vt. 230.

[3] In reviewing the denial of defendant's motion for a directed verdict, the evidence must be viewed in the light most favorable to the plaintiff. *Hazen v. R. R. Railroad*, 89 Vt. 94, 94 Atl. 296. Applying these well-established rules to what appears in this case, we examine the evidence to see if it reasonably and fairly tends to show an implied promise on the part of Mrs. Sheldon to pay the plaintiff what her services were reasonably worth, and from that examination we think it does so show.

[4] The evidence of one witness was to the effect that during the time covered by the plaintiff's bill against Mrs. Sheldon's estate, the witness had on frequent occasions received requests over the telephone from the Sheldon house to ask the plaintiff to call there; that when the witness was at work for Mrs. Sheldon, the plaintiff would call there and Mrs. Sheldon would ask her on those occasions why she, the plaintiff, had not called, stating to the plaintiff that she wanted her to do something for her; that she knew of the plaintiff's bringing to Mrs. Sheldon articles purchased at the store for her; that at one time Mrs. Sheldon said to the witness that she could not pay the plaintiff for what she had done for her. There was other similar evidence in the case which had a tendency to prove that the plaintiff's services were performed at the request of Mrs. Sheldon. This was enough to entitle the plaintiff to go to the jury if the services were valuable. It is said in 40 Cyc. 2810:

"Where valuable services are rendered, or material furnished, by one person for another at the latter's request, in the absence of circumstances showing that the services or material were intended to be rendered or furnished gratuitously, the former is entitled to recover for such services or material, although there was no express contract for remuneration."

To the same effect is 6 R. C. L. supra. Indeed such contracts are of daily occurrence, and no question is made as to their legal and binding force.

An examination of the transcript discloses that the evidence tended to show that the services were valuable; that the plaintiff did washings weekly and special washings twice a year for Mrs. Sheldon; that the washings were not the general washings, but the washings of such things as Mrs. Sheldon's wearing apparel, her bureau covers, towels, napkins, and blankets. There was no error

in overruling the motion for a directed verdict. The exception to the charge raises the same question that is raised by the motion for a verdict, and the disposition of that question makes it unnecessary to consider the exception to the charge.

[6] The defendant excepts to a question asked Georgie Davis, which was received subject to the objection that it had no tendency to prove either a contract or service, and an exception was noted for the defendant. The witness had testified without objection that she had seen the plaintiff go into Mrs. Sheldon's house, and to the question, "How frequently?" answered, "Very frequently, perhaps every day with the exception of Sunday." This evidence was material to show that the plaintiff went to Mrs. Sheldon's house, where it was claimed that much of the services of the plaintiff were performed, and where the plaintiff claimed she went for direction in regard to the errands. The evidence was properly received.

[8] The defendant objected to another question asked this witness upon the same grounds as those stated to the other question. The witness had testified without objection that she had seen a number of things which Mrs. Sheldon told her the plaintiff had purchased for her, and the question objected to was as follows: "What were those articles, do you recall?" The answer was: "I remember postal cards, and the gifts she gave the children, and some little lace and ribbons; that is all I can recall now." The evidence had a bearing upon the extent of the services performed in the matter of doing errands for Mrs. Sheldon, and while the evidence was not very weighty, it has a tendency to prove that the plaintiff did more errands for Mrs. Sheldon than getting the Christmas presents, which the witness had already testified that Mrs. Sheldon had told her that the plaintiff had purchased for her. There was no error in receiving this testimony.

The witness Cecile Bradchaud was asked, "Won't you tell how frequently she called, and what the nature of the purchases were?" referring by the word "she" in the question to the plaintiff. The question was objected to on the same ground as that urged in the objection to the questions asked Mrs. Davis. The witness answered, "Some weeks she came every day and some weeks twice a day; the nature of the purchases would be in the line of dry goods, buttons, laces, ribbons, anything in the nature of household goods, underwear." The witness testified without objection that the purchases made by the plaintiff would not be completed on the first trip of the plaintiff; that on the first trip samples were sent out for approval; and that when the purchase was finally made the goods were sometimes delivered to the plaintiff and sometimes delivered to Mrs. Sheldon by their delivery team, and that the goods so delivered were charged to and paid by Mrs.

Sheldon. This evidence was material as tending to show the extent of services in the line of errands performed for Mrs. Sheldon by the plaintiff. This exception was not well taken.

[7] This witness being recalled later in the trial was asked, "What do you say is a fair and reasonable price for work that I have suggested?" The work suggested was that of buying dress goods and shopping in the city of Rutland where Mrs. Sheldon lived when the alleged services were performed. The witness answered, "Twenty cents an hour." The ground of the objection to this question was that the witness was not qualified to express an opinion. The witness testified that she was acquainted or familiar with the price that was paid for work of buying dress goods and shopping, etc., in the city of Rutland. The testimony of the witness tended to show that she had means of knowing and did know what the price was for such services. There being some evidence of qualification, the finding of the trial court is not revisable. *Griffin v. B. & M. Railroad*, 87 Vt. 278, 89 Atl. 220.

[8] Octave George Chamberland was asked, "From that time on how frequently did you see Mrs. Raymond in your store trading there?" The question was not answered, and the exception, therefore, is not available to the defendant. *Fraser v. Blanchard et al.*, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797.

[9, 10] The next and last exception briefed is that the verdict was excessive, and should have been set aside on the defendant's motion. Such a motion is addressed to the sound discretion of the trial court, and is not reviewable, unless it appears that the court refused or failed to exercise its discretion, or abused it. *Lincoln v. C. V. Railway Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998. It does not appear that the trial court did refuse or failed to exercise its discretion, or that it abused it. There was no error in overruling the motion.

Judgment affirmed, and cause ordered certified to the probate court.

(92 Vt. 371)

HUTCHINS v. GEORGE et al.

(Supreme Court of Vermont. Washington.
May 17, 1918.)

1. EVIDENCE ¶43(3) — JUDICIAL NOTICE — JUDGMENT AND PROCEEDINGS IN OTHER CASE.

As a rule, judgment and proceedings in a case other than that on trial, even between the same parties, will not be taken notice of by the court of its own motion.

2. EVIDENCE ¶43(3) — JUDICIAL NOTICE — RECORDS OF COURT.

When former judicial proceedings between same parties in same court are offered in evidence, they prove themselves, since a court takes judicial notice of the authenticity of its own records.

8. TRIAL ~~§~~39—FORMER JUDICIAL PROCEEDINGS—OFFER IN EVIDENCE.

Plaintiff's request, that court notice former judgment and specification on which it was based in prior action in same court by defendant against him, in effect was offer of former judicial proceedings in evidence.

4. JUDGMENT ~~§~~622(2) — JUDGMENT BY DEFAULT—FAILURE TO DECLARE ON CLAIM.

Plaintiff in general assumpsit, as to items accruing before judgment by default against him in defendant's prior action, is not precluded by the judgment against him since, under P. S. 1507, it was not obligatory upon plaintiff in the prior suit to declare on the claim for which he now sues.

5. APPEAL AND ERROR ~~§~~907(3) — PRESUMPTIONS FAVORING TRIAL COURT—SUPPORT OF RULING.

In absence of transcript, Supreme Court will assume in support of a ruling against defendant that it was based on such showing or lack of showing, or upon such offer or lack of offer of evidence, as the case presented.

6. JUDGMENT ~~§~~595 — CLAIM UNDER RUNNING ACCOUNT—INDIVISIBLE CHARACTER.

Claim under running account covering considerable time in general is regarded as single cause of action, not to be split up by separate suits upon separate items.

Exceptions from City Court of Montpelier; E. M. Harvey, Judge.

Action by Francis B. Hutchins against F. J. George and trustee. Judgment for plaintiff, and defendants except. Affirmed.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

William C. White, of Northfield, for plaintiff. F. J. Marshall, of Montpelier, for defendants.

HASELTON, J. This is an action of contract in the form of general assumpsit brought before the city court of Montpelier. The defenses were the general issue, or denial, and set-off. Trial was by the court, and judgment was rendered for the plaintiff to recover \$22.82, as damages and costs. The defendant brings a bill of exceptions.

[1-3] The writ in this case was dated December 7, 1916. The defendant had previously brought an action in the form of general assumpsit against the plaintiff. That action had been returnable, to the court that tried this, November 13, 1916, and, the defendant there, the plaintiff here, not having appeared, judgment in that action had been rendered on his default for damages \$10.50 and costs. On the trial of this case a certified copy of the record of the former judgment was not offered by either party, but the files therein were at hand in the possession of the court, and at the request of the plaintiff the court took notice of the former judgment and the items of the specification therein, and considered them in the determination of this case. To this action of the court the defendant excepted on the sole ground that a court has no right to take judicial notice of its own judgments. As a rule the judgment and proceed-

ings in another case than that on trial, even between the same parties, will not be taken notice of by the court of its own motion. Otherwise matters might be considered that a party has no opportunity to meet and explain. 15 R. C. L. 1114. But when former judicial proceedings between the same parties in the same court are offered in evidence, they prove themselves, since a court takes judicial notice of the authenticity of its own records, and, where such former proceedings are relevant and are seasonably offered, they are, without more, properly in the case. Here the request of the plaintiff, that the court take notice of the former judgment and the specification on which it was based, was in effect an offer, and nothing appears to indicate that it was not seasonably made, and no question of relevancy raised. Therefore, so far as appears, the matters noticed by the court were properly before it for consideration. State v. Shaw, 73 Vt. 149, 160, 50 Atl. 863; Armstrong v. Colby, 47 Vt. 359, 361, 364.

[4] Some or all of the items of the specification of the plaintiff in this suit, Hutchins v. George, were for indebtedness claimed to have accrued prior to the bringing of the former action, George v. Hutchins, in which Hutchins did not appear but suffered judgment to go against him by default. These items were considered by the court, against objection and exception on the ground that Hutchins was precluded as to such items by the judgment against him in the suit in which he suffered default, the respective claims of the parties being such that in that suit Hutchins might have declared in effect on the claim for which he now brings suit. But, under our statute, it was not obligatory upon him to do so. He could fail to exercise his privilege in that regard without prejudice to his own claim in a suit brought by him. P. S. 1507, now G. L. 1806; Kezar v. Elkins, 52 Vt. 119, 120, 121; Davenport v. Hubbard, 46 Vt. 200, 206, 14 Am. Rep. 620; Carver v. Adams, 38 Vt. 500.

We note that, had the former action been book account, the matter of costs might have been affected by the course taken. P. S. 2084, now G. L. 2312; Scott v. Niles, 40 Vt. 573.

In this action the defendant George, under his plea in offset already mentioned, filed a specification in which he included items of account that had accrued before the bringing by him of his action against Hutchins. The court took into consideration such items so far as they went in payment of the plaintiff's charges.

[5] Other items the defendant "claimed" were omitted from his specification in the former action by mistake, and still others "were treated by him" as in offset to items of the plaintiff's specification. Except as above stated, the court excluded from consideration the defendants' items in offset, ruling that, as matter of law, the defendant was precluded

as to them. To this ruling the defendant excepted. We have no transcript of the case, and we assume, in support of the ruling, that it was based upon such showing or lack of showing or upon such offer or lack of offer of evidence as the case presented. But the bill of exceptions gives us no information in that regard. It informs us only what the defendant claimed and how he treated or regarded the items.

[8] It appears that here were mutual dealings and a running account covering a considerable period of time. One's claim under such an account is, in general, regarded as a single cause of action not to be split up by one suit upon this item, another upon that, and still other suits upon still other items; the suits running on indefinitely according to the course of the mutual dealings back to the beginning of the account. 1 R. C. L. 356, 357.

If the defendant relied upon any exception to the principle announced by the court, he should, at least, have made a definite offer of evidence calculated to take his claim as to the items in question out of the general rule. It does not appear that any such offer was made. On the bill of exceptions brought by the defendant no sufficient reason is shown for disturbing the judgment against him, and, accordingly, it is affirmed.

(132 Md. 626)

ADAMS EXPRESS CO. v. WHITE. (No. 26.)
(Court of Appeals of Maryland. May 8, 1918.)

1. CARRIERS ⇨76 — ACTIONS FOR LOSS OF GOODS—PARTIES ENTITLED TO SUE.

An action against a carrier for loss of goods should be brought by the owner or one having a beneficial interest in the property.

2. CARRIERS ⇨132 — ACTIONS FOR LOSS OF GOODS—PRESUMPTION OF OWNERSHIP.

The presumption that the consignee has the necessary ownership to sue a carrier for the loss or conversion of goods is not conclusive, but may be rebutted.

3. CARRIERS ⇨76 — ACTION FOR LOSS OF GOODS—PERSONS ENTITLED TO SUE.

Where calculating machines returned by a prospective purchaser as unsatisfactory were shipped to a consignee as agent of the owner and seller, the consignee had no beneficial interest entitling him to sue carrier for failure to deliver, regardless of whether he was selling on a commission basis or working on a salary.

4. CARRIERS ⇨132 — ACTIONS FOR LOSS OF GOODS—PRESUMPTIONS.

Where goods were delivered to a carrier for shipment, the bill of lading containing no statement of their condition when receipted for, the presumption arises from the receipt of the goods without objection noted in the receipt that they were in good condition as far as apparent on ordinary inspection.

5. APPEAL AND ERROR ⇨1051(1)—HARMLESS ERROR—EVIDENCE.

Where a carrier's shipping receipt recited that two boxes of machines were delivered to it, and proof showed that but one was received by the consignee, admission of hearsay evidence by the consignee as to how he knew two machines were shipped was immaterial.

6. CARRIERS ⇨135 — LOSS OF GOODS — DAMAGES.

Where calculating machines sent to a prospective purchaser on trial were returned to the agent but lost by the carrier in transit, in an action by the agent as consignee, the carrier was entitled in determining damages to have commissions plaintiff would have earned if he had sold the machines, deducted from the selling price at destination.

Appeal from Superior Court of Baltimore City; John J. Dobler, Judge.

Action by C. Ridgely White against the Adams Express Company, an unincorporated joint-stock association. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

William S. Thomas, of Baltimore, for appellant. W. Lentz, of Baltimore, for appellee.

CONSTABLE, J. The appellee was, at the time of arising of the cause of action herein sued upon, the Baltimore agent of the Marchant Calculating Machine Company of California. He shipped from Baltimore to the Blackwood Coal & Coke Company at Blackwood, Va., one of the machines on trial, and understood that the company also sent one to the same party from California. The machines proving unsatisfactory, the Blackwood Company delivered to the appellant, according to the receipt given to the consignor, the Blackwood Company, "two boxes calculating machines," with a value warranted by the shipper to be \$500, and "consigned to C. R. White, representative Marchant Calculating Machine Co., Baltimore, Md." The box containing the machine originally shipped from Baltimore was duly received by White, but the second box was never received. It was because of failure to deliver that machine that this suit was instituted by White in his individual character, and resulted in a judgment of \$250, the selling price of a machine of this kind when new.

The case was tried before the court without the aid of a jury, and five exceptions were taken to the rulings of the court, four to questions of evidence, and one to the refusal to grant the two prayers offered by the defendants. The plaintiff offered no prayer. The only witness examined by either party was the plaintiff.

[1, 2] The first prayer of defendant sought to direct a verdict for it upon the theory that under the evidence White, as consignee, was not a proper party plaintiff. There seems some confusion among the authorities in actions against carriers for loss or conversion of goods intrusted to them for delivery, but it seems to be fairly established that the rule is that the action should be brought by the owner or one having a beneficial interest in

the property. Hutchinson on Carriers (3d Ed.) §§ 1304-1320; Elliott on Railroads (2d Ed.) § 1692; Thompson on Negligence, vol. 6, §§ 7420-7424; 6 Cyc. 510. The consignee is presumed to possess the necessary ownership to sue, but this presumption is not conclusive, and may be rebutted. 10 Corpus Juris, 351; Ray, Carrier of Freight, 1006; Griffith v. Ingledew, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444; Smith v. Lewis, 3 B. Mon. (Ky.) 229; Arbuckle v. Thompson, 37 Pa. 170; Pennsylvania Co. v. Poor, 103 Ind. 553, 3 N. E. 253; Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58.

Mr. White produced and offered in evidence the appellant's receipt, which, as above noted, showed that the property was shipped, not to C. R. White individually, but to him as the representative of the Marchant Calculating Machine Company. He also testified that he was the agent of the machine company, and that they owned the machine sued for, and it was being returned after it had failed to satisfy the prospective purchaser.

[3] Whether the appellee was selling on a commission basis, or employed on a salary, could not give him any right which he was entitled to protect by bringing suit in his own name, for no commission had been earned. We are of the opinion that the undisputed evidence shows that the appellee had no beneficial interest in the property, and that therefore he had no right to maintain this suit, and that there was error in refusing the defendant's first prayer.

[4] The second prayer asked that a verdict be returned for it, because there was no evidence to show the condition of the machine when it was delivered to the defendant. The refusal of this prayer was correct. There is a well-established rule that in cases of this character a presumption arises from the fact of the receipt of the goods by the carrier without objection or exception noted in the shipping receipt that as far as the condition was apparent on ordinary inspection the goods were in good condition. See 10 Corpus Juris, 371, and long list of cases under note 65. The bill of lading, or shipping receipt, contained no statement as to the condition of the machines when receipted for. Neither did the evidence in the record rebut in any way the presumption.

[5] The first exception occurred during the taking of the testimony of the plaintiff, and referred to how the witness knew that the machine company had two machines at Blackwood. In answer to a question, he replied that he knew it from the fact that the machine company had written to that effect. The appellant objected to this as being hearsay testimony. This exception is immaterial, since the shipping receipt recited that two boxes of these machines were de-

livered to the carrier, and the proof shows that but one was received. N. Y. & Balto. Trans. Co. v. Baer, 118 Md. 73, 84 Atl. 251.

[6] The second, third, and fourth exceptions present the same legal question, and bear upon the proper measure of damages. The plaintiff testified that the selling price of the machine was \$250. The defendant attempted to show that out of the selling price, if the plaintiff had sold them, he would have received a commission. The court, upon objection, refused to allow these three questions to be answered. The questions were asked upon the theory that, since the shipment was from an "on trial" purchaser to an agent without a prospect of sale, there could be no recovery for unearned commissions. In other words, the contention was that, under the circumstances of this shipment, the carrier was entitled to have the amount of the commissions the plaintiff would have received, if he had sold the goods, deducted from the amount of the selling price at the point of destination. We are of the opinion that this contention is correct, both upon reason and principle. The appellee relies upon the case of Kyle v. Laurens, 10 Rich. 382, 70 Am. Dec. 231, in opposition to this contention. This was a case concerning a consignment of cotton to a factor for sale and lost in transit, and the court there held that the measure of damages was the market value of the cotton at the place of destination, without deducting the factor's commissions. We think the present case is clearly distinguishable from that case. The goods in that case consisted of staple goods for which there was a ready and prompt market, and upon the receipt of them the factor could have readily earned the commission which had been agreed upon between him and the owner, while in the present case there was no ready market such as there is for staple articles like cotton, grain, and the like, and in fact they were not consigned to him for sale at all, but were merely returned to him as not satisfactory under the agreement of sale with the consignor. There was no immediate prospect of sale, and therefore no commission expected, if, indeed, he was selling upon a commission basis. We think that the appellant was entitled to show, if possible, that the appellee was selling upon a commission basis, and, if so, to have an instruction eliminating the amount of the commission from the selling price.

We will therefore reverse the judgment, and remand the case in order that the pleadings may be amended or to permit a new suit to be brought in the name of the proper parties.

Judgment reversed and new trial awarded, with costs to the appellant.

(133 Md. 31)

EVANS v. BALTIMORE, C. & A. RY. CO.
(No. 17.)

(Court of Appeals of Maryland. May 1, 1918.)

1. RAILROADS — 307(4) — GRADE CROSSINGS — DUTY TO WARN TRAVELERS.

The law does not impose the obligation upon a railroad company to station persons at every crossing of a public road to warn travelers of the approach of trains.

2. RAILROADS — 346(6) — INJURIES TO TRAVELERS — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

Where plaintiff, in action for injuries when struck by railroad train at crossing, testified to the effect that there was no material obstruction preventing him from seeing the train, he had the burden of showing, not only the railroad's negligence, but his own freedom from contributory negligence.

3. RAILROADS — 348(8) — INJURIES TO TRAVELERS — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

In action for injuries when struck by railroad train at crossing, where plaintiff's testimony showed that there was no material obstruction between him and the railroad, indicating that, had he looked, he must have seen the approaching train, his mere testimony that he looked and did not see it did not establish freedom from contributory negligence.

Appeal from Circuit Court, Queen Anne's County; Philemon B. Hopper and W. H. Adkins, Judges.

"To be officially reported."

Action by Edward S. Evans against the Baltimore, Chesapeake & Atlantic Railway Company. Judgment on directed verdict for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

T. Alan Goldsborough, of Denton (J. H. C. Legg and Thomas J. Keating, both of Centerville, on the brief), for appellant. Henry R. Lewis, of Denton (Lewis & Knotts, of Denton, and J. Frank Harper, of Centerville, on the brief), for appellee.

STOCKBRIDGE, J. The record in this case presents for the consideration of the court a suit for personal injuries received by the plaintiff, Edward S. Evans, as the result of a collision between a Ford machine, which he was driving, and a train of the Baltimore, Chesapeake & Atlantic Railway. At the conclusion of the plaintiff's evidence the defendant offered a prayer to withdraw the case from the consideration of the jury, upon the theory that no negligence of the defendant had been shown, sufficient to entitle the appellant to recover. This prayer was rejected by the court, and in lieu of it, at the suggestion of the court, a prayer was framed, offered, and granted, directing a verdict for the defendant, upon the ground of the contributory negligence of the plaintiff. This action of the court constitutes the sole bill of exceptions upon which this appeal was taken.

At the trial below there was a diagram upon the blackboard for the purpose of show-

ing the relative positions of various objects testified to by the witnesses. As they gave their testimony, it is frequently punctuated with the word "indicating," and, as that drawing does not appear in the record, it is a little difficult to place precisely some points testified to by the witnesses. Enough does appear to remove all difficulty in determining the rules of law applicable to the case, rules which have been frequently announced by this court in a series of decisions.

On the 26th of June, 1916, the plaintiff and Mr. Calvin Richardson, who had been riding through the county that day, were returning to their home at Pittsville, by a road which crossed the track of the Baltimore, Chesapeake & Atlantic Railway Company at or nearly at right angles. As the road approached the railroad there was a slight rise in the grade, and the road was sandy. The Ford machine which the plaintiff was driving was running on low gear, at a rate variously estimated from 4 to 7 miles per hour. It was still light, so that there was no serious difficulty in observing conditions, and the plaintiff asked Mr. Richardson to look in one direction for approaching trains; it being his idea apparently to look in the other. There was some conversation to the effect that there was no train due there at or about that time. Unfortunately a train, known as the Ocean City Special, had been put in service a couple of days before, and was approaching this crossing at a high speed, at the same time that the auto containing the plaintiff and Mr. Richardson approached it upon the highway. Mr. Richardson, who had been looking to the eastward, turned and, looking to the west, discovered the approaching train, only a short distance away, and in some manner, just how he is unable to tell, managed to get out of the machine, while Mr. Evans, who was at the steering wheel, remained, and the machine was struck about the front by the locomotive, practically demolishing the auto, throwing Mr. Evans out, and severely injuring him.

The evidence as to the surroundings of the crossing and the visibility of approaching trains is that of the plaintiff and his witnesses, and is uncontradicted. From this it would seem that the nearest house to the railroad at this crossing was distant 100 feet, that after passing this house there was 20 feet of entirely clear and unobstructed vision, and that for the remaining distance there was a garden, containing some small shade trees, rose bushes, and a patch of butter beans, the height of none of which is given by any witness. These apparently interfered but little, if any, with the opportunity for seeing objects approaching upon the railroad tracks. The witness Richardson testified that he lived almost opposite the butter bean patch, but he was apparently unaware of the existence of the patch at the time of the accident, for he says:

"Like any other garden in town, I never had been interested in that particular garden; but after we were down there, looking at that range of vision, I wondered why we didn't see the train."

And the witness Evans testified, in answer to the question:

"When did you first know there was a butter bean patch there? A. I did not know till Mr. Parsons called my attention to it, after I was able to go around."

In view of this testimony, it is impossible to see how there was any serious physical obstruction between the plaintiff and Richardson and the approaching train.

[1] The plaintiff apparently relies strongly for the negligence of the defendant upon the fact that at the time of the accident there was no flagman, and no warning sign to apprise the plaintiff of possible approaching danger; but "the law does not impose the obligation upon a railroad company to station persons at every crossing of a public road to warn travelers of approaching trains." *Foy v. Railroad Co.*, 47 Md. 85; *Cowen v. Dietrick*, 101 Md. 46, 60 Atl. 282, 4 Ann. Cas. 292. And in this case both the plaintiff and Richardson had lived in Pittsville several years and were thoroughly familiar with this crossing and its immediate surroundings. Both the plaintiff and Richardson testified that they heard no sound of the approaching train, that no whistle was blown or bell rung, and that, though they looked, they saw nothing of the approaching train in time to have stopped the machine.

[2, 3] The case, therefore, falls directly within the principle announced in *Helm's Case*, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215, where the court said:

"By the well-settled law applicable to the class of cases to which this belongs, it is not enough for the plaintiff to prove the negligence of the defendant and the injury which followed; but he is bound also to establish by satisfactory proof, before he can recover, that he was himself free from negligence, and exercised ordinary care to avoid the consequences of the defendant's negligence. The right to recover depends upon two distinct propositions of fact: First, the negligence of the defendant; and, second, the exercise of due and ordinary care by the plaintiff, and if he fails to prove negligence on the part of the defendant, or if it appears from his own evidence that he was guilty of negligence directly contributing to the injury, he cannot recover."

And in *Md. Elec. Ry. v. Beasley*, 117 Md. 270, 83 Atl. 157, Judge Pearce said:

"It has been repeatedly held in this state that when one who can see and hear says he looked and listened, but did not see or hear an object, which if he had really looked and listened he must have seen or heard, such testimony is unworthy of consideration. *B. & O. v. Roming*, 96 Md. 80, 53 Atl. 672; *Phillips v. W. & R. Ry. Co.*, 104 Md. 458, 85 Atl. 422, 10 Ann. Cas. 334. And this is now declared in 1 *Elliot* on Evidence, § 127, to be the general rule."

See, also, *N. C. Ry. Co. v. Medairy*, 86 Md. 168, 37 Atl. 796; *N. C. Ry. Co. v. McMahon*, 97 Md. 487, 55 Atl. 627; *Sullivan v. Smith*,

123 Md. 546, 91 Atl. 456. And the entire subject has been so thoroughly considered in the two recent cases of *Glick v. O. & W. Elec. Ry. Co.*, 124 Md. 308, 92 Atl. 778, and *Cullen v. N. Y. P. & N. R. R. Co.*, 127 Md. 651, 96 Atl. 809; that it does not seem necessary to further prolong this opinion, either by a re-statement of familiar rules or more elaborate citation of authorities.

Judgment affirmed, with costs.

(123 Md. 635)

VANNORT v. COMMISSIONERS OF CHESTERTOWN. (No. 1.)

(Court of Appeals of Maryland. April 26, 1918.)

1. MUNICIPAL CORPORATIONS — §818(1) — PERSONAL INJURY — SIDEWALKS — NEGLIGENCE—EVIDENCE.

In action by one injured through defect in sidewalk, evidence held sufficient to warrant a finding that municipality was negligent.

2. MUNICIPAL CORPORATIONS — §768(3)—DEFECTS IN SIDEWALK—LIABILITY.

Where bricks in sidewalk were torn up, and a depression two inches deep was left for several weeks, and the municipality knew, or by the exercise of ordinary care should have known, of the defect, such municipality was liable to one injured by reason of the depression.

3. MUNICIPAL CORPORATIONS — §821(24) — DEFECTS IN SIDEWALK—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

One using a sidewalk at night, when street lights were out, with knowledge that two weeks before the bricks had been torn up in the walk, leaving a depression two inches deep, was not guilty of contributory negligence as a matter of law in not carrying a lantern.

4. NEGLIGENCE — §136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question is not whether the court, if it was sitting as a jury, would find a plaintiff guilty of contributory negligence, but whether it can properly say that the evidence so conclusively shows such negligence that under the law plaintiff was not entitled to recover.

5. MUNICIPAL CORPORATIONS — §821(26) — INJURIES ON SIDEWALK — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action by person injured on sidewalk, whether plaintiff was guilty of contributory negligence in not using another street or crossing to the opposite side of the street held for the jury.

6. MUNICIPAL CORPORATIONS — §817(1)—INJURIES ON SIDEWALK—NOTICE OF DEFECT.

In action for injuries on sidewalk, caused by removal of bricks, plaintiff must show that the municipality had notice, actual or constructive, of the defect in the walk.

7. NEGLIGENCE — §122(4) — CONTRIBUTORY NEGLIGENCE—PROOF.

It is not necessary for defendant to offer evidence of contributory negligence, for, if plaintiff's evidence discloses it, defendant can rely on it before the jury, or to take case from the jury.

Appeal from Circuit Court, Queen Anne's County; Albert Constable, W. H. Adkins, and Philemon B. Hopper, Judges.

Action by William J. Vannort against the Commissioners of Chestertown, a body corporate. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded. Argued before BOYD, C. J., and BRISCOE, URNER, and STOCKBRIDGE, JJ.

S. Scott Beck and William W. Beck, both of Chestertown (Thomas J. Keating, of Centerville, on the brief), for appellant. John D. Urie, of Chestertown, for appellee.

BOYD, C. J. This is a suit to recover damages for injuries sustained by the appellant (plaintiff) by reason of the alleged negligence on the part of the defendant (appellee) in permitting a sidewalk in Chestertown to be out of repair and in an unsafe condition. The court rejected four prayers offered by the plaintiff and granted the defendant's first prayer, which instructed the jury that:

"There is no evidence in this case legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant."

This is an appeal from a judgment entered on a verdict rendered in accordance with that instruction, and the only exception taken was to the granting of that prayer, and to the rejection of the plaintiff's prayers.

The plaintiff was 81 years of age at the time of the accident. About 7:30 o'clock on the evening of December 13, 1916, he was going from his home in Chestertown to the post office, and stepped in a hole in the sidewalk on Queen street, which caused him to fall, resulting in the injuries complained of. The pavement had been dug up for the purpose of laying a pipe to a property abutting on the sidewalk, and the earth had been put back in the place excavated, but the bricks had not been relaid, and the ground had apparently sunk. The plaintiff claimed that it had been in the condition complained of for several weeks; the witnesses differing as to the precise time, but most of them saying three or four weeks. In bad weather it became muddy, and some one had placed a few bricks in it for pedestrians to step on. The excavation was made through the entire width of the sidewalk, was from 2½ to 3 feet wide, and was several inches deep near the bricks, getting somewhat deeper towards the center. Several witnesses testified that it was a dangerous place. A bricklayer, who was employed by the contractor to replace the bricks after the pipe had been laid and the hole filled, gave as his reason for not having done so that the winter weather had interfered. He said that he measured the space the following spring, and the depth at the deepest point was about 2 inches; but he did not see it during the winter, and there was evidence that it had been filled up after the accident to the plaintiff. It had snowed some the day of the accident, and it was a stormy, dark night. The electric lights on that street were not burning, and there was no light, except such as came from the houses. The plaintiff testified that:

"This opening was covered with snow. It was soft and mushy. I trod on it, and when I found myself, I was thrown on my face on the pavement, partly unconscious."

In another place he said that he supposed his foot slipped and he fell. He laid on the

pavement some time, and to use his language, "I scrambled up and steadied myself and walked to the doctor."

[1, 2] We will first consider the defendant's prayer. It does not in terms instruct the jury that the plaintiff was not entitled to recover by reason of his contributory negligence, but that is what was relied on at the argument. It could not have been granted on the ground that there was no legally sufficient evidence of negligence on the part of the defendant, for the defect was such that, if the defendant knew, or by the exercise of ordinary care could have known, of it in time to have remedied it before the accident, the municipality was liable (*Keen v. Havre de Grace*, 93 Md. 34, 48 Atl. 444), unless the plaintiff was guilty of contributory negligence. The appellee contends that the admission by the plaintiff when on the stand that he had known for two or three weeks that the hole was there, and that he stopped using that side of the street a week or ten days before the accident because he thought it was dangerous, when taken in connection with the age and physical condition of the plaintiff, the character of the night, and the fact that the evidence shows that he could easily have avoided the place where the injury occurred, either by taking another route or crossing over to the opposite side of Queen street, was sufficient to preclude a recovery, on the ground of contributory negligence. But while he was an old man, and had received a wound during the Civil War, and was injured in a collision between an automobile and a vehicle in which he was riding, his testimony shows that his sight was reasonably good before the accident, and he was apparently quite active for one of his age. He lived on the corner of Maple and Water streets. In going to the post office, he could either go a square on Water street to High street, and then on High (crossing Queen street) to the post office (which was on High street), or he could go a square on Maple to Queen, and then a square on Queen to High, and from there to the post office. He could have either crossed over to the north side of Queen, or could go on the south side from Maple to High, which he started to do. Upon being asked why he did not either cross to the north side of Queen street or use the other route on Water to High, etc., he testified that he supposed that the commissioners had by that time done their duty and repaired the sidewalk. This appears in his cross-examination:

"Q. Why, with this dark, stormy night, should you go on the only pavement that you say was dangerous that night? A. I didn't say it was dangerous that night. I say this: That I was under the impression that with three town commissioners sworn to do their duty that place was filled up. That was my belief, that that hole was filled up, and it was not dangerous then. Q. Why did you pick out a dark night, when you couldn't see, to find that out? A. I didn't pick it out; going up there might be a force of habit. Q. You got in the habit of

going up that street? A. Sometimes I did. Q. A little while ago you said you quit going up there ten days before? A. I said that side. Q. You went up the north side, instead of the south side? A. Yes, sir. Q. This dark, stormy night, with no lights, you started up a street where you knew there was a dangerous spot a week or ten days before. A. Yes, sir. Q. Why did you do that? A. I was under the impression the commissioners had done their duty and had filled that hole up."

[3] It was suggested, rather than argued, that he should have taken a lantern, as the street lights were out, so he could see whether the way was safe; but the evidence shows that Queen street, with one exception, was the most frequented street in the town, and it could hardly be contended that it could be held as a matter of law to have been contributory negligence not to have taken a lantern at half past 7 o'clock in the evening to go over those two squares and part of another to the post office of a town of the size of Chestertown. The case of Commissioners of Allegany County v. Broadwaters, 69 Md. 533, 16 Atl. 223, would seem to be a sufficient answer to that contention. On pages 535 and 536 of 69 Md., on page 224 of 16 Atl., it is said:

"The second prayer of the defendants was also properly refused. It announces, as a legal principle controlling the case, that the plaintiff could not recover in the action if, knowing the condition of the road, he failed to carry a light. It has been decided in a number of cases that neither the failure to carry a light on a dark night by one acquainted with the road nor a knowledge of its defective condition is conclusive evidence of contributory negligence."

Nor could it be said that because there was another route he should have taken that, and, not having done so, cannot recover. In County Commissioners v. Gibson, 36 Md. 229, the defendant asked the court to instruct the jury that if they found:

"That the alleged bad road, on which the plaintiff's wagon was broken, could have been avoided by using another road leading to said wharf, which was in good condition and but a short distance further, and had been used by the public for upwards of 20 years, then the plaintiff did not use due care and diligence and is not entitled to recover."

The court first said that the prayer was defective in not submitting to the jury to find knowledge on the part of the plaintiff that the one road was dangerous and the other safe, but added:

"Apart from this the prayer is radically wrong. It is no excuse for the defendants, if damage was sustained in the manner set out in the prayer of the plaintiff, to say that another road could have been traveled without accident."

In Charles County v. Mandanyohl, 93 Md. 150, 48 Atl. 1058, the court said:

"The road upon which the plaintiff was traveling was not impassable and not in such condition that accident must necessarily result from an attempt to use it. The plaintiff had a right to use it and was justified in so doing. All that the law exacted of him was that he should use it with due care; and if the jury found that he was so using it, and that he did not by his own negligence directly contribute to the happening of the accident that produced his injury while

so using it, then, in the language of this court in the case of County Com'rs of Calvert Co. v. Gibson, 36 Md. 229, 'it is no excuse for the defendants * * * to say that another road could have been traveled without accident.'"

As to the knowledge of the plaintiff of the defect in the highway, the case of County Commissioners of Prince George's County v. Burgess, 61 Md. 29, 48 Am. Rep. 88, is applicable. It was there sought to shift the burden as to contributory negligence on the plaintiff because he had knowledge of a defect in the bridge. The court declined to adopt the defendant's contention, and, after referring to a number of cases, said:

"The extent to which the road or bridge is out of repair is always a material question, and upon that depends the effect of a plaintiff's knowledge upon his right to recover. If the defect was so extensive as to make any attempt to cross reckless, and the plaintiff so knew, and still endeavored to cross, we have said already that in such state of proof the case should be withdrawn from the jury; but ordinarily it would be a question for the jury under instructions respecting their duty if they found a particular state of facts. In this case the knowledge of the plaintiff was some evidence of negligence proper to go to the jury, to be considered by them in conjunction with the condition of the bridge of which he had knowledge, and to be found a bar only in case they found the bridge from the proof to be wholly unfit for use, and that he knew its true condition. His knowledge was not necessarily conclusive against his right to recover unless the defect was such that no reasonably prudent man would have ventured an attempt to cross."

[4, 5] The question is not whether the court, if it was sitting as a jury, would find the plaintiff guilty of contributory negligence, but whether it can properly say that the evidence so conclusively shows such negligence that under the law he was not entitled to recover. It is not always easy to draw the line between such cases, but we are of the opinion that this case as presented by the record should have been submitted to the jury, and hence the court erred in granting the defendant's prayer. In addition to the authorities we have cited, the testimony of the plaintiff quoted above as to why he adopted the route he did was for the consideration of the jury. Such a defect in a sidewalk on a street used as this is might reasonably be presumed to be repaired in a week or ten days, for even if the brick could not be relaid, on account of the weather, a few cinders could be used, as was done after the accident.

[6] Of course, when the court granted the prayer of the defendant, it followed that those of the plaintiff would be rejected. As the case will be remanded for a new trial, it is proper to briefly refer to them. His first and second prayers were defective, in not submitting to the jury the question of notice, actual or constructive, to the defendant. Keen v. Havre de Grace, supra, Baltimore City v. Walker, 98 Md. 637, 57 Atl. 4 (which distinguishes that case from Keen's Case), Annapolis v. Stallings, 125 Md. 343, 93 Atl. 974, and Commissioners of Delmar v. Venables, 125

Md. 471, 94 Atl. 89, are amongst the many in this state on the subject.

[7] In view of our conclusion as to the defendant's prayer, we see no objection to the theory of the third prayer of the plaintiff, although the form of it might be changed to prevent misleading the jury. It is not necessary for the defendant to offer evidence of contributory negligence, for, if the plaintiff's evidence discloses it, the defendant can rely on it before the jury, and, of course, can do so in order to take the case from the jury, when the evidence justifies that action. The plaintiff's fourth prayer is practically the same as the one approved in *Annapolis v. Stallings*, supra, and would doubtless have been granted if the case had been submitted to the jury. It follows from what we have said that the judgment must be reversed.

Judgment reversed, and new trial awarded; the appellee to pay the costs.

(133 Md. 19)

GUYER v. SNYDER et al. (No. 16.)

(Court of Appeals of Maryland.
April 26, 1918.)

1. TRIAL. ¶191(4) — INSTRUCTIONS — ASSUMPTION OF FACTS.

In a claimant's suit, a prayer to rule as a matter of law that defendants had offered no evidence legally sufficient to show that the property levied on by the sheriff was the property of defendant, and therefore verdict must be for plaintiff, was properly refused, as assuming the fact of ownership.

2. EXECUTION. ¶194(1) — CLAIMANT'S SUIT — BURDEN OF PROOF.

In a claimant's suit, after a levy by a sheriff, the claimant has the burden of establishing his claim of ownership of the property.

3. EXECUTION. ¶197 — CLAIMANT'S SUIT — INSTRUCTIONS.

In claimant's suit, prayer to rule that the mere possession of the property levied upon was no evidence of title was properly refused; such possession being at least sufficient evidence of title to cast on plaintiff the burden of showing a superior right.

4. TRIAL. ¶86 — RECEPTION OF EVIDENCE — REOPENING CAUSE.

In a claimant's suit, where plaintiff had omitted to prove the judgment, it was within the discretion of the court to reopen the case and permit the introduction of such testimony.

5. APPEAL AND ERROR. ¶970(4) — DISCRETION OF COURT — REOPENING CAUSE FOR FURTHER EVIDENCE.

Discretion of court in reopening cause for further evidence will not be reviewed on appeal.

6. APPEAL AND ERROR. ¶1050(1) — HARMLESS ERROR.

A party who could not have been prejudiced by the admission of testimony could not complain of its admission.

Appeal from Circuit Court, Frederick County; Glenn H. Worthington, Judge.

"To be officially reported."

Claimant's suit to property levied on by writs of fieri facias by Albert S. Guyer against J. O. Snyder and others, as administrators of Daniel or David Long, deceased, William C. Roderick as sheriff and others.

Judgment on verdict for defendants, and claimant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

John L. G. Lee, of Baltimore (Albert S. Brown and Arthur D. Willard, both of Frederick, on the brief), for appellant. Beno S. Harp, of Frederick, for appellees.

BRISCOE, J. This is a claimant's suit, asserting title to certain personal property which had been seized and levied upon by the sheriff of Frederick county under and by virtue of ten writs of fieri facias issued out of the circuit court for Frederick county, at the suit of the plaintiffs in the judgment cases, against the goods and chattels, rights and credits, of Charles H. Goetz and Katie A. Goetz, the defendants in the cases, and two of the appellees, on the record, now before us. The property taken in execution consists of personal property and is appraised at the sum of \$1,354. The claimant's petition is in the usual form, and asserts that the property levied upon is the property of the claimant, Albert S. Guyer, and was not the property of the defendant Goetz. The case was tried before a jury, in the circuit court for Frederick county, and from a judgment on a verdict in favor of the defendants, the claimant has appealed.

At the trial of the case, the plaintiff claimant reserved certain exceptions to the rulings of the court upon the prayers and to the admissibility of certain evidence which was permitted to be introduced after the conclusion of the evidence on both sides, but before the case was submitted to the jury, and these exceptions form the basis of the appeal.

The main contention upon the part of the appellant is that the court below committed an error in refusing to grant the plaintiff's first and second prayers, and for these reasons it is urged the judgment should be reversed. The plaintiff's first prayer asked the court to rule, as a matter of law, that the defendants in the case had offered no evidence legally sufficient to show that the property levied on by the sheriff belonged to and was the property of the defendant Charles H. Goetz, and therefore their verdict must be for the plaintiff for the property claimed. By the second prayer, the court was asked to instruct the jury that under the pleadings and evidence in the case the mere possession of the property levied upon by the plaintiff was no evidence of title to the property in the said Charles H. Goetz, at any time. There was no error in the refusal of the court to grant either of these prayers.

[1] The first prayer was clearly erroneous because it assumed the fact that the property levied on by the sheriff belonged to and

was the property of the defendant, instead of leaving to the jury to find whether there was sufficient proof, in support of the claimant's contention, as to this fact.

[2] The burden of proof clearly rested upon the claimant to establish his claim and ownership of the property, and the court could not take away from the jury the finding of this fact. In *Peterson v. Ellicott*, 9 Md. 52, it is said there is no principle better established than that which denies to the court the right of assuming any fact, in aid of a prayer when the onus of proving such fact rests upon the party asking the instruction, no matter how strong and convincing his proof on the subject may be. And to the same effect are the cases of *McCooker v. Banks*, 84 Md. 292, 35 Atl. 985; *Consolidated Ry. Co. v. O'Dea*, 91 Md. 506, 46 Atl. 1000; *Calvert Bank v. Katz*, 102 Md. 58, 61 Atl. 411; *Lemp Brewing Co. v. Mantz*, 120 Md. 188, 87 Atl. 814.

[3] The second prayer was also properly refused. As offered, it asked the court to say to the jury that the mere possession of the property levied upon by the plaintiff was no evidence of title to the property in the defendant Goetz at any time. While the possession of the property by the defendant at the time it was levied upon by the sheriff was not conclusive evidence of ownership, it was at least, as said by this court in *Lemp Brewing Co. v. Mantz*, 120 Md. 184, 87 Atl. 814, some evidence of title, and sufficient to cast upon the plaintiff the burden of showing a superior right. In *Greenleaf on Evidence*, 84, it is said, as men generally own the personal property they possess, proof of possession is presumptive proof of ownership. *Cole v. Berry*, 42 N. J. Law, 815, 36 Am. Rep. 511; *Miller & Sons Piano Co. v. Parker*, 155 Pa. 208, 26 Atl. 308, 35 Am. St. Rep. 873.

The second, third, and fourth exceptions bring up for review the rulings of the court in reopening the case for further testimony after the evidence on both sides had been closed and the prayers submitted, and in submission of proof of the judgments upon which the executions had been issued. The testimony that was offered and introduced, it will be seen, was clearly admissible, and was necessary for a proper consideration of the case.

[4, 5] The plaintiff had omitted to prove the judgments in the course of the trial, and it was entirely within the discretion of the court to grant the application and to permit the additional testimony to be introduced. In 2 *Poe's Pleading and Practice*, vol. 2, it is said that cases may arise when the purposes of justice may seem to require that the application ought not to be denied, and accordingly it is not a reversible error to permit the case to be reopened for such

purpose. The matter rests in the discretion of the court, and from its action, granting or rejecting the application, no appeal will lie. *State v. Duvall*, 83 Md. 123, 34 Atl. 831; *Dailey v. Grimes*, 27 Md. 446.

[6] The nature and character of the evidence, set out in the exceptions and which was permitted to be introduced, could not have prejudiced the claimant's case, and he was not thereby injured by its admission.

Without stopping to review the testimony or stating it in detail, it is sufficient, to say the case was one that presented a state of facts for the consideration of the jury, and not for the court to decide or determine, as a matter of law.

Finding no reversible error, in the rulings of the court, the judgment will be affirmed.

Judgment affirmed, with costs.

(123 Md. 605)

STATE v. WINGERT et al.

WINGERT et al. v. WINGERT et al.

(Nos. 55, 56.)

(Court of Appeals of Maryland. April 11, 1918.)

1. TRUSTS \Leftrightarrow 86—RESULTING TRUSTS—EXCEPTION.

When price of land is paid by one person, and title is taken in name of another, there is presumption of fact that a resulting trust in favor of first arises, except when person purchases land and pays the consideration with his own money, but causes title to be placed in name of one for whom he is under a natural or moral obligation to provide.

2. TRUSTS \Leftrightarrow 62—RESULTING TRUSTS—INTENTION.

In all species of resulting trust, intention is an essential element.

3. TRUSTS \Leftrightarrow 89(1)—RESULTING TRUST—PURCHASES BY CHILDREN.

Evidence held to show that purchases of land by decedent's brothers and sisters were paid for by them, not with intention that they should be considered as gifts to the mother, in whose name title was placed, but with intention the equitable title should be in them, so that the mother held on resulting trust.

4. TENANCY IN COMMON \Leftrightarrow 29(2)—IMPROVEMENTS BY HEIRS.

If two of seven children erected houses and improvements on their father's land after his death in possession of fact that their brother owned as great an interest as either of them, improvements would inure to benefit of all the children.

5. STATES \Leftrightarrow 191(1)—SUIT TO ENJOIN COLLECTION—STATE AS PARTY.

Since Acts 1820, c. 210, repealing Acts 1788, c. 53, the state, without its consent, by reason of its prerogative as a sovereign, and on grounds of public policy, cannot be made party to suit, as suit by heirs to enjoin administrators from collecting and paying over to register of wills for state collateral inheritance tax due.

Appeals from Circuit Court, Washington County; M. L. Keedy, Judge.

"To be officially reported."

Proceedings to fix and ascertain the collateral inheritance tax on the real estate of

P. Hager Wingert, deceased. From decree passed on bill filed to restrain the administrators, Henry F. Wingert and others, from enforcing the collection of the tax, also enjoining the State, the State and heirs at law, Martha A. Wingert and others, appeal. Affirmed in part, reversed in part, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Ogle Marbury, Asst. Atty. Gen. (Albert C. Ritchie, Atty. Gen., and Omer T. Kaylor, State's Atty. for Washington County, of Hagerstown, on the brief), for the State. Harvey R. Spessard, of Hagerstown (Miller Wingert of Hagerstown, on the brief), for Martha A. Wingert and others.

CONSTABLE, J. The property about which these cross-appeals are concerned has been before this court on four former appeals, this being the fifth. The former cases are reported in 125 Md. 536, 94 Atl. 166, 127 Md. 80, 95 Atl. 1055, 129 Md. 28, 98 Atl. 224 and the last to be reported in 132 Md. —, 103 Atl. 437. The present appeals were taken from a decree passed upon a bill filed to restrain the administrators of P. Hager Wingert from enforcing the collection of collateral inheritance tax on certain real property mentioned in the bill in paragraphs 4 and 5 thereof.

The court below ordered that the administrators aforesaid and the state of Maryland show cause on or before a certain day why the injunction should not be issued, and pending the determination of the relief as prayed issued a preliminary injunction restraining the administrators from collecting or attempting to collect the tax. On the hearing the court decreed that as to the property described in the fourth paragraph the preliminary injunction be made perpetual upon the administrators and the state, but as to the property described in paragraph 5 decreed that the preliminary injunction be dissolved. An appeal was taken by the state from that part of the decree perpetually enjoining the state and the administrators from collecting the tax on the property mentioned in paragraph 4, and the heirs at law, excepting the administrators, appealed from the portion refusing the injunction as to the property mentioned in paragraph 5 of the bill.

The bill alleged that the administrators were attempting to collect collateral inheritance tax on certain property of which it was claimed that P. Hager Wingert died seised and possessed, intestate, unmarried, and without issue, leaving as his heirs at law six sisters and brothers. The property mentioned in the fourth paragraph of the bill, upon which it was claimed by the complainants that no tax was due or collectible, was property for which the record title stood in the name of Eliza J. Wingert, the mother of

P. Hager Wingert, and who had died intestate, leaving seven children, including P. Hager Wingert, surviving her as her only heirs at law, and to whom the property descended in equal shares if owned by her. The property mentioned in the fifth paragraph of the bill was property in which it was alleged there was no record title in P. Hager Wingert, nor in the name of any of the antecedents of P. Hager Wingert, through whom he could have inherited, nor any other title which would subject the property to the payment of the collateral inheritance tax.

The only question presented as to the properties in the fourth paragraph of the bill are whether Eliza J. Wingert at the time of her death absolutely owned the properties, or, although the legal title stood in her name, as a fact did she hold the same as trustee for her six children to the exclusion of P. Hager Wingert. If she owned the properties absolutely, or held them for the benefit of all her children, including P. Hager, then, of course, at her death intestate P. Hager was entitled to a one-seventh interest, and upon his death intestate, unmarried, and without issue, and seised and possessed of said interest in the properties, the collateral inheritance tax would be payable by his heirs at law.

It was upon the theory that Mrs. Wingert held the properties as trustee for the benefit of six of her children, not including P. Hager, and that he held no interest whatever in them, that the bill was filed.

[1] The real question then is: Did Mrs. Wingert hold the legal title to the properties with a resulting trust for the benefit of six of her children? Very recently has the question of what is essential to effect such a trust been so carefully and so exhaustively considered by this court, where, in the opinion by Judge Burke in *Dixon v. Dixon*, 123 Md. 45, 90 Atl. 846, Ann. Cas. 1915D, 616, practically all of the decisions of this court were reviewed, together with many other authorities, that we deem it idle to review them further than to state the conclusion as to the rules of law therein reached by this court:

"The general rule is well settled that, when the purchase price is paid by one person and the title is taken in the name of another, a resulting trust arises in favor of the person paying the purchase money, and the holder of the legal title becomes a trustee for him. There are, however, exceptions to this general rule: Thus, where a person purchases land and pays the consideration with his own money, but causes the title to be placed in the name of one to whom the purchaser is under a natural or moral obligation to provide, such as in the case of parent and child, or husband and wife, no presumption of a resulting trust will arise, but it will be regarded *prima facie* as a gift or an advancement for the benefit of the nominal purchaser. In either case the presumption is one of fact, and not of law, and the real intention of the parties to the transaction may be shown, and the court will give it effect if it does not contravene some rule of property or the policy of the law. If a husband purchases real estate in his own name with money furnished by his wife from her separate estate, a resulting trust in her favor arises

by implication of law. The authorities are practically unanimous in support of these propositions."

P. Hager Wingert died in July, 1913. His father, Philip H. Wingert, had died in 1898. After the death of the father the children, other than P. Hager, began to purchase properties in the city of Hagerstown and farms in Washington county, until they had acquired six properties in all. P. Hager Wingert for a period of 30 years prior to and until his death had been a helpless invalid, unable to attend to business of any kind whatever and without knowledge of the purchases. Eliza J. Wingert was also a great invalid, and knew nothing of the purchases nor that the properties had been placed by the actual purchasers in her name for matter of convenience. The whole scheme of placing the properties in the name of the mother seems to have originated from the fact that one of the sons wished to buy a property adjoining a property which belonged to the estate of the father, Philip H. Wingert. There was a right of way over a portion of an alley between the properties, attached to the property wished to be acquired. One of the sons was about to take title to it in his own name when it was suggested that, if the titles were unified, the easement would be gotten rid of, and for that reason the title was taken in the name of Eliza J. Wingert. From this beginning it followed that all the titles were similarly placed.

It appeared from the testimony clearly that not only did Mrs. Wingert not know that the titles had been so placed, but that she received no benefits from the properties by way of rents, etc., and in fact claimed none. The purchase money for the same, the testimony plainly shows—the canceled checks for the purchase money being produced—was furnished by the children, other than P. Hager Wingert. It is true that some of the checks were drawn upon the bank account standing in the name of Philip H. Wingert's heirs, and although it is admitted that P. Hager Wingert had an interest in this fund, yet it is proven that any money that was his under these payments was returned to his estate through an agreement made with the state's attorney for Washington county, and subjected to the collateral inheritance tax. But, as we have said, he knew nothing of the purchases, and, of course, could not have known of the placing of the titles in the name of his mother.

[2] In all species of resulting trusts, intention is an essential element. *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4.

[3] Without discussing in detail the purchase of each separate property, we are satisfied that the proof is clear and convincing that these purchases were made and paid for by the six sons and daughters, not with any intention upon their part that they should be

considered as advancements or gifts, but with the intention that the equitable title should be in them.

Being of the opinion that P. Hager Wingert had no interest in the properties, it follows that no collateral inheritance tax could be collected from the holders of the Wingert heirs.

[4] In reference to the property mentioned in the fifth paragraph of the bill, we have reached a contrary conclusion. The testimony as to it shows that there is no record title to it in any of the Wingerts, but it does appear that the elder Wingert took possession of and occupied this property by adverse possession for at least 40 years, and that upon his death it descended through this title to his seven sons and daughters, and that up to the present they have continued to so hold it. Prior to the death of the father and afterward two of the sons erected, without his knowledge, houses upon this property, paying for a portion of the materials out of their father's income. There can be no question that, if these sons erected these houses and improvements in full possession of the facts that P. Hager Wingert owned as great an interest as either of them in the land, the improvements would inure to the benefits of all the owners of the fee. Therefore the one-seventh interest P. Hager Wingert had in this property would descend to his heirs at law, and they should pay the collateral inheritance tax on the appraised one-seventh value of the property.

[5] By section 132 of article 81 of the Code it is made the duty of every administrator or executor to collect and pay over to the register of wills, for the use of the state, the collateral inheritance tax due. The bill in this case evidently proceeded upon this theory, for the only prayer of the bill was to enjoin the administrators from collecting the tax. They did, however, join the state as a party defendant. The lower court in granting the preliminary injunction only enjoined the administrators, but did require the state to show cause why the injunction should not be issued. After the hearing, the court, in its decree, did enjoin both the administrators and the state from collecting the tax on the properties described in paragraph 4 of the bill. Therefore, although, as we have said above in this opinion, the tax was not payable on the properties, nevertheless it was not proper to enjoin the state nor to make it a party defendant.

The state, without its consent, cannot be made a party to a suit, by reason of its prerogative as a sovereign and on grounds of public policy, since Acts 1820, c. 210, which repealed Acts 1786, c. 53. *State v. B. & Q. R. R. Co.*, 34 Md. 344. The administrators will be protected from any action taken against them by the state in the future for failure to collect the tax on properties in paragraph 4 by rea-

son of the injunction issued against them, but the injunction against the state must be revoked.

Decree affirmed in part, and reversed in part, and cause remanded for further proceedings; the costs to be paid out of the estate of P. Hager Wingert.

(129 Md. 524)

AMERICAN COLONIZATION SOC. v. LATROBE et al. (two cases).

STATE v. AMERICAN COLONIZATION SOC. et al. (two cases).

(Nos. 40-43.)

(Court of Appeals of Maryland. April 3, 1918.)

1. ESCHEAT \Leftrightarrow 4—PROPERTY SUBJECT TO ESCHEAT.

Where after death of grantor trust is declared void as perpetuity, the trustee having legal title and being competent to hold land, and the grantor having died leaving a will and heirs, the land does not escheat to the state.

2. APPEAL AND ERROR \Leftrightarrow 150(1)—RIGHT TO APPEAL—INTEREST IN SUBJECT-MATTER.

Where it has been held that land did not escheat to state, an appeal by the state complaining of the distribution account of the rent and profits from the land will be dismissed; the state having no interest in the land.

3. TRUSTS \Leftrightarrow 135—CONSTRUCTION—ESTATE OF TRUSTEE.

Where land is conveyed to trustees who were directed to pay the net rent to the beneficiary, and who, as trustees, were required to collect rent, attend to taxes, insurance, repairs, and make permanent improvements in connection with care of five or six warehouses, the legal title vested in trustees, and will not be transferred to beneficiary; such having been intention of grantor.

4. TRUSTS \Leftrightarrow 81½—INVALIDITY OF TRUST—ESTATE OF TRUSTEE.

Where a deed is executed to trustees and after death of grantor the trust is declared void, the invalidity of the trust will not affect the legal estate vested in the trustees.

5. TRUSTS \Leftrightarrow 315(3)—COMPENSATION OF TRUSTEES.

Where for a number of years trustees sent beneficiary statement showing charge of 10 per cent. commission, beneficiary by failing to object to such commission and by failing to apply for statement of account in court is estopped from objecting thereto when statement is rendered to court.

6. TRUSTS \Leftrightarrow 227 — ACCOUNTING — COUNSEL FEES.

The allowance by court of \$4,000 counsel fees held no abuse of discretion where services rendered involved two hearings before circuit court and the argument of two appeals before Court of Appeals.

Appeals from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Actions by the American Colonization Society against Ferd. C. Latrobe, Jr., and others, and proceedings by the State of Maryland against the American Colonization Society and others. In former action plaintiff appeals from order sustaining defendants' demurrer and dismissing petition and from order overruling exceptions to items in an

account. In latter action State appeals from order sustaining demurrer to its petition and from order overruling exceptions filed to an account. Appeal from order last mentioned dismissed. Other orders appealed from affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

William G. Johnson, of Washington, D. C., and D. K. Este Flasher, of Baltimore, for American Colonization Soc. Philip B. Perlman and Ogle Marbury, Asst. Attys. Gen. (Albert C. Ritchie, Atty. Gen., on the brief, for the State. Eugene O'Dunne, of Baltimore, for trustees.

STOCKBRIDGE, J. This case has been so recently before this court in two previous appeals that any recital of the facts out of which it arises is unnecessary. All of the essential facts will be found in the very full opinion filed in the case of American Colonization Society v. Robert Soulsby et al., 129 Md. 605, 99 Atl. 944, L. R. A. 1917C, 937, and the second of which appeals, decided less than a year ago will be found in full in the Daily Record of July 21, 1917.

The present record contains four separate and distinct appeals, all of which raise questions of law rather than questions of fact, so that a brief statement will suffice, as these are successively considered.

The appeals numbered respectively 41 and 43 are appeals by the state of Maryland, the one from an order of court sustaining a demurrer to a petition filed on behalf of the state by which it was sought to have the property involved in the case declared escheated to the state, as the result of the decision in this court in the case in 129 Md., and the second on the appeals now to be considered is from the action of the circuit court in overruling the exceptions filed on behalf of the state to the auditor's account, by which a balance of money in the hands of the trustees was audited to be paid to the American Colonization Society. It will tend to simplify the case now before the court to dispose of these two appeals before considering the others.

As appears from the prior history of this litigation, Caroline Donovan executed a deed to certain named trustees of fee simple property in the city of Baltimore for purposes in that deed fully set forth. She also executed a will disposing of the property of which she died seised and possessed. Long after the execution of the deed, and after her death, proceedings were instituted by her heirs to have the deed of trust set aside because by the terms of that deed it was claimed that the instrument violated the rule of perpetuities.

By the opinion of Judge Pattison, speaking for this court, in the case of 129 Md., that

contention was sustained, and the deed set aside, but a recovery of the property was refused to the heirs, because of the uninterrupted adverse possession of the trustees for a period in excess of 20 years. The state of Maryland then intervened, and by its petition sought to have the property in question declared escheated to the state. This petition was demurred to, the demurrer sustained, and petition dismissed, and this presents the question involved in the appeal in No. 41.

A number of cases have been cited by the Assistant Attorney General to support the state's contention, but they are for the most part without any application in the present instance, for the reason that they are based on statutes adopted in the states where those cases have arisen, and the courts were called on to deal with a claimed escheat upon the basis of a proper interpretation of the statute. In this state there is practically no statute which is applicable, the section in article 57 of the Code having to do mainly with a question of limitations, and the provisions contained in article 93 relating only to personal property. But there have been numerous adjudicated cases in this state dealing with the subject of escheat, wherein the subject has been fully considered. These are to be found as early as *Casey v. Inloes*, 1 Gill, 430, 39 Am. Dec. 658, and *Hammend's Lessee v. Inloes*, 4 Md. 133, *Matthews v. Ward*, 10 Gill & J. 443, and as late as the case of the *George's Creek Co. in Liquidation*, 125 Md. 595, 94 Atl. 209.

The general doctrine which has become the accepted rule of law in this state is that laid down in the case of the *Rockhill College v. Jones*, 47 Md. 17, and a careful examination of the cases discloses insurmountable obstacles against any recovery by the state of the property conveyed by Mrs. Donovan to her trustees, for two reasons: In the first place she did not die without heirs; and, in the second place, she did leave a will by which all of the rest and residue of her estate was devised and bequeathed.

The rule of escheat in this state is approximately that of the common law, and is clearly set out in 10 R. C. L. 604, in part as follows:

"In a strict sense escheat at common law is applicable only to that which can be the subject of tenure, for the reason that it represents the reversionary interest or right of the lord to take for want of a tenant. * * * In a trust estate the trustee holds the legal title, and is competent to perform the necessary services; therefore, upon the death of the cestui que trust intestate and without heirs, the trustee takes the absolute title clear of the trust, and this right to take for his own use extends to the heir of the trustee."

[1] This summary is a deduction from the English cases upon the subject, and in its concluding part is not entirely in harmony with the rule as recognized in this state in *Matthews v. Ward*, 10 Gill & J. 443. It therefore follows that under the common law the trustees were competent to receive

and hold the property as against the state, because they could render the service required by the feudal principle of tenure; that Caroline Donovan left heirs and did not die intestate, and therefore the essential requirements for a reversion of the property to the state of Maryland by way of escheat are lacking in this case, and the order appealed from must in this particular be affirmed.

[2] Having reached the conclusion that the property cannot be escheated to the state, it necessarily follows that the state has no present interest therein, and, not having a present interest in the property, it has no standing to object to the distribution account disposing of the money now in the hands of the trustees. *Wagner v. Freeny*, 123 Md. 24, 90 Atl. 774, and cases there cited. The appeal in No. 43 therefore should be dismissed.

The appeal numbered 40 is the one which presents the greatest difficulty. This is the appeal of the American Colonization Society against the trustees from the action of the court in sustaining a demurrer of the trustees to a petition of the appellant, and dismissing that petition.

The attitude of the Colonization Society at this point is somewhat anomalous. For a long series of years the American Colonization Society had made no claim to any interest in the property involved in this litigation, other than that of a beneficial use, as the cestui que trust, under the terms of the deed of Mrs. Donovan. As such it had received quarterly remittances from the trustees named in Mrs. Donovan's deed, and their successors, without any question of any character, so far as is disclosed by the records in the several appeals, which have come to this court.

When the provisions of that deed were declared void, the attitude of the Colonization Society immediately changed, and the claim now put forth in its behalf is that the trustees named by Mrs. Donovan were its agents; that the property belonged to it, or at any rate that there was only a bare legal title in the trustee, which the society at its will and pleasure is entitled to have transferred to it, working a merger of the legal and beneficial title; that the trust upon which the property was held involved no active duties to be performed on the part of the trustees, and for that reason as well the trustees should be required to transfer to the society the legal title held by them. As a statement of an abstract legal principle, without reference to the facts of a particular case, there is ample law to support most of the argument advanced on behalf of the Colonization Society.

The difficulty arises, however, when an attempt is made to apply these principles to the facts, as they have developed and exist in the present case. In most instances in interpreting a trust courts endeavor to seek out the intent of the creator of the trust, and, when it is ascertained, to give effect to

it as far as is compatible with the language employed.

There can, of course, be no pretense that it was the purpose of Mrs. Donovan to transfer the entire corpus of the estate conveyed by her to the American Colonization Society. If that had been her intent, it would have been a far simpler matter to accomplish than to endeavor to create a trust of the character which she did. So far as any intent upon her part was concerned, it is manifest that what she had in mind was the creation of a legal estate, and a beneficial estate in the same property, but without their coalescing. But Mrs. Donovan's purpose is not now the controlling element involved in this proceeding. This court has already declared her deed to be void because transgressing a fundamental rule of the policy of this state. From this it follows that the petitioner, the American Colonization Society, can gain no assistance whatever from the fact that it was named as beneficiary in the Donovan deed, nor any right accrue to it, legal or equitable, because of that deed, and therefore the present contention of the society, carried to its logical result, would exclude the American Colonization Society from any benefit whatever because of the deed of Mrs. Donovan to Latrobe and Harvey as trustees.

The deed did convey to them a legal estate. The vice of the deed lay rather in the beneficial interest sought to be created under it. Messrs. Latrobe and Harvey were not trustees by virtue of any appointment of the American Colonization Society. If they had been, there would have been more ground for the present contention of that society. The trustees were not in any proper sense the agents of the society. They derived their appointment, their power with regard to the property, their authority for its management, from Caroline Donovan, not from the society. Hence their possession of the premises was in no manner the possession of the petitioning society. So far as they were accountable, their accountability was to the court or courts exercising equity jurisdiction in the city of Baltimore, an entirely different matter from what would have been the case had they derived their powers from, and been made accountable to, the American Colonization Society.

The cases of *Lee v. O'Donnell*, 95 Md. 538, 52 Atl. 979, and *Potomac Lodge v. Miller*, 118 Md. 417, 84 Atl. 554, relied on by the petitioner, both turned on the intent of the creator of the trust, which as already stated, cannot be given controlling effect in the present case. The first of these two cases leads up, however, to the other contention of the petitioner, that the estate of the trustees is a bare legal title, without active duties to be performed, and that the cestui que trust, or individual or corporation which had received the benefit of the trust, is entitled to a transfer of the legal title.

In the case of *Lee v. O'Donnell* this was

held to be true, for the reason that the sole duty in that case to be performed was the selection of a house, and, when selected, the house was to vest in fee in the children of the testator. The trustee was not instructed to rent the property, or told what use should be made of it.

There is a long line of cases in this state dealing with the question of coalescing of legal and equitable estates, by reason of no active duties to be performed by the trustees. *Warner v. Sprigg*, 62 Md. 14, *Thompson v. Ballard*, 70 Md. 10, 16 Atl. 378, *Brillhart v. Mish*, 99 Md. 447, 58 Atl. 28, *Raffel v. Safe Dep. & Tr. Co.*, 100 Md. 141, 59 Atl. 702, and *In re Hagerstown Trust Co.*, 119 Md. 224, 86 Atl. 982, are but illustrations of them.

[3] The case of *Johnson v. Safe Dep. & Tr. Co.*, 79 Md. 18, 28 Atl. 890, in which the opinion was prepared by the late Chief Judge McSherry, was a case in which under the terms of a will there were created coextensive legal and equitable estates for the benefit of the testator's daughters. By the terms of the will the trustees were authorized to hold the property and pay the rents and profits thereof equally to and for the benefit and use of the daughters. In that case the question of the intent of the testator was largely controlling of the conclusion reached. If now in the present case we could have regard to the intent of Mrs. Donovan, it will be noted that the trustees were directed to pay the net rents. The use of this expression "net rents" would carry with it as a necessary implication that it was the purpose of the grantor that the trustees should continue to hold the legal title of the property, attend to its upkeep, and pay over the income which remained, and that is exactly what the trustees in this case did. The duties performed by them cannot be characterized as nominal merely. They involved the rental of some five or six warehouses, attending to the taxes, insurance, repairs, the installation of an elevator, the rebuilding of a front wall, and other similar duties which were more than mere incidental repairs, and went to the permanent betterment of the property, and was reflected by the increase in the rentals derived by them. In so far as the contention made in the petition now under consideration rests upon the lack of active duties to be performed, it must fail.

[4] It is presented for the consideration of the court that, since the deed of Caroline Donovan has been declared null and void, because offending the rule against perpetuities, the legal estate, as well as the beneficial, must fail. Such a proposition is unsupported by the authorities in this state. *Grove v. Congregation of Disciples of Jesus Christ*, 33 Md. 451; *Gump v. Sibley*, 79 Md. 165, 28 Atl. 977; *Trustees of Zion Church v. Hilken*, 84 Md. 170, 35 Atl. 9; *Regents v. Calvary*

Church, 104 Md. 635, 65 Atl. 398; Dickerson v. Kirk, 105 Md. 638, 66 Atl. 494; Mills v. Zion Chapel, 119 Md. 510, 87 Atl. 257; Novak v. Trustees of Orphans' Home, 123 Md. 161, 90 Atl. 997, Ann. Cas. 1915C, 1067. In each of the cases mentioned a conveyance of certain property had been held void; nevertheless the legal title in the trustees was sustained, for the reason stated in Gump v. Sibley, supra, that:

"The deed, even if void, could not be less than color of title, and the entry under it would constitute adverse possession to the extent of the boundaries contained in it; and a continuance of this possession for 20 years would perfect the title against all persons not under legal disabilities."

In all of these cases the court had to deal with the question of the legal title, and confirmed it as being in the trustees, without reference to the effect on the equitable or beneficial title. Following these cases, therefore it is clear that the title of the trustees to these several lots of ground and improvements is unassailable as against all persons not under legal disability.

It follows from what has been said that the order of the circuit court sustaining the demurrer to the petition of the American Colonization Society, to require a transfer to it of the legal title, and dismissing that petition will be affirmed.

No. 42. This appeal is from the action of the court overruling the exceptions of the Colonization Society to certain items appearing in the auditor's account. The important ones to consider are the objections now made to the allowance to the trustees of commissions at the rate of 10 per cent. on \$85,520.51; to the allowance to the attorneys for the trustees of a fee of \$4,000; and to the amount audited, at the suggestion of the counsel for the trustees, to the American Colonization Society, \$2,074.26. The account to which these objections are made covers a period of 13 years, a fact which must be taken into consideration in passing upon these exceptions.

The appellant relies apparently for its objection to the commissions on the case of Abell v. Brady, 79 Md. 94, 28 Atl. 817. The facts of that case were quite different from those presented in this record. It appeared there that the estate upon which the trustees were to receive commissions was in receipt of an annual income of approximately \$160,000. In this case the commissions asked, and which by the action of the court were allowed, were at about the rate of \$600 per annum during the period covered by the account, or a difference between \$8,000 and \$600 per annum, as commissions to the trustees for the service performed by them. The opinion of Chief Judge Robinson in the Brady Case held, not as a question of law, but as a question of fact, that considering the size of the annual income of the estate, 5 per cent. thereon was a fair commission

to be paid to the two trustees. In so finding he used this language:

"It is a matter largely in the discretion of the court, its reason and judgment, taking into consideration all the facts and circumstances surrounding the trust."

In other cases it has been held that 6 per cent., 8 per cent., and even 10 per cent. was not an unreasonable compensation to trustees for the services performed.

[6] When, how, or by whom a rate of 10 per cent. as commissions to the trustees was first established in this case does not appear, but it is shown that quarterly statements of account have been regularly rendered by the trustees to the American Colonization Society, in which commissions were deducted at the present proposed rate, and no objection has been raised to such allowance by the Colonization Society, or any one representing it, until the statement of the auditor's account herein. The trustees may have been lax in permitting so long a period as 13 years to elapse without a statement of account in the court, but it was within the power of the Colonization Society at any time during that period, by proper application, to have had the trustees render to the court a statement of account. This, however, they did not do, nor even raise an objection to this allowance when it was brought to its attention each quarter, by the accounts furnished by the trustees. It would be most inequitable now to permit it to be heard to object, when by a long continuous course of conduct the trustees had every reason to believe that such an allowance was entirely acceptable to the Colonization Society. No better condition of facts could be presented than is done by this record for the application of the maxim, "*Vigilantibus non dormientibus leges subveniunt*."

It will not do to take the total commissions allowed for a period of 13 years, and then, because they seem large, to say that the charge is an improper one, when the services which have been rendered have extended over the same period of time, and involved permanent betterments to the property, which have been paid out of the income instead of the corpus, with a permanent benefit to the estate and a resultant increase of the annual revenue. During the period covered by the account there has been paid to the American Colonization Society, in the quarterly payments mentioned, \$41,006.89, or, if we add to this the sum now audited to it by the present account, the total payments to that society will be \$43,081.15.

The imputation in the brief of the exceptant of the great disproportion between the amount of the rents collected and the amounts paid over to the society is hardly warranted by the facts of the case. Thus no account is taken of \$15,528.03 paid in taxes and assessed street benefits, or of \$5,200.50 paid for insurance, or of \$1,002.23

paid for water rent, or \$2,273.85 paid for the permanent betterments, which total \$24,004.11; and if there then be added to this sum the amount paid to and audited to the society there has been expended from the \$85,520.51 of collections \$67,085.26, which leaves a difference of \$18,435.25, used in making of current repairs on the several warehouses during a period of 13 years, the payment of commissions and counsel fees to which the estate has been subjected. When all of these elements are taken into consideration, as was pointed out in the case of *Abell v. Brady*, supra, should be done, the allowance for the commissions is not so extravagant that this court can say that the circuit court of Baltimore city abused its discretion in overruling the exceptions taken upon this ground.

The counsel fee, which forms another ground of exception, was of \$4,000. Some comparatively recent cases have dealt directly with allowances of counsel fees under somewhat similar circumstances, and but little need be said beyond referring to them. See *Griffith v. Dale*, 109 Md. 700, 72 Atl. 471, and *Taylor v. Denny*, 118 Md. 124, 84 Atl. 369. In the last of these cases Judge Boyd reviews the adjudicated cases in this state upon the subject with his accustomed thoroughness and acumen, and after quoting at considerable length from the *Griffith v. Dale* Case he says:

"It may be stated as a general proposition that the right of a trustee to employ counsel and pay him out of the trust fund is thoroughly established, when the court can see that it is necessary for the proper administration of the trust for the trustee to have legal advice or the aid of an attorney. Of course, that right includes cases where it is necessary, or proper, for the trustees to be represented in court in the defense of the estate, or some part of it."

Counsel for the society lay special emphasis upon the fact that, when the petition was filed on behalf of the Donovan heirs, they offered the trustees to undertake the conduct of the case and bear all the expenses, and that therefore it was unnecessary for the trustees to be represented by counsel, and at all events it was unnecessary for them to be so represented upon the appeals which were taken to this court. While conceding the value of the services rendered by the counsel to the trustees, the intimation is that the trustees should regard the employment as in the nature of a luxury, to be paid for out of the private purse of the trustees, and not chargeable against the income or corpus of the estate in their hands. It must be borne in mind in considering this exception that the employment of counsel and the taking of an appeal by the trustees had received antecedent authorization by the court in which jurisdiction was being exercised over the fund.

In their petition the heirs of Mrs. Donovan endeavored to entirely break down and destroy the trust which she had attempted to create, to dispossess the trustees, and to se-

cure to themselves the property which had been conveyed by her deed. Under such circumstances it was not only proper but the plain duty of the trustees to avail themselves of apt legal means to sustain the then existing trust. Not to have done so would have been a dereliction of duty upon their part. It was not merely a contest between two parties to settle their rights inter sese, but one which had for its object the annihilation of the trust in toto. Nor at that time was it possible for the trustees to know what might be the attitude of persons claiming to be interested in the property, nor even who might ultimately be held entitled to the property. Such a claim might even extend, as does that of the present petitioner, the American Colonization Society, to the destruction of the trust, and the appropriation, not merely of the income of the estate, but the corpus as well. As to all parties, therefore, the trustees had a clear duty to perform, which could only be performed by the aid of able and experienced counsel.

The case of *Warburton v. Robinson*, 118 Md. 24, 77 Atl. 127, cited by the appellant in this appeal, is hardly in point, as the appeal in that case was dismissed for technical reasons, incident to the delay in the transmission of the record, and the facts disclosed in the record were entirely dissimilar from those appearing in this case.

No more delicate duty is ever presented to a court to perform than the determination of what is a reasonable counsel fee to be allowed. Much necessarily depends upon the circumstances of each particular case. In this case we have the certificates of four members of the bar of recognized ability and high standing as to the proper fee to be allowed. As opposed to this is an attempt to invoke a rule of the Baltimore city court to the effect that, the case having been set for hearing on bill and answer, the allegations of the answer, not being controverted by evidence, are to be taken as true, and for that reason any claim for a fee chargeable against the fund in the hands of the trustees should be disallowed. This objection is entirely technical.

[6] Some of the evidence taken at the hearing was intended to support the appellant's contention that it, through its chosen attorneys, took the lead in the contest. But it is not perceived how any injury will be done to either party by taking the record as it is, and considering both the testimony and the certificate of counsel. The services rendered involved at least two hearings, one of them quite lengthy, before the circuit court, and the argument of two appeals in this court. While the fee allowed seems large, its reasonableness and propriety must depend upon the amount of labor which the conduct of the litigation in which the services were rendered entailed. As compared with the allowances which have been approved in the *Heating Co. v. Whitelock*, 120 Md. 408, 87 Atl. 820, *Title Co. v. Burdette*, 104 Md. 671, 65 Atl. 341, and

the case of *Friedenwald v. Burke*, 123 Md. 511, 91 Atl. 461, the allowance of the fee was not so excessive as to amount to an abuse of the discretion which rests with the trial court in such cases.

The order from which this appeal is taken will accordingly be affirmed.

Objection was made by the counsel for the American Colonization Society to the incorporation into the record in this case of certain papers. There is but one of those papers mentioned in the memorandum which was in fact so incorporated, namely, the colloquy between counsel and the court, which is attached to and preceded the testimony included in the record. It is impossible to accept the view presented by the solicitor for the American Colonization Society. The evident purpose of the colloquy was to clarify and narrow, as closely as possible, the issues to be presented to the court. That was in large measure accomplished, and has been of most material assistance to the court in disposing of the present appeal. The cost of its inclusion will therefore be treated as part of the costs of these cases.

Orders appealed from affirmed in Nos. 40, 41, and 42, and appeal in No. 43 dismissed; the costs to be paid by the trustees out of the income now in their hands.

(79 N. H. 63)

CROWTHER v. WHITE MOUNTAIN FREEZER CO.

(Supreme Court of New Hampshire. Hillsborough. June 29, 1918.)

1. MASTER AND SERVANT ¶286(10)—INJURY TO SERVANT—DEFECTIVE SAWING MACHINE—JURY QUESTION.

In employe's action for negligence, the question of whether sawing machine on which employe worked was defective at time of injury was for jury, where jury had viewed machine in same condition as at time of injury.

2. APPEAL AND ERROR ¶980(1)—REVIEW—VERDICT.

In reviewing sufficiency of evidence to support a verdict for plaintiff, evidence will be construed most favorably for the plaintiff.

3. MASTER AND SERVANT ¶279(5) — INJURY TO SERVANT — DEFECTIVE MACHINE — SUFFICIENCY OF EVIDENCE.

In employe's action for injuries caused by defective sawing machine, evidence held sufficient to support jury finding that machine was defective at time of injury.

4. APPEAL AND ERROR ¶1050(1)—REVIEW—HARMLESS ERROR.

In employe's action for injuries caused by defective sawing machine, on which two saws were used, testimony that one saw ran well and the other badly was harmless, where witnesses could not remember which saw was on machine on day of accident.

Exceptions from Superior Court, Hillsborough County; Marble, Judge.

Action by William Crowther against the White Mountain Freezer Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Case for negligence, brought under the Employers' Liability and Workmen's Compensation Act (Laws 1911, c. 163), to recover damages for injuries received while splitting blocks on a splitting saw in defendant's mill. The defendant had not accepted the provisions of the act. Trial by jury, and verdict for the plaintiff. The jury took a view of the sawing machine on which the plaintiff was injured. The plaintiff's claim is based upon lack of proper instructions and that the sawing machine upon which he worked was defective. The defendant excepted to the submission to the jury of the latter question, and to the portion of the charge relating thereto. The defendant excepted to evidence of the plaintiff referring to the defective condition of the sawing machine.

Doyle & Lucier, of Nashua (A. J. Lucier, of Nashua, orally), for plaintiff. Streeter, Demond, Woodworth & Sulloway, of Concord (Jonathan Piper, of Concord, orally), for defendant.

PLUMMER, J. The defendant's exceptions to the action of the court in submitting to the jury the issue as to whether the sawing machine was defective, and to the charge of the court relating thereto, raise the questions for determination whether there was any evidence upon which the jury could find that the machine was defective, and, if so, did that defect cause or contribute to cause the accident? It is claimed by the plaintiff that the saw arbor of the sawing machine at the time of the accident was so loose in its bearings that the saw did not run true and even, but wobbled to such an extent as to render it defective, and that such defect was instrumental in causing his injury.

The evidence of the officers of the defendant showed that an eighth of an inch play of the saw arbor in its bearings was too much; that with such an amount of play the saw would not go so steady and would be more likely to bind. While they did not admit that the saw wobbled, the character of their testimony was such that it had some tendency to prove that it did. At the view of the machine taken by the jury, it appeared that the saw arbor was so loose that it could be lifted up in its bearings until it rattled up and down. The machine was in the same condition at the time of the accident as it was when the view was taken. The plaintiff testified that he was sawing a block eight inches in length, holding it in a vertical position, and that the accident occurred as follows:

"Q. Well, tell the jury what happened. A. Why, I just pushed the block up to the saw, when there was a jarring sound, and the saw stopped, and then started again, and all I could see was blood. Q. State whether or not the saw did anything to that block that you were holding, except to cut it. A. Why, I have an

idea that it must have twitched it into the saw—must have twitched it around into the saw."

It is doubtful if the jury could find affirmatively on the issues here presented upon the oral evidence in the case, but that supplemented by the evidence furnished at the view might warrant such a finding.

[1] The defendant contends that the jury would not have sufficient knowledge, without expert testimony, to determine that the sawing machine was defective, or that a defect such as claimed would contribute to cause the accident. We do not think this contention is tenable. Sawing machines are not intricate or complicated in their construction or operation, and they are in common use in nearly every community. The jury, composed of intelligent, experienced men taken from the ordinary walks of life, and engaged in various pursuits, would have a general knowledge of the use and operation of sawing machines. The view may have furnished a vital part of the evidence, and apparently did. This court does not know how strong and convincing that evidence was; but the jury were fully informed of its character, and therefore this is peculiarly a case where their judgment and experience should be invoked to determine the issues involved. *Lyman v. Railroad*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; *Whitcher v. Railroad*, 70 N. H. 242, 248, 46 Atl. 740.

[2-4] Construing the evidence most favorably for the plaintiff (*Lyman v. Railroad*, supra) it cannot be said that there was no evidence upon which the jury could find for the plaintiff. Two of the men employed, the defendant's employes who worked on the saw were called by the plaintiff and allowed to testify. Their testimony, in substance, was that there were two saws used upon the sawing machine, one being used while the other was sharpened, that one of them ran well and the other badly and that the one which run badly would bind and wobble. But they could not remember which saw was on the machine on the day of the accident. One of them, however, stated that he sawed a few blocks that day, and that the saw did not bind, and he had no trouble with it then. To this evidence the defendant excepted. The evidence of one of these witnesses was immaterial for any purpose. It was clear that he did not remember which saw was on the machine on the day of the accident, and he made no statement that would warrant any inference as to whether the saw that run well or badly was in use. His evidence was valueless for either party. The testimony of the other witness was immaterial, so far as furnishing any proof that would aid the plaintiff in securing a verdict. On the other hand, it did tend to prove, as claimed by the defendant in its brief, that the saw which run well was on the machine at the time of the accident. It cannot be asserted that this evi-

dence was prejudicial to the defendant, for it furnished some proof to sustain its claim, and none to support that of the plaintiff. This exception does not afford any ground for disturbing the verdict. *Parsons v. Wentworth*, 73 N. H. 122, 59 Atl. 623; *Bunker v. Manchester Real Estate & Mfg. Co.*, 75 N. H. 131, 71 Atl. 866; *Proctor v. Blanchard*, 75 N. H. 186, 72 Atl. 210.

An exception of the defendant bearing upon the rights of the plaintiff, if he were found to be a volunteer at the work he was engaged in at the time of the accident, has not been referred to in the defendant's brief or oral argument, and is not understood to be relied upon.

Exceptions overruled. All concurred.

(79 N. H. 59)

BARRETTE v. CASUALTY CO. OF AMERICA et al.

(Supreme Court of New Hampshire. Hillsborough. June 29, 1918.)

1. INSURANCE §128(1) — PRELIMINARY INSURANCE—"COVER."

Where employer, applying for employers' liability insurance, was advised by insurer's authorized general agent that insurer would "cover" him, he was insured against liability for accidents to his employes for a time at least; for by the term "cover" it was intended that the company would protect the applicant and insure him against liability to his employes for all injuries they might sustain which were caused by the usual and ordinary risks of the business named in the application unless and until the company notified him that it declined to underwrite them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cover.]

2. INSURANCE §148—OPERATION OF POLICY —ESTOPPEL.

Where, after applicant for employers' liability insurance had been advised by insurer that it would "cover" him, the insurer's local agent, in delivering the policy, gave insured to understand that the policy protected him from all liability to employes, and insured did not read the policy at that time, insurer was estopped, when an employe was killed riding on a material hoist, an ordinary risk of insured's business, to set up that the policy in fact excepted risks of such character.

Transferred from Superior Court, Hillsborough County; Allen, Judge.

Bill in equity by Louise Barrette, administratrix, against the Casualty Company of America and another. Decrees in favor of plaintiff and defendant Dubray against the Casualty Company, and the Casualty Company excepted. Transferred from superior court. Exceptions overruled.

Bill in equity. Hearing by the court. Decrees for the plaintiff and for the defendant Dubray. The plaintiff's intestate, who was one of Dubray's employes was killed October 2, 1915, by the fall of a hoist or elevator on which he was riding, and she has recovered a judgment against him, which she is seeking to enforce against the defendant company

In this proceeding. Dubray applied to the company for insurance against liability to his employes in April, 1915; but the policy, which was issued a month later, excepted risks like the one in question from its operation. The court found the company was estopped to deny that the policy covered this risk, and the company excepted.

Taggart, Wyman, McLane & Starr, of Manchester (L. E. Wyman, of Manchester, orally), for plaintiff. Streeter, Demond, Woodworth & Sulloway, of Concord, and Cyprian J. Belanger, of Manchester (Jonathan Piper, of Concord, orally), for defendants.

YOUNG, J. [1] Dubray, who had contracted to take down an old building and erect a new one, applied to the defendant company's local agent for insurance against liability to his employes while doing this work. The local agent transmitted his application to the company's general agent, who informed him (the local agent) that the company would "cover" Dubray. By that was intended that the company would protect Dubray or insure him against liability to his employes for all injuries they might sustain which were caused by the usual and ordinary risks of the business named in the application, unless and until the company notified him (Dubray) that it declined to underwrite them. The court has found that the general agent had authority to make this agreement, and that the risk incident to using a material hoist is one of the usual and ordinary risks of the business. Dubray, therefore, was insured against liability for accidents to his employes for a time at least. Whether this insurance had terminated at the time of the accident in question depends on whether the delivery of the policy was notice to Dubray that the company declined to underwrite the risk incident to his employes' riding on a material hoist, for no one contends that the company did anything else to notify him of that fact, and the court has found that he did not read the policy until after the accident. The test to determine whether the delivery of the policy was such notice is to inquire whether he was in fault for not reading it.

[2] In other words, the questions of law raised by the company's exceptions to the court's finding that it is estopped to deny it insured Dubray against liability for the accident in question are whether there is any evidence to warrant the court's finding (1) that the company was in fault for not notifying him that it would not underwrite the risk in question; and (2) that he was not in fault for not ascertaining it. The evidence relevant to the first issue tends to the conclusion that the company did absolutely nothing to notify Dubray. The evidence relevant to the second issue tends to the conclusion that, when the company's local agent delivered the policy, he gave Dubray to understand

that it protected him from all liability to his employes while he was doing the work in question. It cannot be said that Dubray was in fault for relying on the agent's representation, or that the ordinary man in his situation would have read the policy to ascertain whether it evidenced the contract he made with the company; and there is no rule of law, written or unwritten, which provides either in terms or by reasonable implication that one who buys insurance is bound by the terms of a policy the company subsequently delivers to him, both when it does and when it does not evidence the contract he made with it. In other words, the evidence warrants the findings that the company was, and that Dubray was not, in fault for his not knowing of the exception in the policy, and these findings warrant the further finding that the company is estopped to deny that it insured Dubray against liability to the plaintiff for the death of her intestate.

Exceptions overruled. All concurred.

(79 N. H. 57)

ROCKWELL v. HUSTIS.

HOLDEN v. SAME.

(Supreme Court of New Hampshire. Hillsborough. June 29, 1918.)

1. TRIAL \S 165—MOTION FOR NONSUIT—EFFECT.

On motion for nonsuit, where several grounds for recovery are argued, if one of them is sufficient, the others need not be considered.

2. MASTER AND SERVANT \S 228(1)—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—FELLOW-SERVANT DOCTRINE.

In an action under the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665) for injuries to a servant, the fellow-servant doctrine has no application.

3. MASTER AND SERVANT \S 278(18)—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence held to warrant finding that foreman in charge of section crew was guilty of negligence proximately contributing to plaintiff's injuries.

4. MASTER AND SERVANT \S 270(13)—INJURIES TO SERVANT—EVIDENCE—ADMISSIBILITY—CUSTOM.

In action for injuries when section hand was drawn under wheels of motor car, derailling the car and injuring other servants, evidence that the company had other cars with smaller wheels, which would not draw men under them, was competent, not to show custom, but to show the company's knowledge that the car in question was not reasonably safe.

Transferred from Superior Court, Hillsborough County; Marble, Judge.

Two actions, by Dearborn S. Rockwell and by Henry Holden, against J. H. Hustis, receiver of Boston & Maine Railroad. The cases were tried together, and resulted in verdicts for plaintiffs, and a denial of defendant's motions for nonsuit and directed verdict, subject to exceptions. Cases transferred; exceptions overruled; judgments on verdicts.

Doyle & Lucier, of Nashua (A. J. Lucier, of Nashua, orally), for plaintiffs. Jones, Warren, Wilson & Manning, of Manchester (Geo. H. Warren, of Manchester, orally), for defendant.

WALKER, J. The evidence tended to show the following facts: The plaintiffs were employed by the defendant as section hands, and were engaged in that employment when they received the injuries on account of which these suits were brought. They were riding upon a motor-driven section car with six other employes, and on account of the size of the car they were obliged to sit close together upon a narrow seat running lengthwise of the car, four facing in one direction and four in the other. Upon the floor were various tools used by them in their work, which prevented them from placing their feet firmly upon the floor. There was an iron rail two or three inches high upon the sides of the car, upon which they put their feet to support themselves. The car was going at the rate of 10 or 12 miles an hour on a curve in the track of about four degrees. One of the men, Thompson by name, who was sitting at the front end of the car on the left-hand side, for some reason lost his balance, his feet came in contact with the forward wheel of the car, and he fell or was drawn under the wheel, which passed over his body, inflicting fatal injuries. As a result the car was derailed, and the other men were thrown from the car. In this way the plaintiffs received their injuries.

[1, 2] Several grounds upon which a recovery is sought have been argued. But upon a motion for a nonsuit, if one of them is in law sufficient, the others need not be considered. No exceptions were taken to the charge of the court. The claim is made that the foreman of the crew who operated the car managed it in a negligent manner, which caused Thompson to be thrown or pulled under the wheel, and consequently that his negligence was the proximate cause of the plaintiffs' injuries. As it is conceded that the action is governed by the federal statute (Act April 22, 1908, c. 149, 35 U. S. Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]) the fellow-servant doctrine has no application. *Topore v. Railroad*, 78 N. H. 311, 100 Atl. 153. The contention of the defendant is that there is no sufficient evidence of negligence by the foreman in operating the car.

[3] An examination of the evidence leads to the conclusion that the jury were warranted in finding that the plaintiff's injuries were due in part at least to the foreman's negli-

gence. It is not disputed that Thompson's fall or sliding out onto the wheel occurred when the foreman either increased or decreased the power. It was also in evidence that at that instant of time the car "jumped," or "twisted," or "lurched," and that that sudden movement threw Thompson off. This evidence, in view of the circumstances, is amply sufficient to account for the accident.

But it is necessary to consider whether the foreman was negligent in the way he managed the car. It seems to have been his custom, known by the other section men, to reduce the speed before or at the time of reaching the curve, while in this instance he was half way around the curve when he regulated the speed. It was an unusual place for him to perform that act, the men were not anticipating he would attempt it at that place, and the jury may have believed that it was a dangerous thing to do—such a thing as reasonably prudent men would not do upon a curvature of that character. While the speed of the car may not have been excessive, it was competent for the jury to find that it was sufficient at that place, when changed by the foreman by increasing or decreasing the power, to cause the car to suddenly sway and throw Thompson upon the wheel. Further evidence of negligence was unnecessary to support the verdicts. *Boucher v. Larochelle*, 74 N. H. 483, 68 Atl. 870, 15 L. R. A. (N. S.) 416; *Castonia v. Railroad*, 78 N. H. 348, 100 Atl. 601.

[4] Subject to exception, the plaintiff introduced evidence that upon another line of its road 12 motor cars were in use in which the wheels did not extend above the floor of the car, as they did in the car in question, and that for that reason they would not carry or pull one under the car, whose feet happened to reach over the side of the car. The evidence was not introduced to prove a custom of railroad companies to use cars of that construction, as argued by the defendant, but to prove the knowledge of the defendant that the car the plaintiffs were employed to use was not a reasonably safe car, and that the defendant was negligent in this respect. The competency of the evidence cannot be doubted. *Warburton v. Company*, 75 N. H. 592, 72 Atl. 826.

Other exceptions to the evidence are without merit and do not require extended consideration.

Exceptions overruled; judgment on the verdicts. All concurred.

(89 N. J. Eq. 336)

THOMSON MACH. CO. v. BROWN et al.
(Court of Chancery of New Jersey. July 11, 1918.)

1. INJUNCTION \S 136(2) — **PRELIMINARY INJUNCTION—STRIKERS—BOYCOTT.**

A preliminary injunction will be issued restraining strikers from denominating employer as "unfair to labor" and its employees as "scabs" by means of a posted placard, cards handed out to prospective employees, and communications to users of the machine manufactured by employer and to labor unions whose members work thereon and in repair thereof.

2. INJUNCTION \S 136(3)—**PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL—LACK OF INJURY TO COMPLAINANT.**

A preliminary injunction will be issued restraining strikers from continuing to commit illegal acts in the prosecution of the strike, where continuance thereof would undoubtedly injure employer, although at the time of the issuance of the injunction no actual injury had been done.

3. INJUNCTION \S 22 — **PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL.**

An injunction restraining continuance of unlawful practices by strikers will not be denied because of the discontinuance of such practices shortly before issuance of injunction, where, strike still being in progress, recurrence of unlawful acts is probable.

4. INJUNCTION \S 21 — **PRELIMINARY INJUNCTION—STRIKERS—GROUNDS FOR DENIAL—REFUSAL OF EMPLOYER TO MEDIATE.**

Equity will not deny issuance of injunction restraining continuance of unlawful practices by strikers because of refusal of employer to mediate.

Suit by the Thomson Machine Company against Harvey W. Brown and others. Application by complainant for preliminary injunction pending the suit. Injunction granted.

Addison Ely, Jr., of Rutherford, for complainant. Harry Unger, of Newark, for defendants.

LANE, V. C. (orally). The application is for a preliminary injunction restraining, pending the suit, respondents, some of whom are striking employees of complainant and others members of International Association of Machinists, a labor union, from committing unlawful acts in connection with a strike which has been on at the plant of complainant since December, 1917. That some of the acts committed by respondents were unlawful is undoubted. They maintain in close proximity to the plant of complainant a shanty upon which are placarded posters calling attention to the strike, denominating complainant as "unfair to labor," and referring to employees of complainant as "scabs." There was also posted upon the shanty a black list containing the names of those who worked for complainant, and there were handed to prospective employees of complainant cards containing similar statements to those placarded upon the shanty and other statements of similar nature. In an attempt to enforce their demands by coercion, the respondents, or some of them, communicated

with users of the machines manufactured by complainant (machines used in bakeries) and also with labor unions whose members worked with the machines and on the repair thereof indicating that complainant was unfair. The result was that various officials of other unions communicated with complainant. A fair idea of the purpose of these letters is indicated by one received by complainant from Minneapolis purporting to be signed by the president and secretary of the Bakers' Union. It contained the following statement:

"As there is many of your machines used in the bakeries in the Twin Cities we hereby urge you to straighten up the machinists organization, before we are compelled to take any active actions against your machinery in this locality."

And one received from Springfield, Mass., from the Bakery and Confectionery Workers' International Union of America, which contains the following statement:

"Hoping that the friendly relations between your company and the organized machinists and union labor in general, will again be resumed in the near future, and that it will be possible for the bakers to again work with union-made Thomson machinery."

One received from the local of the same union containing the following statement:

"Therefore it was voted, that the baker of Local 317 refuse to work with a Thomson machine, or co-operate with the Thomson Machine Co."

It is impossible to read the letters without reaching the conclusion that it was the purpose of the respondents to coerce complainant by refusal of customers to buy its product and refusal of employees of customers to work with the product or to repair it. In the affidavit of respondent Brown there is a denial that any one was notified that complainant's product was unfair and that no union labor should use or work with said product. When counsel's attention was brought to this statement and the fact that it was in direct conflict with the written evidence, the only reply was that the affiant meant that in so many words the statements were not made. Assuming that the entire affidavit of Brown is drawn in the same spirit, it is entitled to but little, if any, weight. Indeed, it is still a question in my mind as to whether proceedings should not be instituted to punish for perjury. No serious argument is made by respondents that the acts hereinbefore referred to were not illegal. They insist, first, that it does not appear that complainant is being injured. The free flow of labor is being obstructed, the complainant is being harassed in its business. If the threats, open and implied, of the various users of the machinery and workers thereon, are carried out, there will unquestionably be injury. This court does not wait until there is actual injury; it protects against anticipated injury. Second, respondents insist that the unlawful acts are not now being performed. So far as the placards are

concerned, even after this court ordered their removal, they were retained until a few days ago. So far as written communications are concerned, there is one as recent as April of this year. The strike is still on, and I think it reasonable to assume that unless restrained the unlawful practices will be continued. Third, it is argued that complainant refuses to agree to mediation, and that for that reason this court ought not to interfere in its behalf. As I previously stated in this case, whatever the personal feelings of the court may be, it has no power to coerce an employer into mediation. If coercion be proper in any event, it is not the function of the court to apply it. There is a sharp line of division between complainant and respondents as to the reasons which induced complainant to refuse to submit to mediation or arbitration. Complainant is operating an open shop, and it charges that the union insisted, before agreeing to mediate, that complainant should agree to unionize its shop. This proposition complainant rejected. Respondents do not in terms deny that this was a condition precedent; but, even if such a denial may be gathered from their papers, there is a question of fact which it is not for this court, in dealing with the legal and equitable rights of the parties, to settle. The broad question of public or governmental policy which respondents seek to inject into this issue is one which must be left to some one tribunal.

[1-4] There will be an injunction against the continuance of the unlawful practices heretofore referred to. With respect to picketing, there is not sufficient evidence now before me on that subject to warrant me in acting. Leave will be reserved to complainant to apply at any time for such relief as it may be advised is proper with respect to this. It seems to me that the injunction prayed for has clear support in *George Jonas Glass Co. v. Glass Blowers' Ass'n*, 77 N. J. Eq. 219, 223, 79 Atl. 262, 41 L. R. A. (N. S.) 445, and *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, Ann. Cas. 1918B, 461.

(91 N. J. Law, 651)

DORAN et al. v. CITY OF ASBURY PARK et al.

(Court of Errors and Appeals of New Jersey.
June 19, 1918.)

1. MUNICIPAL CORPORATIONS — 404(4)—ACTION FOR DAMAGE TO LAND—JOINDER OF PLAINTIFFS.

Property owners, whose land is damaged by city's erection of detritus tank, flume, and straightway, made under New Practice Act, § 4, could sue for their damages in one action; there being a common question of law and fact arising out of the same transaction.

2. APPEAL AND ERROR — 273(5)—GENERAL EXCEPTION TO CHARGE.

A mere general exception to the charge, failing to point out with any degree of specific-

ness what proposition of law was erroneous, will not be considered.

3. MUNICIPAL CORPORATIONS — 388—DAMAGE TO PROPERTY.

If a city by building detritus tank, flume, and straightway damaged land of private owner, it was liable for the damages; the mere fact that the work was a public work of necessity being no defense.

4. MUNICIPAL CORPORATIONS — 404(8) — DRAINS—DAMAGE TO PROPERTY—QUESTION FOR JURY.

The mere fact that damage resulted to property owners from building of detritus tank, flume, and straightway by city was some evidence of negligence sufficient to warrant submission to the jury.

5. APPEAL AND ERROR — 991 — REVIEW — FINDINGS OF FACT.

In action for damages by diversion of lake waters, the court on appeal cannot review the question whether damage was caused by natural flow of waters, which was for the jury under evidence.

Appeal from Court of Common Pleas, Monmouth County.

Action by Mary J. Doran and others against the City of Asbury Park and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Durand, Ivins & Carton, of Asbury Park, for appellants. Ward Kremer, of Asbury Park, for appellees.

KALISCH, J. The plaintiffs below, five in number, joined in one action, against the city of Asbury Park and Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, the defendants below, to recover damages, resulting from water being backed up on their premises and into their cellars through the erection, by the defendants, of a detritus tank, flume, and straightway, at the head of Wesley Lake, when laying out a new road from Bond street in Asbury Park, to Main street, in front of Ocean Grove. The jury found a verdict for the plaintiffs and assessed the damages as follows: In favor of Mary J. Doran and John Doran, \$300; Elizabeth Woehrer, executrix, \$80, individually, \$160; Frederick Woehrer, \$60; and Louis Weldman, \$157.32. A judgment was entered upon this verdict, from which an appeal has been taken to this court.

[1] The plaintiffs were entitled to join in the action under section 4 of the new practice act (P. L. 1912, p. 377), there being a common question of law and fact arising out of the same transaction.

Although there are 13 grounds of appeal set forth in the record, the only two relied on and argued in the brief of counsel for appellants relate to and challenge the legal propriety of the rulings of the trial judge in refusing appellants' motion for a nonsuit at the close of the plaintiffs' case, and for a direction of a verdict for the defendants at the close of the entire case.

[2] As both of these motions involve the same legal question, they will be considered

together. Before doing so, it may be well to mention that an effort is made to raise the like legal question on an exception taken to the charge of the trial judge; but, as the exception taken is too broad and failed to point out with any degree of specificity to the trial judge what particular proposition of law laid down by him was erroneous, it will not be considered. It will not, therefore, avail an appellant to take a general exception to the charge of the trial judge. In order to have the exception considered by the appellate tribunal it must appear that the attention of the trial judge was specifically called to the matter challenged as erroneous. *Kargman v. Carlo*, 85 N. J. Law, 632, 90 Atl. 292; *Miller v. Del. River Trans. Co.*, 85 N. J. Law, 700, 90 Atl. 288, Ann. Cas. 1916C, 165.

[3] The contention of counsel for appellants is that the defendants cannot properly be held liable for damages sustained by them by reason of the overflow and backing up of the waters on their property and into their cellars, because the building of the detritus tank, flume, and straightway, by defendants, at the head of Wesley Lake, which caused the waters of the lake to be diverted from their natural flow, was the prosecution of a public work necessary to be done. This position is untenable and in direct conflict with the settled law of this state. Mr. Justice Trenchard, in *Kehoe v. Rutherford*, 74 N. J. Law, 859, 85 Atl. 1046, 122 Am. St. Rep. 411, speaking for this court, on page 661, states with clearness and accuracy the legal principles which must control the situation presented by the facts of the case sub judice. He says:

"But it is also a rule of law of equal importance that the exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done for which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing chargeable to the corporation" (citing cases). "It is also the settled law of this state that a municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take and cast it, in a body large enough to do substantial injury, on land where, but for such artificial drain, it would not go" (citing cases).

[4] The fact that the defendant municipalities had performed a lawful and necessary work in a manner not injurious to the public does not relieve them from liability to persons injured from active wrongdoing; and, since there was testimony in the present case tending to show that the work done by the defendants caused a diversion of the waters of the lake and to overflow to the special injury of the plaintiffs, it was at least some evidence of active wrongdoing, and hence sufficient to warrant the refusal of the trial judge to take the case from the consideration of the jury.

[5] Whether the waters which backed up on the plaintiffs' lands and flowed into their cellars was the natural flow of surface water, as claimed by defendants, presented a question of fact for the decision of the jury, and is not reviewable here.

Judgment is affirmed, with costs.

(92 N. J. Law, 253)

NAYLOR v. KNAPP et al.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

REPLEVIN \Leftrightarrow 119 — BOND — LIABILITY — LIEN FOR REPAIRS.

Where plaintiff in replevin obtains possession of a motorcar and has the same repaired, and judgment goes for defendant, defendant is entitled to the possession of the car without paying for the repairs, and in an action by defendant on the bond it is no defense that there is a lien on the automobile for the repairs.

Appeal from Supreme Court.

Action by Edward Naylor, Sr., against George H. Knapp and Albert Mathias. Judgment for plaintiff, and defendants appeal. Affirmed.

A. V. Dawes, of Hightstown, for appellants. James J. McGoogan, of Trenton, for appellee.

PER CURIAM. This action was brought to recover damages for breach of condition of a replevin bond in not returning an automobile awarded to defendant in replevin, who is plaintiff in this action. The automobile was not reclaimed by defendant in replevin suit, and was delivered to plaintiff in that suit, and while in his possession he caused it to be repaired. After judgment awarding return of the goods to Naylor, the plaintiff in this suit, Mathias, the obligor in the bond and the defendant below, tendered a return upon payment of the bill for repairs, claiming that the car was subject to a garage lien for them. This Naylor refused to pay, and thereupon the car was retained by the defendant in this action.

The plaintiff recovered in the district court, and its judgment was affirmed by the Supreme Court. We think the judgment should be affirmed upon the ground that the tender of the car was not unconditional, but subject to a claim for payment for repairs, without which no delivery would be made.

The Supreme Court determined that there was a valid lien, and therefore the car was not returned as required by the condition of the bond. It is not necessary to determine in this case whether a legal lien can be created by one who holds an automobile taken by virtue of a writ of replevin, or whether any lien existed in this case, and in affirming this judgment we do not express any opinion on that question.

The plaintiff's right to recover had a sufficient basis if rested on the fact that the ten-

der was not unconditional but subject to a demand for payment. The condition of the bond requires a return of the chattel, and a tender of the character present in this case is not a return of the goods awarded.

The judgment is affirmed, with costs.

(92 N. J. Law, 229)

FIDELITY & DEPOSIT CO. OF MARYLAND v. BROCK'S GARAGE, Incorporated.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT §106(9), 120(7)—AUTHORITY OF AGENT—ACCEPTANCE OF PAYMENT—KNOWLEDGE—JURY QUESTION.

When one appoints an agent to collect money, the agent cannot take merchandise in payment. But testimony is competent and material to prove knowledge on the part of the principal, as to the course of business being done by the agent, regarding payments with merchandise or supplies, that the agent was authorized to receive such payments. Thus, in this case raising a question of fact for the jury.

2. COSTS §280(1)—DOUBLE COSTS—AFFIRMANCE OF JUDGMENT.

2 Comp. St. 1910, p. 2296, § 43, providing for double costs, does not apply to a case commenced in the Supreme Court, in which the plaintiff had a verdict and on plaintiff's appeal to the Court of Errors and Appeals the judgment being affirmed. The rule under which costs are recovered is stated in the case of Lehigh Valley R. Co. v. McFarland, 44 N. J. Law, 674.

Appeal from Supreme Court.

Action by the Fidelity & Deposit Company of Maryland against the Brocks Garage, Incorporated. From a judgment for defendant, plaintiff appeals. Affirmed.

Joseph L. Bodine, of Trenton, for appellant. Hervey S. Moore and John A. Hartpence, both of Trenton, for appellee.

BLACK, J. The suit in this case was brought to recover premiums on four accident policies of insurance written by the appellant. The trial resulted in a verdict for the plaintiff-appellant for \$517.12, the amount admitted to be due by the defendant. The plaintiff below brings the appeal, alleging twenty-three grounds of appeal. Seventeen are directed to the admission of testimony, for the most part to the testimony of two witnesses John L. Brock and J. Chauncey Van Horn; four to the refusal of the trial court to direct a verdict for the plaintiff for the full amount claimed, and two to alleged errors in the charge of the trial court to the jury. We have examined these grounds of appeal, with the result that we find they are all without any legal merit. It would serve no useful purpose to discuss them seriatim. Two, however, may be referred to briefly—the testimony objected to was both competent and material. It tended to prove knowledge on the part of the appellant as to the

course of business between the parties, the appellant's agent, the Van Horn Company, and the defendant, regarding the payment of premiums with merchandise or supplies, and the jury by its verdict has found that was the effect of such testimony.

[1] The trial court quite correctly stated the rule to be that, when one appoints an agent to collect money, the agent cannot take merchandise or personal property in payment. 2 Corp. Juris, p. 599, par. 234; page 630, par. 270. A bare power to collect can be exercised in no manner short of an actual collection of the money. 31 Cyc. p. 1375. But the testimony objected to tended to prove, and did prove, that the appellant's agent, the Van Horn Company, did receive, and the appellant knew of such receipt of, payments for the premiums, with supplies and merchandise. This testimony raised a jury question, which the trial court properly submitted to them. We find no error on this branch of the case. The only other point that need be referred to is the appellant's criticism of the action or the statement of the trial court, when the court said during the cross-examination of Mr. Brock, in reference to items made or taken from the books of the Brock Company:

"Then I will exercise the prerogative of the court, and strike—or I may rather strike out the testimony as to these books, which will leave you without any testimony, as incompetent (referring to the books as 'incompetent' doubtless). Mr. Bodine: I consent to Mr. Moore proceeding with the examination of Mr. Brock. The Court: All right."

We fail to see how this statement of the trial court is error, or even the subject of criticism as a departure from proper judicial action.

[2] The respondent asks for an affirmance with double costs, under paragraph 43, 2 C. S. p. 2296. It is sufficient to say that this statute does not apply to this case; a case in which the statute was applied is International Watch Co. v. Delaware, etc., R. Co., 82 N. J. Law, 459, 82 Atl. 730.

The rule under which costs are recovered in a court of errors is stated in the case of Lehigh Valley R. Co. v. McFarland, 44 N. J. Law, 674.

The judgment of the Supreme Court will be affirmed, with costs.

(92 N. J. Law, 204)

ANCONA PRINTING CO. v. WELSBACH CO.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §291(13)—HOLDING OVER—PENALTIES.

In an action to recover double the yearly value of premises which the tenant holds and refuses to surrender to the landlord after expiration of his term, and written demand for possession, the annual rent for the expired term is

not conclusive as to yearly value, and therefore a request to direct a verdict for plaintiff for double the rent paid under the lease for the expired term was properly refused, as the yearly value may be more or less than the prior rent paid.

2. LANDLORD AND TENANT §291(14, 16)—HOLDING OVER—PENALTIES—DEFENSES—INSTRUCTION.

A belief of the tenant that he has a right to hold over must, in order to avoid the penalty of double yearly value, be an honest one, based on reasons sufficient to induce a jury to believe he had a right to remain in possession after written demand therefor; the mere statement that he believed he had such right is not sufficient, and an instruction to the jury that, if the tenant believed that he had such a right, the holding over was not willful, and the plaintiff's case failed, was erroneous.

(Additional Syllabus by Editorial Staff.)

3. LANDLORD AND TENANT §291(16)—HOLDING OVER—REMOVAL OF FIXTURES—JURY QUESTION.

Whether the removal of fixtures by a tenant was within a reasonable time, or so delayed as to amount to a willful holding over, is a question for the jury.

Appeal from Supreme Court.

Action by the Ancona Printing Company against the Welsbach Company. From a judgment for defendant, plaintiff appeals. Reversed.

Wescott & Weaver, of Camden, for appellant. Bleakly & Stockwell, of Camden, for appellee.

BERGEN, J. This action was brought against a tenant to recover double the yearly value of the demised premises for a period during which, it is alleged, the tenant willfully held possession after the expiration of its term, and is based on section 27 of our statute entitled "An act concerning landlords and tenants" (3 C. S. pp. 3065, 3076), which enacts that if any tenancy for any term of life or lives, year or years, or those who shall come into possession under, or by collusion with any such tenants, shall willfully hold over after the determination of such terms, and after demand made and notice in writing given for the delivering of the possession thereof by the landlord or the reversioner, "such person or persons so holding over, shall, for and during the time he, she or they shall so hold over, or keep the person or persons entitled out of the possession of said lands," pay, to the party so kept out of possession, "at the rate of double the yearly value of the lands," for so long a time as the same are detained. In order to have the benefit of this act the plaintiff must prove that the tenancy has expired, a demand for possession, and that the tenant willfully holds over.

Sections 27 and 28 of the statute are substantially counterparts of those of 4 Geo. II, c. 28, § 1, and 11 Geo. II, c. 19, § 18, respectively—the latter providing that where the tenant gives notice of his intention to quit, and does not comply, he shall pay double the

rent he would have paid, the distinction being that if the tenant holds over after his notice to quit he shall pay double rent, but if the tenant holds over after demand of possession by his landlord he is liable, not for double rent, but for double the yearly value. In this case the suit is for double the yearly value, and the testimony shows that the tenant's term, as expressed in its lease, had expired June 30, 1916, and it was bound to surrender the premises on that day, or within such reasonable time thereafter as would permit the removal of reserved fixtures; that the landlord demanded delivery of possession July 6, 1916; that defendant did not surrender until December 30, 1916; and therefore, if the holding over was willful, the plaintiff was entitled to double the yearly value of the premises from July 6, 1916, to December 30th following, as was held in *Cobb v. Stokes*, 8 East, 357, the willfulness beginning with the written demand. The jury found for the defendant, and plaintiff appeals, relying principally upon the refusal of the trial court to direct a verdict for plaintiff, and an alleged error in the instruction of the jury by the court.

[1] The refusal of the motion to direct for the plaintiff for double the amount of the rent reserved in the lease was proper. This, being a penal statute, is to be strictly construed, and it does not fix as a penalty double the rent for the previous year, as in section 28, where the tenant holds over after giving notice that he will quit the premises, but double the yearly value, and this distinction in penalty between the two sections indicates that the Legislature intended a different penalty for the violation of the respective sections; one being double rent, and the other double the yearly value. We are of opinion that what is the yearly value is a jury question, and, while the prior rent is some evidence of the yearly value, it is not conclusive, for such value might be more or less than the previous rent, and the determination of that fact is essentially a jury function. It was not error to refuse a direction for the plaintiff for double the rent reserved for the previous year as requested.

[3] The consideration of the second ground of appeal, which relates to instructions given to the jury, requires a short résumé of the facts. The plaintiffs, by a written agreement dated September 26, 1904, and a supplemental one dated March 14, 1905, let to defendant the premises which this controversy involves, for a term expiring June 30, 1915. On March 7, 1914, another agreement was entered into by the plaintiff and defendant by which the original letting was extended from June 30, 1915, to June 30, 1916, upon the same conditions, except an increase in the rent from \$6,750 and taxes, as reserved in the original and supplemental leases, to \$10,000 and taxes. Under this agreement the defendants were

to surrender possession on June 30, 1916, subject to the right to remove, at the termination of the term, all fixtures, gasworks, holders, and appurtenances erected on the lands by defendant during the term, the buildings erected to become the property of the lessor. In September, 1915, in reply to an offer by the defendant, the plaintiff wrote it a letter offering to extend the lease for five years at an annual rent of \$15,000, stating, however, that the property was not for sale. To this defendant replied, under date of October 6, 1915, that if the property was not for sale it was no longer necessary to "consider a further lease of the premises." There were subsequent attempts by defendant to purchase the property, and also an offer, made June 26, 1916, to lease at \$12,000 a year; but these negotiations did not result in any agreement, and on July 6, 1916, plaintiff demanded in writing possession of the property. Between that time and December 30, 1916, the defendants remained in possession, removing their machinery and other fixtures which they were entitled to remove, but with extreme deliberation, as a jury might find, and in the meantime using each machine for manufacturing purposes until it was moved from the premises. Whether the fixtures were removed within a reasonable time, or so delayed for the convenience of the defendant as to amount to a willful holding over, was a jury question.

[2] The president of the defendant company testified that he had an honest belief that his company did not have to surrender possession as demanded, because he had every reason to believe that the plant would be sold or leased to his company, notwithstanding the demand for possession on July 6, 1916, and their previous inability to agree upon terms, as well as the fact that defendant had commenced the removal of its fixtures before the expiration of the lease to another location, which it was preparing for the continuance of its business. Such a belief, to be available, must be an honest, bona fide one, based on facts from which such an inference can be drawn. "A tenant cannot relieve himself by the mere statement that he believed he had a right to hold the premises. He must furnish reasons sufficient to induce a jury or court hearing the case to believe he had a right to remain in possession." 16 R. C. L. § 692, p. 1171, and cases cited. Instead of submitting to the jury the question whether, under the facts, the defendant was justified in his alleged belief, the jury was instructed:

"If they [defendants] did not have the right, did they believe that they had such a right? If they did, why then the plaintiff's claim goes for nothing, because the statute is based upon willful action."

This amounted to an instruction to find for the defendant, if defendant believed it had a right to hold over, and entirely ignored the

right of the jury to find whether any reason for such belief existed in the proofs. We think there was no evidence to justify, under the rules of law, any such belief, and the jury might have so found, except for the instruction that defendant was not liable for holding over if it believed that it had a right to do so, although in fact the right did not exist, as the jury might have found under the evidence. This was an erroneous instruction, and injurious to the plaintiff, for, while the English cases hold that the holding over must be willful and contumacious (*Swinfin v. Bacon*, 6. H. & N. 184), a refusal to deliver possession after written demand is willful and contumacious, unless it be of right, or there be shown some reason for an honest belief that it is justified.

We have not been referred to a case, nor can we find any, which holds that the mere statement of such a belief is a sufficient excuse. Reasons for the belief must appear, and the jury are entitled to find whether they are sufficient to justify it, and it was clearly error to limit the jury in the present case to the question of defendant's belief, for it was their province to say whether it was an honest belief, based upon facts which would reasonably justify it.

The judgment below is reversed.

(92 N. J. Law, 216)

GUMAERD LEAD & ZINC CO. v. ERIE R. CO. (No. 57.)

(Court of Errors and Appeals of New Jersey. June 17, 1918.)

(Syllabus by the Court.)

ACTION ~~27~~(1) — RAILROADS ~~72~~(2, 8) — CONSTRUCTION—RETAINING WALLS—ACTION FOR DAMAGES—QUESTION FOR JURY.

Plaintiff and defendant entered into a covenant as follows: "The party of the second part [defendant] covenants and agrees that in case it shall make any excavation upon the adjoining land, which shall interfere with the natural support of the surface of such parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel." The defendant made the excavation contemplated by the covenant, but failed to protect the adjoining land, upon which plaintiff conducted a mining enterprise, until after the damage to plaintiff's shaft had resulted. *Held*, that the covenants contemplated a protective construction, by defendant, to the plaintiff's land and enterprise, which would serve to prevent resulting damage; that the failure to construct the necessary device gave the plaintiff a right of action on the covenant for damages; that the action was *ex contractu*, and not *ex delicto*; and that the question whether there was a breach, and the resulting damage, were jury questions.

Appeal from Supreme Court.

Action by the Gumaerd Lead & Zinc Company against the Erie Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Collins & Corbin, of Jersey City, for appellant. Thomas S. Woodruff and Coult & Smith, all of Newark, for appellee.

MINTURN, J. Plaintiff was owner of a tract of land in Orange county, N. Y., which contained certain ores, which it was engaged in mining, and, as a necessary requisite for the work, sunk a shaft not far from the defendant's right of way. The defendant, for the purpose of acquiring a right of way across the plaintiff's adjoining land, instituted condemnation proceedings in Orange county, which proceedings were compromised by an agreement which resulted in the execution of a deed by the plaintiff to the defendant containing, *inter alia*, this covenant:

"The party of the second part [defendant] covenants and agrees that in case it shall make any excavation upon the adjoining land, which shall interfere with the natural support of the surface of such parcel, it will construct and maintain such retaining walls or other devices as may be necessary to prevent its slopes from encroaching on said parcel."

The testimony makes it apparent that, in making the excavation required for railroad purposes, the retaining wall or other device contemplated by this covenant was not constructed, the result of which was that the shaft upon plaintiff's land was forced out of alignment, and became useless for the purpose for which it was constructed. This suit, based upon the breach of the covenant, was thereby instituted, and resulted in a verdict for the plaintiff, from which this appeal has been taken.

There were two trials of the case. The first resulted in a *venire de novo* upon a rule to show cause by the Supreme Court, upon which rule the right of the plaintiff to recover was judicially declared, and the case was sent back upon the legal impropriety of the rule of damages applied at the circuit. The second trial produced a similar result, and a rule to show cause, reserving certain exceptions, was allowed. That rule was discharged, and an application for a reargument was also denied. The exceptions reserved upon the latter rule are limited to the inquiry whether there was evidence, sufficient to go to the jury, as to the alleged breach of the covenant, and whether the action is maintainable on the covenant, both of which inquiries were raised on the motions to nonsuit and to direct a verdict.

It is primarily insisted that the court below was in error in refusing a nonsuit, and also in refusing to direct a verdict, upon the ground that the testimony failed to show a breach of covenant. The rationale of the defendant's construction of the covenant is in effect a contention that it was the intention of the parties, as evidenced by the covenant, that the proposed wall or other device was not to be of a preventive nature, but rather remedial in character; in other words, that its building by defendant might follow after the construction of the slope, and meet the

situation then existing, regardless of the damage which might accrue to the plaintiff, pending completion of the slope construction, and that the construction of what may be termed a post hoc wall or device relieved the defendant of the necessity of accounting for the intermediate damage, resulting from the actual working of the slope construction. We do not agree with this construction of the covenant, but think its terms, fairly construed, required the defendant to anticipate by the construction of a reasonable wall or device the damages which might result, and which in fact presents the basis for this suit. In this respect the covenant is clear and unambiguous, and reduces the status of the parties entirely to one *ex contractu*, and not *ex delicto*. Such an action at common law was in covenant, and not in case. *Jones v. Clark*, 45 N. J. Law, 437.

The fact that the defendant, after the damage was done, erected a retaining wall in accordance with its conception of the effect of the covenant, cannot serve to deprive the plaintiff of the contractual rights it is entitled to demand, as the legal and logical, the direct and natural, result of the defendant's failure to adhere to the terms of its covenant. We think the exceptions presented as to the charge of the court are not reserved by the rule, and are not before us here; but, if the fact were otherwise, we think the disposition here made of the fundamental proposition presented by the case is equally dispositive of such exceptions.

We think the resulting questions as to the fact of the breach of the covenant, and the damage resulting to the plaintiff therefrom, were properly submitted to the jury, and that the judgment below should be affirmed, with costs.

(30 N. J. Eq. 531)

EUGSTER v. EUGSTER.

(Court of Errors and Appeals of New Jersey.
June 18, 1918.)

1. APPEAL AND ERROR §151(2)—RIGHT TO APPEAL—"AGGRIEVED PERSON."

Where wife sued husband for accounting of profits of a business arranged before marriage, and the existence of a partnership was disputed, the decree declaring that a partnership existed and immediately dissolving it did not make complainant an aggrieved person (one whose pecuniary interests are injuriously affected), and she could not appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved.]

2. PARTNERSHIP §297—EQUITABLE PARTNERSHIP—DISSOLUTION.

A partner suing for dissolution could not object to award of share of profits to the other on the ground that there was an equitable partnership terminable at the option of either, and that the filing of her complaint terminated it, and defendant thereafter had no right to share in the profits.

3. JOINT ADVENTURES — 1 — CONTRACTS — CONSTRUCTION.

Antenuptial contract by which wife was to purchase land, erect and equip a factory, and the husband was to operate the business, and after making certain payments the profits were to be divided equally between the parties, constituted a joint adventure, and the wife could not urge against allowance of profits to husband, that she could not be held to pay for the husband's services.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Adventure.]

4. TRUSTS — 108(3)—TRUST EX MALEFICIO.

Antenuptial contract by which wife was to purchase land, erect and equip a factory, and the husband was to operate the business, and after making certain payments the profits were to be divided equally between the parties, did not make the husband a trustee ex maleficio for the wife.

Appeal from Court of Chancery.

Suit by Marie A. C. Eugster against Jean B. Eugster. From the decree rendered, complainant appeals. Affirmed.

J. Emil Walscheid, of Town of Union, for appellant. Queen & Stout, of Jersey City, for appellee.

GUMMERE, C. J. The complainant and defendant, at the time of the filing of the bill in this case, were wife and husband, their marriage occurring on the 23d of November, 1910. Before their marriage they entered into an agreement for the establishment and carrying on of an embroidery business at West Hoboken, by the terms of which the intended wife was to purchase the necessary land, and erect and equip the embroidery factory upon it, Mr. Eugster on his part was to operate the business (in which he was an expert), and, after making certain payments provided in the agreement, the net profits were to be divided between the parties. In 1912 the relations of the husband and wife, both matrimonial and business, having ceased to be harmonious, Mrs. Eugster filed the bill in this case praying for an accounting by her husband of the profits made out of the business, and the appointment of a receiver. Pursuant to the prayer of her bill the Court of Chancery directed an accounting to be taken between the parties before Special Master Asper, and this officer of the court, after hearing the parties and their witnesses, and examining the exhibits submitted to him, reported that the net assets or profits of the business up to the date of the making of the order of reference (approximately) amounted to \$6,243.20, and that one-half of these net assets or profits belonged to each of the parties. Upon the coming in of this report Vice Chancellor Lewis, after hearing counsel for both parties, affirmed it, and thereupon advised a decree adjudging that the parties had been copartners in the business; that the partnership "be and the same is hereby dissolved"; that the em-

broidery business, and the premises upon which it was carried on, together with all machinery and other appurtenances and appliances located therein, were the property of the complainant, subject, however, to a lien for the payment of the debts of the business, and the sum found to be due to the defendant on the accounting. From the decree entered upon the advice of the Vice Chancellor, the complainant has appealed.

The first ground of appeal is that the evidence does not warrant a finding that a business partnership existed between the complainant and the defendant.

[1] Whether the business arrangement between these parties entered into prior to their marriage constituted them partners, and, if it did, whether the partnership relation was terminated by their subsequent marriage, we do not find it necessary to consider. Conceding the contention of complainant's counsel to be sound in law, she is not legally aggrieved by the adjudication upon this point, and for this reason the adjudication declaring the existence of a partnership had no effect until it was pronounced; that is, no partnership existed in fact until the Court of Chancery declared otherwise. In conjunction with this declaration was a further adjudication that the partnership which was then created "be and the same is hereby dissolved." The net result of the judicial action complained of, therefore, was to leave the complainant and the defendant, so far as a partnership between them was concerned, in exactly the position which she claims they were in from the beginning. Relief by appeal from chancery is only for "persons aggrieved" by the order or decree appealed from. *Beckhard v. Rudolph*, 68 N. J. Eq. 749, 63 Atl. 708. And a party aggrieved is one whose personal or pecuniary interests, or property rights, have been injuriously affected by the order or decree. *Swackhamer v. Kline's Adm'r*, 25 N. J. Eq. 503; *Parker v. Reynolds*, 32 N. J. Eq. 290; *Andress v. Andress*, 46 N. J. Eq. 528, 22 Atl. 124.

The next ground of appeal is that the contract between the parties relative to the operation of this embroidery business is not enforceable in equity, for the reason that it does not express the free and uncontrolled intention of the parties, or, rather, of the complainant. The question thus raised is one purely of fact; the Vice Chancellor determined it against the complainant, and our examination of the proofs sent up with the appeal satisfies us that he was entirely justified in so doing.

[2] It is next asserted as a ground for appeal that the evidence did not warrant a finding that the defendant was entitled to \$3,190.77 by way of profits. The ground upon which this contention is based is thus stated in the brief of counsel:

"If there was an equitable partnership under which defendant was entitled to profits, and if either party had a right to terminate it, such termination must be inferred, from the filing of the bill of complaint, and from that time forward, at least, defendant must be considered a trespasser in the business."

No argument is submitted in support of this contention, and we are unable, without the assistance of counsel, to discover any merit in it.

[3] The fourth ground of appeal is based upon the following proposition, viz. a married woman cannot enter into a business partnership with her husband, nor can she be held to pay him for service. What we have already said upon the question of the partnership between these two litigants is dispositive of this point. Moreover, there is nothing in the case to show any agreement on the part of the complainant to pay the defendant for his services. On the contrary, there was a joint adventure, and an agreement to divide the profits of it between the parties to it.

[4] Lastly, it is contended that the defendant held the property of the complainant as a trustee ex maleficio, and, consequently, is not entitled to compensation. The answer to this proposition is twofold: (1) Upon the proofs submitted there was no ground for holding the defendant to be a trustee for the complainant; (2) there was no allowance to him of any compensation, but a mere division of the profits between him and his wife as ascertained by the accounting which she sought by her bill.

The decree below will be affirmed, with costs.

(91 N. J. Law, 563)

DRUMMOND et al. v. HUGHES.

(Court of Errors and Appeals of New Jersey. June 17, 1918.)

1. APPEAL AND ERROR \S 362(2) — RESERVATION OF GROUNDS—FORM.

A ground of appeal embracing a large part of the charge, and including several distinct propositions, cannot be considered.

2. CONTRACTS \S 320—BUILDING CONTRACTS—SUBSTITUTION OF MATERIAL.

Where a contractor has so improperly plastered a dwelling house as to necessitate replastering, the owner has no right to substitute patent plastering for the plaster provided for in the specifications.

3. CONTRACTS \S 320—BUILDING CONTRACTS—COMPLIANCE WITH SPECIFICATIONS.

Where a building contractor has improperly plastered a dwelling house, necessitating replastering by the owner, the owner is entitled to have the defective plastering replaced with the plaster under the terms of the specifications as contemplated by the original contract, and to be paid a reasonable sum therefor.

4. CONTRACTS \S 323(3) — BUILDING CONTRACTS—ACTIONS—INSTRUCTIONS.

In an action by the owner of a dwelling house against a contractor for negligent plastering, an instruction leaving it to the jury whether certain cracks in the plastering were consistent with a workmanlike job was proper.

5. TRIAL \S 234(2) — INSTRUCTIONS — REFERENCE TO FACTS.

It is not legal error to fail to call attention in an instruction to a fact which one of the parties thinks important; the judge being under no obligation to state one fact rather than another.

6. CONTRACTS \S 320—BUILDING CONTRACTS—COMPLIANCE WITH SPECIFICATIONS.

Where an owner of a dwelling house has undertaken to remedy improper work done by the contractor, he is not entitled to erect a better house than that provided in the specifications, and to recover therefor.

7. CONTRACTS \S 199(1) — BUILDING CONTRACTS—ACTIONS—INSTRUCTIONS.

Where a building contract required the contractor to remove from premises within 24 hours after notice all material condemned by the architect, specifications calling for "approved brand of lime" contemplated a brand approved by the architect.

Appeal from Supreme Court.

Action by Isaac Drummond and another, executors of the estate of one Wise, against Richard H. Hughes. From a judgment for defendant, plaintiffs appeal. Affirmed.

Action by the executors of Wise to recover damages for the failure of Hughes to perform properly a contract for the building of a dwelling house. The dwelling was completed in June, 1912, and occupied some time before that by Wise's family. The architect, pursuant to the contract, gave a certificate for the final payment September 28, 1912, and the executor made the payment October 9, 1912. During the interim between the completion of the house and the final payment there was a continuous dispute about the plaster. This continued after the payment, and in 1915 the defendant seems to have been willing to bear part of the expense of making some small repairs. The plaintiffs, however, proceeded to put on new plastering, and in 1916 brought this action.

Durand, Ivins & Carton, of Asbury Park, for appellants. Wilbur A. Helsley, of Newark, for appellee.

SWAYZE, J. (after stating the facts as above). [1] 1. The first ground of appeal cannot be considered. It embraces a large part of the charge, nearly two printed pages, including several distinct propositions. The reason for condemning that practice is as strong under our present procedure as it was when the method of review was by writ of error. As to bills of exception, see *Oliver v. Phelps*, 21 N. J. Law, 597; *Associates of Jersey Co. v. Davison*, 29 N. J. Law, 415; and as to the application of the rule to assignments of error, see *Fivey v. Penna. R. R. Co.*, 67 N. J. Law, 627, 636, 52 Atl. 472, 91 Am. St. Rep. 445; *Defiance Fruit Co. v. Fox*, 76 N. J. Law, 482-491, 70 Atl. 460.

[2, 3] 2. The second ground of appeal is that the judge erred in charging that the plaintiffs had no right to substitute patented plaster for plaster provided for in the speci-

fications. If we take the charge in its literal terms, the proposition is correct. The plaintiff had no such right. His right was to make good his damage, if he had suffered any; but this was very far from a wholesale substitution of patented plaster for that put on in accordance with the specifications. If, however, we discard this literal construction, and take the charge as it was intended, and as the jury must have understood it, the judge only meant to say, as he immediately did say, that "the plaintiffs could not recover for the reasonable cost of the patented plaster"; that they could not adopt such a plaster (i. e., one "which had never been contemplated by the specifications"), and require the defendant to pay for it. He then charged the legal rule correctly as follows:

"If there was defective work with respect to the plastering performed by the contractor, the defendant in this case, the plaintiffs were entitled to have that replaced with the plaster under the terms of the specifications, in order to make the work good as contemplated by the original contract, and to be paid by the defendant, or to claim of the defendant, a reasonable sum for the expense so incurred."

[4] 3. The third ground of appeal is that the judge erred in charging that cracks are not inconsistent with a good and workmanlike job. This is a misstatement of the charge. What the judge said was:

"You may as men of common sense reach the conclusion under the evidence that those cracks were no evidence of defective work; in other words, that they were the ordinary and customary cracks that appear in a new construction, due to causes for which the contractor cannot be in fact held responsible. In other words, you may conclude that such cracks are not inconsistent with a good and workmanlike job."

We know of no reason why this question might not properly be left to the jury, as the judge in fact left it.

[5] 4. It is no legal error to fail to call attention to a fact which one of the parties thinks important. The judge is under no obligation to state one fact rather than another. There was no legal error in the omission complained of.

5. The fifth ground of appeal is that the judge erred in charging that if Rockland lime was used by the direction of the architect, and proved to be unsatisfactory, defendant was not responsible. This is an inaccurate statement of what the judge said. What he charged was:

"If Rockland lime was used by the direction of the architect, no criticism can be made of the defendant by the plaintiffs. They were bound by the architect's direction in that respect."

We do not know how the judge could have charged otherwise under the terms of the contract.

[6] 6. The sixth ground of appeal is that the judge erred in charging that the defendant was obliged to follow the plans and specifications, even though the materials or work called for by such plans and specifications were defective, and would not give a good,

workmanlike job. This again is an inaccurate statement of what the judge said. He charged:

"If the sagging of the walls and the falling of the plaster was due to insufficient support through joists or timbers, even though the defendant put them in, but if the specifications called for them, this defendant cannot be held responsible in this case. In other words, if the defendant simply complied with the terms of the specifications, and the architect, through a mistake, provided for timbers in the specifications which were insufficient to properly carry the weight of this building where it was necessary to have such support, and as a result, the natural and proximate cause of those insufficient timbers, the cracks occurred and the plaster fell, then this defendant is not responsible in the law, and no verdict can go against him."

In short, the plaintiff was entitled to the house he bargained for, and not a better house. If the contract and specifications are not to be the builder's guide, he has none, and the owner may contract for a \$1,000 house and demand a \$10,000, house. A good workmanlike job is a job properly executed; whether the result is what it should be depends on the plans and specifications.

[7] 7. The seventh ground of appeal is that the judge erred in charging that the approved brand of lime called for in the specifications contemplated a brand of lime approved by the architect, instead of an approved brand of lime or brand approved in the trade. With this may be coupled the eighth ground of appeal, that the judge failed to charge that the defendant was required to procure an approved brand of lime for the building, without regard to the approval of the architect. It is enough to say that the contract required the defendant to remove from the premises, within 24 hours after receiving written notice from the architect, all materials condemned by him. This necessarily involved the use of materials which had the approval of the architect, and, when the words "approved brand of lime" were used, they necessarily meant approved by the architect, who had the power to condemn. The Rockland lime was bought by the architect's orders and inspected by him.

We find no error. Let the judgment be affirmed, with costs.

(91 N. J. Law, 424)

FIRST NAT. BANK OF FREEHOLD v. RUTTER.

(Supreme Court of New Jersey. June 5, 1918.)

(Syllabus by the Court.)

HUSBAND AND WIFE \S 161—MARRIED WOMAN'S NOTE—ESTOPPEL TO DENY VALIDITY—
—"BENEFIT."

Defendant, a married woman, executed a promissory note for the benefit of her brother and which he discounted at the plaintiff bank. It bore the words "value received, for my own use and benefit," on the face; but in fact she received no benefit of it and the bank officials, as the jury could find, knew this before advancing money on it. *Held*: (1) That there was no basis

for a claim that defendant was estopped from denying that her separate estate was benefited; (2) that the hope of bettering her brother's financial affairs by the proceeds of the note, so that he might perhaps repay other moneys that he owed her, was not the "benefit" to her, contemplated by the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Benefit.]

Appeal from Court of Common Pleas, Monmouth County.

Action by the First National Bank of Freehold against Abbie M. Rutter. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Vredenburg & Vredenburg and Samuel C. Cowart, all of Freehold, for appellant. John S. Applegate, of Red Bank, for respondent.

PARKER, J. Defendant is a married woman. The action is upon a promissory note signed by her and made to the order of her brother John T. McChesney, to whose credit the proceeds were placed, defendant not getting any of the money so raised. The jury found a verdict for defendant and plaintiff appeals.

The special facts of the case are as follows: Defendant is a married woman running a little business of her own. Her brother, McChesney, wished to borrow money from the plaintiff bank, which refused to discount his note. Then he asked the bank people if they would lend on his sister's note, and they said they would. The note was drawn with defendant as maker, to the order of McChesney and indorsed by him and discounted to his account. The assistant cashier said in his testimony that he knew Mrs. Rutter was not getting the proceeds of the note at the time they were placed to McChesney's credit. The bank people, knowing the dangers of a married woman's paper, wrote on the note after the words "value received," the further words "for my own use and benefit." Mrs. Rutter swore that she saw those words, but that she received no benefit from the making of the note, that it was purely for her brother's accommodation, and that the statement on the note was false. It was a jury question on the evidence whether the bank people knew or had reason to know that she was receiving no benefit from the note.

In this condition of things the question of law raised at the trial was whether she was estopped by the statement on the note from denying that she received any benefit for the use of her separate estate. Defendant claimed that she, being disabled by law from contracting for her brother's sole benefit, could not enable herself by any false statement of fact, and, admitting that she could, plaintiff knew the actual facts, and hence no estoppel arose. The trial judge left it to the

jury to say whether the bank was deceived by the words on the note or put them there only to make the paper apparently good; and the jury evidently found that the bank officers knew that she was only an accommodation maker. So the question whether she could estop herself is one that in this case we need not pass upon, for if the bank officers knew the words were false, they were not entitled to advance money on her account as if they believed them true. It is suggested that she did get some benefit for her separate estate by the signature because she knew her brother was in financial difficulties and would be in a better position to look after his debts, including one that he already owed her. But this, in our judgment, is altogether too remote and shadowy to be considered as coming within the description of "money, property, or other thing of value for her own use, benefit or advantage of her separate estate" that the statute mentioned. In fact it is against just such transactions as this that the law is intended to guard.

This disposes of the fundamental points in the case. The other minor points discussed in the brief are either not properly before us, or are not such as to require special mention. We find no error properly brought up that should lead to a reversal, and the judgment is therefore affirmed.

(89 N. J. Eq. 116)
BRUNETTI v. GRANDI et al. (No. 43/245.)
(Court of Chancery of New Jersey. May 9, 1918.)

1. MECHANICS' LIENS §113(2) — NOTICES OF CLAIM—EFFECT AS ASSIGNMENTS.

Notices of the claims of mechanics lienors, served under Mechanics' Lien Act, § 3, operate as assignments pro tanto of the moneys due from the owner to the contractor, to the extent necessary to pay the claims.

2. MECHANICS' LIENS §113(2) — NOTICE TO OWNER—ACTION BY NOTICING CLAIMANT.

Action at law will lie by noticing claimant of mechanic's lien against owner, but it is necessary for claimant to prove there is a sum due from owner to contractor under all terms of contract.

3. INTERPLEADER §11—UNDER MECHANICS' LIEN LAW.

Where several notices of claim of mechanic's lien are served on owner, and there is question of priority or validity, or dispute as to amount due from owner to contractor, general practice is for the owner to seek relief in equity on bill of interpleader, or in nature of interpleader.

4. MECHANICS' LIENS §113(2) — STOP NOTICES—ACTION BY CONTRACTOR.

Where there is a dispute between contractor and owner, amount due must be fixed; the approved practice being to permit contractor to proceed to judgment, though mechanic's lien claimants have filed stop notices with owner.

5. MECHANICS' LIENS §198 — ATTORNEY'S LIEN—"CAUSE OF ACTION"—PRIORITY.

Though stop notices have been served by mechanic's lien claimants on the owner, the contractor suing owner had a "cause of action" against him within attorneys' lien statute in his own right, or in right of noticing claimants,

so that amount due his attorney is lien prior to liens of noticing claimants.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

Interpleader suit by Nicola Brunetti against Antonio Grandi and Francesco Criscitelli and others. Decree for one Themistocles Mancusi-Ungario, a defendant.

Gaetano M. Belfatto, of Newark, for complainant. Osborne & Astley, of Newark, for Rome Stone Cutting Co. Stallman, Van Liew & Peck, of Newark, for Bockovan Bros. Co. Henry H. Dawson, of Newark, for Tomkins Bros. Charles G. Giffonello, of Newark, for Joseph Occhicone, Essex Mosaic Tile Co., and West Side Iron & Steel Works. Carl F. Hinrichsen, of Newark, for Cook & Genung. Kessler & Kessler, of Newark, for East Side Molding & Lumber Co., Herman Mass, Rising & Thorne, and Max Abramson. Themistocles Mancusi-Ungario, of Newark, pro se.

LANE, V. O. This is an interpleader suit brought by the owner of property against whom there had been obtained a judgment by a contractor for the balance due him for work performed under the terms of a filed contract for the construction of a building. On January 13, 1915, suit was brought at law by the builder against the owner. Judgment was obtained for \$3,516.62. The case was taken to the Supreme Court and the Court of Errors and Appeals, and the judgment was finally affirmed on the 15th day of March, 1916. Prior to the institution of suit notices had been served under the third section of the Mechanic's Lien Act (3 Comp. St. 1910, p. 8204) by subcontractor, and materialmen. The amounts admitted to be due to the noticing claimants exceed the amount of the judgment. The claimant, Themistocles Mancusi-Ungario, was the attorney for the contractor in the suit at law. Immediately after the entry of judgment he obtained an assignment thereof to secure his fees and disbursements, which was duly recorded. He now claims priority over the noticing claimants for his costs and disbursements and a reasonable fee for his services rendered. There is no dispute as to the validity or priority of the claims of the respective noticing claimants, nor is there any dispute as to the amount that should be allowed the attorney, if he is entitled to priority, and the only question in the case is whether or not this priority exists.

[1-4] Prior to the adoption of the statute giving attorneys' liens (Laws of 1914, p. 410) the law seems to have been that a lien of attorneys for compensation arose only after judgment recovered, or after the proceeds of a compromise or settlement had come to the actual possession of the attorney. Magle, Chancellor, in *Weller v. Jersey City, Hoboken & Paterson St. R. Co.*, 66 N. J. Eq. 11, 57 Atl. 730, citing *Terney v. Wilson*, 45 N. J. Law

(16 Vr.) 282; *Phillips v. Mackay*, 54 N. J. Law (25 Vr.) 319, 23 Atl. 941; *Barnes v. Taylor*, 30 N. J. Eq. (3 Stew.) 467; *Middlesex Freeholders v. State Bank*, 38 N. J. Eq. (11 Stew.) 36. After the entry of judgment or decree, the defendant after notice of a claim of lien might not pay the amount due without making himself liable for the amount due the attorney for services and disbursements. *Barnes v. Taylor*, 30 N. J. Eq. (3 Stew.) 467. Nor could the client substitute an attorney, where there was a fund within the control of the court without satisfying the attorney's lien. *Hudson Trust & Savings Inst. v. Carr-Curran Paper Mills*, 44 Atl. 638. The statute (P. L. 1914, p. 410) provides that:

"After the service of a summons and complaint in any action at law, * * * the attorney, solicitor or counselor-at-law who shall appear in said cause for such party instituting the action at law, or suit, * * * shall have a lien for compensation, upon his client's cause of action, * * * which shall contain [sic] and attach to a verdict, report, decision, decree, award, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come."

The contention of the noticing claimants is that at the time of the service of summons the contractor had no cause of action upon which an attorney's lien could attach because the notices served theretofore had operated as assignments pro tanto of the moneys due from the owner to the contractor to the extent necessary to pay the claims. It has been held that notices served under the third section do operate as assignments pro tanto. *Wightman v. Brenner*, 26 N. J. Eq. 489; *Kirtland v. Moore*, 40 N. J. Eq. 106, 2 Atl. 269; *Kreutz v. Cramer*, 64 N. J. Eq. 648, 54 Atl. 535. An action at law will lie by a noticing claimant against the owner. *Craig v. Smith*, 37 N. J. Law, 549; *Wightman v. Brenner*, supra; *Reeve v. Elmendorf*, 38 N. J. Law, 125. In such an action it is, however, necessary for the plaintiff to prove that there is a sum due from the owner to the contractor. Such an action will not lie until the amount is due under all of the terms of the contract. *Booth v. Kiefer*, 60 N. J. Eq. 57, 47 Atl. 12. Where there are several notices served and there is a question of priority or validity, or where there is a dispute as to the amount due from the owner to the contractor, the general practice is to seek relief in a court of equity on bill of interpleader or in the nature of a bill of interpleader. *Superintendent, etc., v. Heath*, 15 N. J. Eq. 22; *Aleck v. Jackson*, 49 N. J. Eq. 507, 23 Atl. 760; *English v. Warren*, 65 N. J. Eq. 30, 54 Atl. 860; *Kirtland v. Moore*, supra; *Hall v. Baldwin*, 45 N. J. Eq. 858, 18 Atl. 976. The danger to which the owner may subject himself by permitting suits brought by stop noticing claimants to go against him before seeking relief in a court of equity by a bill of interpleader, or in the nature of a bill of interpleader, is well illustrated by the case of *Pusakowski v. Woodward Lumber & Supply Co.*, 87 N. J. Eq.

665, 103 Atl. 194. Where the dispute is as to the amount from the owner to the contractor, the practice as to the method of determination has not been uniform. In *Aleck v. Jackson*, the contractor was permitted to proceed with his suit against the owner to final judgment. In that case it appeared that the amount admitted to be due by the owner to the contractor was less than the aggregate of the amounts claimed by the noticing claimants. Although the term "assignment pro tanto" has been applied to the effect of these notices, the served notices have not all the qualities of assignments, for the owner cannot, in an action brought by the contractor against him, claim credit for the amount claimed by any of the notices, unless he shall have in fact paid the amount claimed to be due. *Wightman v. Brenner*, supra. Notwithstanding, therefore, the service of notices the contractor retains either in his own right, or in the right of the noticing claimants, a sufficient cause of action to warrant a judgment in a law court for the full amount due from the owner under the contract. It seems to me that the holdings that the effect of the service of notice is to assign pro tanto, and that the owner has no right to credit until payment, and that the contractor may recover after the service of notice from the owner the full amount due on his claim, must necessarily result in the holding that when the contractor brings his suit against the owner he represents the claims of the noticing claimants and their causes of action. Where there is a dispute, as in this case, between the contractor and owner, it is necessary that the amount due should be fixed and determined, and an approved practice is to permit the contractor to proceed to judgment. *Aleck v. Jackson*, supra. A court of equity, upon bill of interpleader, or in the nature of a bill of interpleader, will not permit more than one suit to be brought for the purpose of establishing the amount due.

In the case at bar the noticing claimants brought no suit against the owner. They had knowledge of the suit of the contractor. By silence at least, they acquiesced in his prosecuting the suit to judgment. The fund in court represents the proceeds of that suit, and its existence is due to the labors of the attorney.

[5] I conclude, therefore, that the contractor had a cause of action within the meaning of the statute of 1914, either in his own right or in the right of the stop-noticing claimants, and, if in their right, then that he acted as their agent by force of the statute, and that the amount due to the attorney constitutes a lien upon the cause of action, and is entitled to be first satisfied.

This case was rather informally tried. No testimony was taken. Upon the hearing the amount, validity, and priority of the respec-

tive claims were agreed to, in open court. The amount due to the attorney if he had a lien was agreed to. My recollection is that it was also agreed that the stop-noticing claimants had notice of the bringing of the suit by the contractor, and that none of them brought suits upon their stop notices. If there is any question but that the facts above stated are correct, then testimony must be taken to establish them before the signing of a final decree. If the case goes up without the taking of further testimony, it must go up with the facts in these conclusions admitted.

Settle decree on two days' notice.

(89 N. J. Eq. 99)

POSTAL TELEGRAPH CABLE CO. OF
NEW JERSEY v. DELAWARE, L. &
W. R. CO. et al. (No. 41/648.)

(Court of Chancery of New Jersey. June 18, 1918.)

1. TELEGRAPHS AND TELEPHONES \Leftrightarrow 20(2)—
EASEMENT IN POST ROAD—CHANGE OF
GRADE—RIGHT OF ACTION.

Telegraph company maintaining poles in post road crossed by railroad at grade cannot enjoin township and county from changing grade of road because it would interfere temporarily with poles, or recover cost of changing location of poles, and of restoring them to former location; easement being subject to public rights in highway.

2. RAILROADS \Leftrightarrow 99(2) — TELEGRAPH LINE—
CHANGE IN GRADE OF POST ROAD—EXPENSE
OF SHIFTING POLES.

Work of changing grade of post road at railroad crossing, under agreement between township and county authorities and railroad, with legislative sanction, held not for railroad's sole benefit to render it liable to telegraph company for expenses of temporary relocation of poles in post road during work.

3. RAILROADS \Leftrightarrow 99(2) — TELEGRAPH LINE—
SHIFTING POLES—CHANGE IN GRADE OF
POST ROAD.

Where township and county had right to change grade of post road at railroad crossing, under agreement with railroad having legislative sanction, railroad, which did work, was not liable to telegraph company for cost of shifting poles temporarily, railroad standing toward municipalities in relation of contractor and employee.

Suit by the Postal Telegraph Cable Company of New Jersey against the Delaware, Lackawanna & Western Railroad Company and others. Decree dismissing the bill advised.

Vredenburgh, Wall & Carey, of Jersey City, for complainant. W. J. Larrabee, of New York City, for Delaware, L. & W. R. Co. F. W. Van Blarcom, of Paterson, for Board of Chosen Freeholders of the County of Passaic. W. B. Gourley, of Paterson, for Township of Acquackonk.

GRIFFIN, V. C. This cause is submitted upon the pleadings and a stipulation of facts, from which it appears that the River road in the township of Acquackonk in the county

of Passaic is a public highway which was crossed by the Delaware, Lackawanna & Western Railroad at grade; that said River road is a post road within the meaning of the act of Congress, within the lines of which the complainant had erected its telegraph poles carrying wires for the transmission of messages. The railroad company and the township and county authorities entered into an agreement to change the grade of the River road to abolish the grade crossing, under Laws 1903, p. 661, §§ 30, 31, Comp. Stat. p. 4234 (section 30 amended P. L. 1915, p. 98, 1 Supp. Comp. Stat. p. 1299). In doing the work it became necessary to temporarily remove the telegraph poles and wires of the complainant to a point outside the lines of highway, anticipating which the complainant filed its bill to restrain this disturbance, and obtained an order to show cause, with restraint, upon the hearing of which an order was entered on the 19th day of June, 1916, on motion of the solicitors of all the parties, which, after permitting the work to be proceeded with, ordered as follows:

"Further ordered, that the question, which of the parties shall be liable for the cost and expense of such relocation or reconstruction and the restoration of said poles and lines to within the lines of said River road upon the completion of said improvement, and the costs on said order allowed June 3, 1916, abide the final decree of this court."

The complainant thereafter removed its poles, wires, etc., outside the lines of the road, and restored the same after the change of grade was completed, at an expense of \$1,137.63.

The question now presented is which of the parties should bear this expense. First, are the municipalities liable?

[1] If the complainant sought to enjoin the municipalities from changing the grade of the road because it would interfere temporarily with the maintenance of its poles in the locus in quo, or if it sued to recover the cost of changing the location of its poles during the improvement and restoring them to their former location after its completion, it is quite clear it would fail in both instances, because its easement is subservient to the rights of the public in the highway, from which it follows that the cost of all changes of location in the highway, made necessary to the use of the dominant right of the public in the highway, must be paid by the owners of what might be termed the subordinate easement. *Jersey City v. City of Hudson*, 13 N. J. Eq. 420; *Erie R. R. Co. v. Public Utilities Com'rs*, 89 N. J. Law, 57, 98 Atl. 13, affirmed 90 N. J. Law, 372, 673, 103 Atl. 1052.

Second, is the railroad company liable?

[2,3] The complainant insists that even though the municipalities are not liable, the railroad company is. Its view is that the change of grade was made for the sole benefit of the railroad company. With this I do

not agree, and do not deem it necessary to pass upon what the situation would be if this contention were true. The change of grade was made with legislative sanction, which authorized municipalities and the railroad companies to enter into agreements to abolish grade crossings—a thing clearly beneficial to both—and fixing the portion of the expense to be borne by the municipalities. This is precisely what defendants did. In the sixth paragraph the municipalities agreed to take the necessary official, or other action, etc., to carry out the provisions of the agreement, etc. In the fifth paragraph the municipalities agreed (among other things) to secure the removal and relocation of the poles in question, where rendered necessary to perform the work contemplated. This paragraph was evidently inserted to bind the municipalities to exercise their rights to compel the removal or relocation of the poles during the work, so that the same might not be impeded. The railroad company assumed no liability under this paragraph.

The complainant, as I understand it, makes the point, which is combated in defendants' brief, that, as the railroad did the work (which is true), coupled with the assertion that it was for the railroad's sole benefit (which I have found to be untrue), a legal or equitable right arises in favor of the complainant against the railroad company to reimbursement. I do not deem it necessary to pass on this compound contention, if it is so urged, because the element of sole benefit to the railroad company is missing; and, as to the fact that the railroad company did the work, that fact alone does not render the railroad company liable, because, in doing it, it stood toward the municipalities in the relation of contractor and employé. *Clark v. Elizabeth*, 61 N. J. Law, 565-577, 40 Atl. 616, 737.

Being of the opinion that the defendants are not liable to reimburse the complainant, a decree will be advised dismissing the bill.

(89 N. J. Eq. 91)

FREILE et al. v. RUDIGER et al.

(No. 39/46.)

(Court of Chancery of New Jersey. May 20, 1918.)

1. BILLS AND NOTES §495 — LIABILITY OF INDORSER—BURDEN OF PROOF.

Burden is on an indorser of note to show contract different from that raised by indorsements.

2. DISCOVERY §15—ACTION ON NOTE—PARTIES INTERESTED.

Where holder of note on failure of maker to pay applied to payee, who had a claim against the holder for an amount equal to note, for payment, and it was agreed that holder would pay such amount if he could collect note from intermediate indorser, and payee wrote "without recourse" after his indorsement, and holder sued intermediate indorser, the real party in interest was the payee, and he could be brought in as defendant by the intermediate indorser on bill of discovery.

3. BILLS AND NOTES §301—INDORSEMENTS—DISCHARGE OF INDORSERS.

Where payee of note on being presented note for payment wrote "without recourse" after his indorsement, failure of the holder to disavow the alteration after knowledge thereof was a ratification of a material alteration which operated as discharge of subsequent indorsers.

Bill by William Freile and others against Joseph H. Rudiger and others. Decree for complainants.

Randolph Perkins, of Jersey City, for complainants. Treacy & Milton, of Jersey City, for defendant Rudiger. McDermott & Enright, of Jersey City, for defendants Schatzkin and Oetjen.

GRIFFIN, V. C. The bill in this cause is filed for discovery in aid of a suit at law against the complainants, William Freile, Anthony Michel, and P. Edward Wisch, upon a promissory note made by Orpheum Amusement Company (upon which the complainants are indorsers subsequent to the defendant Rudiger, who is payee and first indorser), and for a perpetual injunction against the suit at law, and for a decree that the note be delivered up for cancellation, and for other relief. The note, at maturity, was protested for non-payment by Schatzkin, the holder thereof. It seems that after the note had been protested, Schatzkin delivered the same to Rudiger, the payee and first indorser, to hand to his (Schatzkin's) attorneys for collection, under circumstances hereinafter stated. Rudiger, who was a director and vice president of a bank who knew the order of liability between indorsers, wrote after his name the words "without recourse" and handed the note to the attorneys of Schatzkin. The bill contains numerous prayers for discovery, one of which called on the defendants Rudiger, Schatzkin, and Oetjen to discover what interest either of them had in the note, and what interest Schatzkin or Rudiger had in the suit at law. The defendant Rudiger, answering this prayer, denied that "he is the beneficial owner of the note," or "that neither at this time nor at any other time has he had any interest in said note and the suit instituted thereon by the said Henry A. Oetjen."

The joint answer of Schatzkin and Oetjen denies that Rudiger has any right, title, or interest in said note, but does not state whether he has any interest in the suit at law. These answers, in the respects above stated, are not strictly true, because Mr. Rudiger was the one most vitally interested in the suit at law. Schatzkin and Oetjen also filed an answer by way of cross-bill against the complainants and Rudiger, praying that the words "without recourse" be stricken from the indorsement of Rudiger, and that the complainants and Rudiger be decreed to pay to them the amount due upon the note.

Three questions are presented for consideration: First, was there an agreement between

the complainants and the defendant Rudiger that complainants should be liable on the note prior to Rudiger? Second, was the suit at law instituted for the benefit of Mr. Schatzkin, or Mr. Rudiger, the payee? Third, was there such a material alteration made in the note after its delivery to Schatzkin that, under the Negotiable Instruments Act, (3 Comp. St. 1910, p. 3732), it is void as to the complainants?

[1] First. Was there an agreement between the indorsers that the liability of the complainants should be prior to that of the defendant Rudiger? In *Polhemus v. Prudential Realty Corporation*, 74 N. J. Law, 570-577, 67 Atl. 303, 306, the Court of Errors said:

"When there are several parties to a bill or note who have become such for the benefit of another, their status, not only as to the holder for value, but inter sese, is, in the absence of relevant proof to the contrary, that which is shown by the paper upon which they have placed their names."

In the present case, the evidence offered for and against an agreement varying the contract raised by the order of indorsement is so vague, indefinite, and contradictory that the court cannot find that such contract existed; and, as the burden of proof is on Rudiger to show a contract different from that raised by the indorsements, and as he has not sustained that burden, he fails.

[2] As to the second and third questions: Schatzkin says that when the note was not paid he demanded payment of Rudiger, and then an arrangement was entered into between them, which, in answer to a question of his counsel, Schatzkin explained as follows:

"A. Mr. Rudiger had a claim for an even amount of \$2,500 for some insurance, which he came to me and tried to collect; and I told him, I said, 'You owe me \$2,500 for the note; deduct the amount you owe me on the note, \$2,500, to cover one amount for the other;' he said, 'Well, I suppose I will be responsible anyway, if it cannot be collected from them,' and we had an understanding that if I can't collect the note from Mr. Wisch or the other indorsers, then I shall deduct it from the amount due him; and in case I do collect the note, then I shall have to turn him over the \$2,500 for the claim he had. Q. At any rate, it was a \$2,500 debt? A. Yes, which nominally I owe him now, and I hold him responsible on the note. That was understood between us, that one should offset the other; if I collect here, I pay him his money, and if not, it should be deducted."

Pursuant to this agreement the note was delivered to Rudiger to take to Schatzkin's attorneys for collection. Rudiger thereupon wrote, under his indorsement, the words "without recourse" and delivered it to an attorney connected with Schatzkin's attorneys, at the same time advising him that he had written the words "without recourse" after his signature. Schatzkin assigned the note to one Oetjen, a clerk in said attorneys' office, for the purpose of suit only. Oetjen had no beneficial interest either in the note or the moneys collected thereon. Oetjen sued on the note in the Supreme Court. Ru-

diger was not made a party defendant. After the commencement of the suit at law Schatzkin learned of the alteration, but did not object until his answer was filed herein.

On the foregoing facts, it is quite apparent that Mr. Schatzkin and Mr. Rudiger, in answering the above prayers for discovery, were untruthful. It is quite plain that Mr. Schatzkin was only nominally interested; that the real plaintiff and the one for whose benefit the suit was brought was Rudiger; and that his purpose in writing the words "without recourse" after his name was to avoid the liability imposed on him by law according to the order of indorsement.

[3] If Schatzkin should be regarded as the person beneficially interested in the suit at law, and he failed, after knowledge of the facts, to disavow the alteration, he ratified Rudiger's act; and the alteration being material, changing the rights and liabilities of the indorsers, *inter sese*, operates as a discharge of the complainants from liability. *Bodine v. Berg*, 82 N. J. Law, 662-669, 82 Atl. 901, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913D, 721; *Gray v. Williams* (Vt.) 99 Atl. 735; *Crawford's Annot. Neg. Inst. Law*, p. 196, § 120, and cases cited.

The parties having gone to hearing, and having stated on the record that they desired the whole controversy to be decided, the court, in its discretion, will retain jurisdiction and decide the issues. *Lehigh Zinc & Iron Co. v. Trotter*, 43 N. J. Eq. 185-204, 7 Atl. 650, 10 Atl. 607; *Van Horn v. Demarest*, 76 N. J. Eq. 386-391, 77 Atl. 354; *Knikel v. Spitz*, 74 N. J. Eq. 581-584, 70 Atl. 992; *Varrick v. Hitt*, 66 N. J. Eq. 442-444, 57 Atl. 406; *Mertens v. Schlemme*, 68 N. J. Eq. 544-548, 59 Atl. 803; *Coast Co. v. Spring Lake*, 56 N. J. Eq. 615-627, 36 Atl. 21.

The decree will be for complainants, the form of which may be settled on notice. What decree Mr. Schatzkin may be entitled to against Mr. Rudiger may then be considered.

(92 Vt. 319)

CHARLES BIANCHI & SONS v. MONTPELLIER & W. R. R. CO.

(Supreme Court of Vermont. Washington. May 8, 1918.)

1. CARRIERS §180(3)—BILL OF LADING—CONSTRUCTION—PRIVATE SWITCHES.

That a railroad may put goods on a siding does not make it other than private within bill of lading that carrier shall incur no liability for goods received from or delivered on private sidings, where such place of delivery was fixed by the bill, with the making of which the terminal carrier had nothing to do.

2. CARRIERS §149½ — BILL OF LADING — VALIDITY.

A provision in a bill of lading that property when received from or delivered on private sidings shall be at the owner's risk while on such sidings is reasonable and valid.

3. CARRIERS §49—PROVISIONS IN BILL OF LADING—PRESUMPTION.

The law presumes that a shipper agreed to be bound by a provision in bill of lading that the carrier would not be liable for property received from or delivered on private siding except when attached to train.

4. CARRIERS §175—CONNECTING CARRIERS—DELIVERY AT PRIVATE SIDING—NOTICE TO CONSIGNEE.

Where under a nonnegotiable bill of lading property was delivered on private siding, the terminal carrier had a right to act upon the basis that the shipper, who was also consignee, still held the bill of lading, and the property could be placed upon the siding without receipt of the bill of lading and without notifying the consignee.

5. CARRIERS §142—DUTY AS WAREHOUSEMEN.

Where carrier places goods on private siding, and its duty as carrier has ceased, if it still has any duty as warehouseman, it is only bound to use ordinary care in keeping the goods safe.

6. CARRIERS §146—DUTY AS WAREHOUSEMAN—NEGLIGENCE—BURDEN OF PROOF.

The burden of proof is on a shipper to show negligence of a carrier in its relation as warehouseman.

7. CARRIERS §143—DUTY AS WAREHOUSEMAN.

Assuming that carrier was not relieved of its common-law duty as warehouseman after placing property on private siding, a monument from its very nature was not improperly allowed to remain in a car on a siding.

8. CARRIERS §146—DUTY AS WAREHOUSEMAN—NEGLIGENCE—QUESTION OF FACT.

Whether carrier was guilty of negligence in its relation as warehouseman in leaving property in a car on a switch, *held*, under the evidence, a question of fact for the trial court.

Exceptions from Washington County Court; Stanley C. Wilson, Judge.

Action by Charles Bianchi & Sons against the Montpelier & Wells River Railroad Company. Judgment for defendant, and plaintiffs bring exceptions. Affirmed.

The trial of this case was by court. It is found that on the 3d day of September, 1915, the plaintiffs delivered to the defendant at Barre, this state, the monument in question, manufactured by them for the Norman Monument Company of St. Louis, Mo., and received of the defendant a bill of lading which is made a part of the findings. The monument consisted of four pieces, each of which was boxed and marked "Chas. Bianchi & Sons [the plaintiffs], St. Louis, Mo." The bill of lading reads: "Consigned to C. Bianchi & Sons. Destination, St. Louis, Mo., L. H. Tieman switch on Mo. Pac." The bill of lading had printed across its face the words, "Not negotiable."

The terminal carrier, the Missouri Pacific Railroad, at the point of destination, without the production of the bill of lading, delivered the car containing the monument onto the Tieman switch mentioned in the bill of lading. The monument was unloaded from the car by Tieman and held on wagons for 20 days, when it was delivered to him to the Norman Monument Company at Mt. Sinai

Cemetery, and was afterwards set up there in a family lot.

The L. H. Tieman mentioned lived at St. Louis, and had had the switch in question built by the Missouri Pacific Railroad for his convenience, it being understood that he should be responsible for the freight charges on all shipments placed on that switch. The switch or siding named abutted on Tieman's land, and no one except Tieman and the railroad company could have goods placed thereon without the former's consent. The plaintiffs lived in Barre, this state, and had no expectation of receiving the monument personally at St. Louis. They had previously shipped monumental work to the Tieman switch. No notice was ever given to Tieman of the arrival of the car containing the monument in question upon the switch, except that he found it there on the tracks of the switch. He unloaded the car because Mr. Norman, of the Norman Monument Company, had told him that he was expecting it; but Norman had not told Tieman who the shipper was.

The bill of lading was never assigned to any one by the plaintiff, and was always in their possession until it was delivered in court at the time of the trial of this case. The plaintiffs never gave any order for the delivery of the monument to any one; nor have they ever paid the freight for its transportation, though it was paid to the delivering railroad by some one, but by whom it did not appear. The plaintiffs have never received pay for the monument, nor have they ever received the monument from the terminal railroad, unless the delivery onto the Tieman switch was in law a delivery to them as consignees.

It is stated in the finding of facts that there was no evidence of any loss, misdelivery, or conversion of the monument by any of the carriers unless the facts recited constitute such, and that there was no evidence of any neglect or shortage or duty on the part of the defendant unless the facts recited constitute such.

The judgment below was for the defendant, and the plaintiffs excepted.

Argued before WATSON, C. J., and HASELTON, POWERS, and TAYLOR, JJ.

Richard A. Hoar, of Barre, for plaintiff.
H. C. Shurtleff, of Montpelier, for defendant.

WATSON, C. J. The bill of lading stipulated the Tieman switch as the place of delivery. The contract was controlling in this respect, and the monument was delivered by the terminal carrier at that place accordingly.

[1] The facts found show that the Tieman switch is a private siding built for the convenience of Tieman, who, by reason thereof, became responsible for freight charges on all shipments placed thereon. The fact that the railroad may put goods on that siding did not make it other than private in this instance where the place of delivery was fixed

by contract, with the making of which the terminal carrier had nothing to do.

[2, 3] The bill of lading contains a provision as follows:

"Property, * * * when received from or delivered on private or other sidings, wharves, or landings, shall be at the owner's risk until the cars are attached to and after they are detached from trains."

This provision is reasonable in the eye of the law, and not inconsistent with public policy; and the law presumes that the plaintiffs assented thereto and agreed to be bound by it. *Davis v. Central Vermont R. Co.*, 66 Vt. 290, 29 Atl. 813, 44 Am. St. Rep. 852; *Leavens v. American Express Co.*, 88 Vt. 842, 85 Atl. 557, Ann. Cas. 1915C, 1188.

[4] When the car containing the monument was delivered on the Tieman switch specified, and was detached from the train, and the consignees were given a reasonable opportunity to inspect the monument and take it away, the responsibility of the carrier, as such, ceased. *Stone v. Walitt*, 31 Me. 409, 52 Am. Dec. 621; *Michigan Southern, etc., R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199, 69 N. E. 825; *Kingman, St. Louis Impl. Co. v. Southern R. Co.*, 133 Mo. App. 317, 112 S. W. 721; *Gulf Compress Co. v. Alabama Great Southern R. Co.*, 100 Miss. 582, 56 South. 666; 10 O. J. 233; 4 R. O. L. 833. It is urged, however, that the placing of the car upon the side track, as per bill of lading, without notice of its arrival being given to the consignees, and the bill of lading surrendered, was not such a delivery as will relieve the carrier from liability. But this position is unsound so far as surrendering the bill of lading is concerned, for that was not negotiable, and the property was delivered at the place stipulated therein. The terminal carrier had a right to act upon the basis that the consignees still held the bill of lading and were the owners of the property until it was notified to the contrary. *National Bank v. Baltimore & Ohio R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. By the law of this state the carrier was not bound to give notice to the consignees of the arrival of the property at the place of destination, in order to relieve it, as such, from liability. *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349. On facts of record, there is no ground upon which the defendant can be held liable in its capacity as a common carrier.

[5-8] The question then is whether the defendant is liable in its relation of a warehouseman. Assuming that the provisions quoted above from the bill of lading do not relieve the carrier from its common-law duty in this respect, have the plaintiffs made out a case? In this relation the carrier is bound only to use ordinary care and diligence in keeping the goods safely. *Blumenthal v. Brainerd*, cited above. And the burden of proof is with the plaintiffs. The record states that there was no evidence of any

neglect or shortage of duty on the part of the defendant unless the facts recited constitute such. The nature of the goods was such that in the performance of its duties as warehouseman the terminal carrier might very properly let the goods remain in the car on the siding (where it was required to be placed by the bill of lading), instead of putting them in a storehouse. *Schumacher v. Chicago, etc., R. Co.*, cited above. The carrier delivered the monument to no one other than the plaintiffs, nor did it authorize its removal from the car or from the siding by any one except the plaintiffs. The facts recited do not, as matter of law, constitute neglect or shortage of duty by it, and there was no error in the judgment.

Since liability on the part of the defendant is not established, the questions argued touching the amount of damages are immaterial.

Judgment affirmed.

MILES, J., did not sit.

(32 Vt. 330)

WELLS v. BLODGETT.

(Supreme Court of Vermont. Caledonia.
May 8, 1918.)

1. CHATTEL MORTGAGES §47—DESCRIPTION OF PROPERTY—LOCATION.

Location of property is not indispensable in description of property in chattel mortgage.

2. CHATTEL MORTGAGES §49(1)—DESCRIPTION—SUFFICIENCY—DETERMINATION.

In testing sufficiency of description to give purchaser constructive notice of chattel mortgage, it will not be assumed that mortgagor had more than the one red and white cow four years old described in the mortgage; that he had being a matter of defense.

3. TRIAL §178—DIRECTED VERDICT.

In trover for alleged conversion of a cow on which plaintiff held a mortgage from his purchaser, defendant's seller, in which defendant set up insufficient description to give constructive notice, a binding instruction could not be granted unless the court could say, as a matter of law, that description was insufficient.

4. CHATTEL MORTGAGES §47—DESCRIPTION OF PROPERTY—SUFFICIENCY IN GENERAL.

As to third persons having constructive notice only, description in a chattel mortgage must be such that property can be identified by reference to the mortgage itself aided by such inquiries as may be indicated or directed thereby.

5. CHATTEL MORTGAGES §49(1)—DESCRIPTION OF PROPERTY—PRIMA FACIE VALIDITY.

The general rule is that a description in chattel mortgage of animals by sex, age, and color is sufficient to give the description prima facie validity.

6. TRIAL §178—DIRECTED VERDICT—DESCRIPTION OF PROPERTY—PRESUMPTION.

In determining sufficiency of description of cow in chattel mortgage to give defendant subsequent purchaser constructive notice, it will be assumed for purpose of defendant's request for a binding instruction that cow was truly described as to color.

7. TRIAL §178—DIRECTED VERDICT—DESCRIPTION OF PROPERTY IN MORTGAGE.

In determining the sufficiency of description of cow in chattel mortgage to give subsequent purchaser constructive notice, facts disclosed in

evidence of which subsequent purchaser must be deemed to have had notice will be taken into account.

8. CHATTEL MORTGAGES §49(1) — CONSTRUCTIVE NOTICE—QUESTION FOR JURY.

Description "one red and white four years old" in chattel mortgage describing 12 cows was prima facie sufficient, and question whether it was sufficient to create a lien against defendant purchaser from mortgagor was for jury.

9. CHATTEL MORTGAGES §229(1) — PURCHASERS' RIGHT.

Where plaintiff mortgagee was relying upon three mortgages, two of which were executed after a time which evidence tended to show was after sale of the property by the mortgagor to defendant, the court erred in refusing to instruct that plaintiff could not recover by virtue of any mortgage executed after defendant's purchase and possession.

10. TRIAL §253(3) — SUBMISSION OF CASE UPON ERRONEOUS THEORY.

In trover for conversion of a cow, disputed fact being accuracy of description in mortgage, submitting case upon theory that determinative issue was identity of cow mortgaged was inadequate.

11. APPEAL AND ERROR §1067—FAILURE TO CHARGE IN ACCORDANCE WITH ISSUE—REVERSAL.

In trover for conversion of a cow, disputed fact being accuracy of description in mortgage, failure to charge that, if color of cow was as described, description was sufficient, otherwise not, was error requiring reversal.

Exceptions from Caledonia County Municipal Court; George C. Frye, Judge.

Trover by Joseph L. Wells against Roy E. Blodgett. Judgment for plaintiff, and defendant brings exceptions. Judgment reversed, and cause remanded.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Searles & Graves, of St. Johnsbury, for plaintiff. Porter, Witters & Harvey, of St. Johnsbury, for defendant.

TAYLOR, J. The action is trover to recover for the alleged conversion of a certain cow on which the plaintiff claimed to hold a mortgage. The trial was by jury, with verdict and judgment for the plaintiff. There was evidence tending to show that the defendant purchased the cow of one Cushman; that Cushman had previously bought the cow from the plaintiff; that he had given the plaintiff three chattel mortgages covering this cow and other personal property; that the mortgage liens were still in force; that before this suit was brought the defendant had sold the cow to one Gilman. The plaintiff produced in evidence three chattel mortgages from Cushman to himself, one executed in September, 1913, and the other two in October, 1914, on which he based his right of recovery.

The principal issues at the trial were as to the color of the cow in question and the date of her purchase by the defendant. By a special verdict the jury found that the purchase was in June, 1914. It was not claimed that the cow purchased by the defendant was

not the one the plaintiff sold Cushman; but the defendant relied upon the claim that the description in the mortgage was insufficient to create a lien against a third person, among other things, in that the color of the animal was not truly stated. It did not appear whether the defendant had or did not have notice of an incumbrance other than such constructive notice as the record of the mortgages would impart; but no claim has been made that the rights of the parties are affected thereby.

The plaintiff's evidence tended to show that the cow was still in Cushman's possession when the last mortgage was executed, and that she was a red and white grade Durham, four years old at the time of the original mortgage; while the defendant's evidence tended to show, as the jury has found, that she was sold and delivered to the defendant in June, 1914, before the two last mortgages were executed, and that she was not in color red and white, but a gray or Jersey color, with no distinct markings.

The chattel mortgage of September, 1913, so far as is material, described 12 cows, giving the color and age of each, including "one red and white, 4 yrs.," and concluded, without more, "All above-described cows are grade Durhams and Holsteins." The location of the mortgaged property is not given in the description. There was evidence tending to show that the cows described in this mortgage were at the time of its execution in Cushman's possession on his farm in St. Johnsbury, and were the only cows then on said farm.

[1] By certain requests the defendant asked for a binding instruction that as to the cow in question the mortgage was of no force, because of an insufficient description. It is urged, citing *Joslyn v. Moose River Lumber Co.*, 83 Vt. 50, 74 Atl. 385, 138 Am. St. Rep. 1067, 21 Ann. Cas. 1024, as a ground of insufficiency; that the location of the property sought to be mortgaged is not given. It was said in the case cited that one of the most important elements in the description of mortgaged chattels is a statement of their location and the one thing which the draftsmen of a mortgage should never omit. These remarks were cautionary and are of force at the present time. They were specially significant in that case, where an erroneous location of the property was suggested. However, it was not held that location of the property is indispensable to a sufficient description. It will always aid in identifying the property, and may often render a mortgage otherwise indefinite and uncertain sufficiently certain by making the mortgage itself indicate where the property may be found on inquiry.

[2] It is also said in support of the claimed insufficiency that it does not appear from the mortgage, but that the mortgagor at the time owned either cows answering the description. But in testing the sufficiency of

the description it will not be assumed that he may have had more than one red and white cow 4 years old. That fact would be a matter of defense in impeachment of the mortgage. *Shum v. Claghorn*, 69 Vt. 45, 59, 87 Atl. 236.

[3, 4] The requests for a binding instruction could not be complied with unless the court could say as a matter of law that the description was insufficient. As a general proposition, to be sufficient against third persons having constructive notice only, the description in a chattel mortgage must be such that the property can be identified by reference to the instrument itself, aided by such inquiries as may be indicated or directed thereby. 5 R. C. L. 484; *Rogers v. Whitney*, 91 Vt. 78, 99 Atl. 419; *National Bank of Chelsea v. Fitts*, 67 Vt. 57, 30 Atl. 697.

[5] It is the well-settled general rule that the description of animals by sex, age, and color is sufficient to give the description prima facie validity. *Shum v. Claghorn*, supra; *Rogers v. Whitney*, supra. However, this rule is subordinate to the rule stated above. The ultimate question is whether the description in the particular case is such as to enable a third person to identify the property by its aid, together with the aid of such inquiries as the instrument itself suggests. See *Parker v. Chase*, 62 Vt. 206, 20 Atl. 198, 22 Am. St. Rep. 99, and cases cited above.

[6-8] For the purposes of a request for a binding instruction (the equivalent of a motion for a directed verdict) we must assume that the cow in question was truly described. We must also take into account the facts disclosed in the evidence, of which the defendant must be deemed to have had notice. The record of the mortgage charged him with notice that Cushman, from whom he was about to purchase a red and white grade Durham cow, had in September, 1913, mortgaged to the plaintiff 12 cows all grade Durhams and Holsteins, including a red and white cow, then four years old. It would be presumed in aid of the description that Cushman was then the owner of the cows. *Shum v. Claghorn*, 69 Vt. 45, 50, 87 Atl. 236. Inquiry would have disclosed that Cushman had in his possession when the mortgage was given, on the farm where this cow was in June, 1914, 12 cows answering the description of mortgage, and no more, and would have identified the cow he was purchasing as one of this number. With this information the defendant could not well have had any doubt that the mortgage covered this particular animal. In the circumstances the description was prima facie sufficient, and the case was for the jury.

[9] The court erred in refusing to comply with the defendant's first request, which was that the jury be instructed that the plaintiff could not recover by virtue of any mortgage executed by Cushman to him after the defendant had purchased and taken possession of the cow (in question). The plaintiff was

relying upon three mortgages, two of which were executed after a time when there was evidence tending to show Cushman had parted with the property. The jury found for the defendant on this issue, and should have been told that in case they so found the mortgages subsequently executed could not be considered as a basis of recovery.

There were other requests to charge which need not be specifically noticed. They present abstract questions of law, and are not applicable to the facts in issue in this case.

[10, 11] The charge of the court is challenged by several exceptions. The case was submitted upon the theory that the determinative issue was the identity of the cow, whether the cow mortgaged by Cushman to the plaintiff was the same cow that Cushman sold the defendant. As the case was tried this was an inadequate submission of the disputed fact. The jury was told that the description by age, sex, and color was *prima facie* sufficient, and that the question for their consideration was the identity of the cow; while, as the case was made up, they should have been charged that whether or not the mortgage was binding against the defendant depended upon the accuracy of the description; that, if the color of the cow was as described in the mortgage, the description was sufficient to give the mortgage validity as against the defendant; otherwise not. This fault was sufficiently pointed out and requires a reversal.

The defendant moved the court to set aside the verdict and excepted to the overruling of his motion. As the defendant prevails on other exceptions, it is not necessary to consider the questions presented by this motion.

Judgment reversed, and cause remanded.

(92 Vt. 325)

WRIGHT v. LINDSAY.

(Supreme Court of Vermont. Orleans. May 8, 1918.)

1. CHATTEL MORTGAGES ¶47 — CONSTRUCTIVE NOTICE—DESCRIPTION—SUFFICIENCY.

Description in mortgage, "One Ford touring automobile, model T, serial No. 621120, being the same automobile purchased of Wright November 2, 1915," was sufficient to charge the purchaser from mortgagor with knowledge, since automobile could be identified by reference to recorded mortgage.

2. CHATTEL MORTGAGES ¶102—CONSTRUCTION.

Provisions of chattel mortgage must be so construed that every part may be effectual.

3. APPEAL AND ERROR ¶219(2)—FAILURE TO PROCURE FINDINGS.

Defendant, having failed to procure findings that take away *prima facie* effect of description in chattel mortgage, cannot complain on appeal of judgment for plaintiff based on finding that description was sufficient to give defendant constructive notice.

Exceptions from Orleans County Court; Fred M. Butler, Judge.

Replevin by William Wright against W. O. Lindsay. Judgment for plaintiff, and defendant brings exceptions. Judgment affirmed.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Porter, Witters & Harvey, of St. Johnsbury, for plaintiff. J. W. Redmond, of Newport, for defendant.

TAYLOR, J. The action is replevin for an automobile. The plaintiff claims the property as mortgagee and the defendant as vendee of the mortgagor. The trial was by the court with judgment for the plaintiff on the facts found. The defendant excepted to the judgment on the findings, which is the only question presented for review.

On November 2, 1915, the plaintiff sold and delivered to one Baldwin the automobile in question and took a chattel mortgage to secure a note for the purchase price. The mortgage was duly recorded on November 9, 1915. The note was payable six months after date, and still remains in part unpaid. The description in the mortgage is as follows:

"One Ford touring automobile, model T, serial No. 621120, being the same automobile purchased of W. A. Wright November 2, 1915; one brown mare eight years old, weight about 1,000 pounds; one Babcock open buggy and one driving harness—all said property being now in the possession of said Baldwin in Newport, Vt., and being the only property of like kind now owned by said Baldwin."

The defendant purchased said automobile of said Baldwin on November 10, 1916, and took it into his possession, where it was found when replevied. Demand was made of the defendant for the automobile before service of the writ of replevin, who refused to deliver it on the ground that there was no sufficient description of the automobile in the chattel mortgage, and that there was no mortgage on the automobile.

On the trial the defendant denied the plaintiff's right to the automobile on the ground that the description contained in the chattel mortgage does not describe the automobile in question and is not such a description as would charge him with knowledge of said mortgage. The serial number given in the description was the serial number on the engine. There were at least five different serial numbers of principal parts on this automobile. There was a plate on the dash of the car on which were the words, "Mfg.'s number of this car is 593350." It is found that the latter number was commonly used by the manufacturers, repair shops, insurance agents, and by the Secretary of State to identify the Ford car, until the year 1916, when such cars began to appear in this section without such number plate on the body; that sometimes the engine number is

used for the purpose of identification, and that usually the manufacturer's number is employed to identify the assembled units. The defendant did not claim that there was any universal rule as to the use of any particular number for the purpose of identification. The automobile replevied was the one sold by the plaintiff to Baldwin on November 2, 1915, and was the one intended to be mortgaged. The court found that its identity could have been easily established by inquiries suggested in the description contained in the mortgage.

[1, 2] In view of the findings there seems to be little room for doubt as to the validity of this mortgage against third persons, when we apply the well-recognized test in such cases that the description is sufficient if such that the property can be identified by reference to the instrument, aided by such inquiries as it suggests. *Wells v. Blodgett*, 104 Atl. 146, and cases there cited. The only room for doubt arises from the designation of the automobile by a number which, at the most, would not ordinarily be employed for the purposes of identification. But this alone is not enough to nullify the notice that the mortgage would impart. The instrument must be construed together in view of all its parts so that every part may be effectual. 5 R. C. L. 422.

The number used actually appeared upon the car and was one sometimes employed for identification. So far as appears, the defendant was not misled thereby. However, the inquiries suggested by the instrument would correct any misapprehension that the number could have created and afforded ample basis of identification, notwithstanding the confusion which may have been occasioned by the presence of other numbers.

The defendant's construction of the findings savors too much of special pleading. It is said that it is not found that the car was a "Ford touring automobile," nor that it was a "model T." To be sure, the expressions are not used in the findings; but the car is termed a "Ford automobile," and its identity with the car intended to be mortgaged is expressly found. The identity being established, the only question is the sufficiency of the description to give the defendant constructive notice that this particular automobile was mortgaged.

[3] The defendant was bound to know from the record of the mortgage that a Ford touring automobile of a certain model and number, purchased by Baldwin of the plaintiff on a certain day, then in Baldwin's possession, and, being the only automobile that he then owned, was the same day mortgaged to the plaintiff. Aided by the inquiries which this description suggests, the defendant would certainly have been able, upon reasonable investigation, to ascertain that the automobile he was about to purchase of the mortgagor

was the one that had been mortgaged to the plaintiff. This is all that is required to give the description *prima facie* validity. Having failed to procure findings that take away the *prima facie* effect of the description, the defendant is not in a position to question the judgment.

Judgment affirmed.

(361 Pa. 11)

DOLAN et al. v. SCHOEN et al.

(Supreme Court of Pennsylvania. March 18, 1918.)

1. MUNICIPAL CORPORATIONS \S 330(2)—CONTRACTS—ADVERTISEMENT FOR BIDS—STATUTE — "NECESSARY REPAIRS OR INCIDENTAL EXPENSES."

Under Third Class City Act (Act June 27, 1913 [P. L. 568, 578]) art. 4, § 5, providing that all work and materials required by city shall be furnished, and that the printing, advertising, and other work, except ordinary repairs, shall be performed under contract given to the lowest bidder, and that the council may by ordinance provide a contingent fund for necessary repairs or incidental expenses, which may be expended without advertising for bids, contracts for improvements to a city hall, amounting to a permanent alteration and remodeling, including new heating, lighting, and pumping systems, new partitions, stairways, windows, entrances, etc., must be let as provided by the act, and cannot be paid out of the contingent fund without competitive bidding, as such claims could not be included under the term "necessary repairs or incidental expenses"; and while some of the work might be classed as ordinary repairs, it was so blended with the other work that it could not be the basis of a separate claim.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessary Repairs; First Series, Incidental Expenses.]

2. MUNICIPAL CORPORATIONS \S 244(2) — MUNICIPAL CONTRACTS—CHARTER.

Where the Charter Act of a city prescribes the method or formal mode of making municipal contracts, it must be observed, and, if not executed in conformity therewith, the contract is not enforceable against the municipality.

Appeal from Court of Common Pleas, Schuylkill County.

Bill in equity for an injunction by Hugh Dolan, for himself and for other taxpayers becoming parties, against Jacob B. Schoen and others, councilmen, and others. From a decree awarding an injunction on the final hearing, defendants appeal. Affirmed.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

E. P. Leuschner and James B. Reilly, both of Pottsville, for appellants. E. D. Smith, of Pottsville, for appellee.

WALLING, J. This is a taxpayer's bill to restrain the expenditure of public money. Pottsville is a city of the third class; and, at the beginning of 1916, its councilmen decided to remodel and improve the city hall. For such purpose \$2,500 were included in the general appropriation ordinance for that

year. An architect was employed to prepare plans and specifications, and thereafter, upon due advertisement, bids were submitted for different parts of the work, a tabulation of which showed that the improvement would cost nearly \$2,000 more than the sum appropriated, and the bids were rejected. Then the council transferred the \$2,500 to a contingent fund. Hiram S. Davies, a member of council, was superintendent of parks and public property, and as such took a leading part in this matter. He consulted with some who had submitted bids and with others, took them to the city hall, and verbally explained what was to be done in the different branches of the work; secured new bids on such explanations without advertising, and ignoring the original plans and specifications. The mayor and council let contracts on such new bids, and the work was proceeded with. The improvement as so made cost about \$2,000, and included new heating, lighting, and plumbing systems; also new partitions, stairs, doors, windows, etc. It also included some excavation and the construction of a new drain in the basement, and the removal of the tower; also plastering, painting, papering, etc. As stated by the court below:

"It consisted in the remodeling of the city hall; new rooms were added; bathrooms put in; staircases changed; hall built. In fact, the interior of the building was completely changed."

So far as appears, the work was well, economically, and honestly done, and no fraud is alleged. However, plaintiff filed this bill to enjoin the city authorities from paying and the contractors from collecting for the same, on the ground that the work had been illegally done. A preliminary injunction was granted as prayed for, which the court below made permanent after final hearing. Defendants appealed.

[1] We are all of the opinion that the decree was right under the law. Section 5 of article 4 of the Third Class City Act of June 27, 1913 (P. L. 568, 576), known as the Clark Act, provides, *inter alia*:

"All stationary, paper, and fuel used in the council and in other departments of the city government, and all work and materials required by the city, shall be furnished, and the printing, advertising, and all other kinds of work to be done for the city, except ordinary repairs of highways and sewers and other public improvements, shall be performed, under contract to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance. * * * Council may by ordinance provide a contingent fund for necessary repairs or incidental expenses, not otherwise provided for in the general appropriations, and such funds may be expended without advertising for bids."

The work here was not done under contract given to the lowest responsible bidder. In fact all the competitive bids had been rejected, and these contracts were let by private arrangement on different conditions.

The claims cannot be sustained under the exception as to ordinary repairs, for the chancellor properly finds that the improvements in question were not ordinary repairs. Neither can they be included under the term "necessary repairs or incidental expenses." Council evidently did not regard the improvements to the city hall as necessary repairs to be made from the contingent fund without advertising for bids, as they embraced that expense in the general appropriation ordinance and advertised for bids. True, as the chancellor finds, some of the work may properly be classed as ordinary repairs, but as that is blended with the other it cannot be made the basis for a separate claim. To hold that a contingent fund created to meet incidental expenses and necessary repairs could be used for the permanent alteration and remodeling of public buildings would practically abrogate this section of the statute. Council might have changed their plans and readvertised for bids, but they could not evade the law by the attempted creation of a contingent fund and by denominating the improvement necessary repairs. New partitions, new stairways, new windows, new entrances, etc., cannot pass as necessary repairs. While here no actual loss resulted, yet the statute requiring important municipal work to be open to competition is a valuable protection to the public, and cannot be ignored.

[2] The provision stated in the above-quoted section is not new to the statutes of this commonwealth. It appears in the Wallace Act of May 23, 1874 (P. L. 230), and in subsequent legislation, and has been construed by this court. In *Mazat v. Pittsburgh*, 187 Pa. 548, page 561, 20 Atl. 608, page 697, it is held:

"It cannot be doubted that the true intent of the act of 1874, and the ordinance passed in pursuance thereof, regulating the awarding of public contracts, is to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism, and fraud in its varied forms."

See, also, *Louchheim v. Philadelphia*, 218 Pa. 100, 66 Atl. 1121. In considering a similar provision relating to cities of the second class in the very recent case of *Philadelphia Company v. City of Pittsburgh*, 253 Pa. 147, page 151, 97 Atl. 1063, page 1064, our Brother Mestrezat in delivering the opinion of the court, says:

"We have uniformly held in numerous decisions, and it may now be regarded as the general rule in this state, that where the charter act of a city prescribes the method or formal mode of making municipal contracts, it must be observed, and, if not executed in conformity therewith, a contract is not enforceable against the municipality."

The assignments of error are overruled, and the decree is affirmed, at the costs of the appellants.

(260 Pa. 576)

SHRADER v. COMMERCIAL COAL MINING CO.

(Supreme Court of Pennsylvania. March 18, 1918.)

1. MINES AND MINERALS ⇐70(1)—CONSTRUCTION OF LEASE—SHARE OF PROFITS—DEDUCTION OF LOSSES.

A mining company leased to another company coal mines known as No. 2 and No. 5, the lease providing that, during the life of mine No. 2, the lessee should apply two-thirds of the net profits to the reduction of the indebtedness of the lessor, and, on cancellation thereof, that share should be paid to the lessor, and that the net profits of mine No. 5 should be applied until payment in full of the costs of equipping and putting in condition for operation, with interest at 6 per cent. to the payment thereof, and be applied monthly, and that after such indebtedness was liquidated, in consideration of the assignment of the lease and the use of the lessor's machinery and equipment, the lessee should pay the lessor one-half of the net profit from that mine, and one-half of the net profit from operation of lands leased or purchased by the lessee in the operation of plant, payable quarterly during the lease, and that a statement and application of profits should be made to the lessor every three months. Held that, after the profits had been ascertained for a certain period, they could not be diminished because of losses sustained during the previous period.

2. MINES AND MINERALS ⇐70(1) — MINING LEASE—EQUIPMENT—CHARGE.

Where such agreement required the lessee to develop and equip one of the mines, and stipulated that expenditures for machinery and development should include only labor and cost of material purchased, without charge for general superintendence, and that the total expenditure to be made should not exceed \$25,000, all renewals to be charged to the cost of production, and the lessee equipped the mine at a cost of about \$20,000, and thereafter re-equipped it for operation by electric power at a cost of \$37,000, the entire expense of the new equipment and the old equipment could not be charged against the cost of operation, as it did not come within the provision as to renewals.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an accounting for money due under a coal lease by James F. Shrader, trustee in bankruptcy of the Black Lick Mining Company, against the Commercial Coal Mining Company. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHIZSKER, FRAZER, and WAL-LING, JJ.

William A. Glasgow, Jr., of Philadelphia, Evans & Evans, of Ebensburg, and Samuel Scoville, Jr., and Chester N. Farr, Jr., both of Philadelphia, for appellant. H. B. Gill and W. B. Linn, both of Philadelphia, for appellee.

FRAZER, J. Defendant appeals from a decree ordering it to account to plaintiff, trustee in bankruptcy of the Black Lick Mining Company, for the net earnings of two coal mines operated by defendant under agreement with the Black Lick Company.

[1] The Black Lick Mining Company operated a coal mine, known as No. 2, under a lease from the estate of Charles McFadden, deceased, and, being largely indebted, entered into a contract with the Commercial Coal Mining Company, the defendant, whereby the latter company agreed to operate the mine and finance the indebtedness of the former company, in consideration of one-third the net profits of the undertaking. The contract remained in force approximately three years, until January 12, 1917, when it was superseded by the agreement now before the court for construction. This agreement, after reciting that the Black Lick Mining Company was about to procure from the estate of Charles McFadden, deceased, a lease of an additional mine, known as No. 5, provided that such lease should be assigned to the Commercial Coal Mining Company, and that the latter would continue to operate mine No. 2, and also provide the necessary capital to "develop and equip and put in condition for operation" mine No. 5; the Black Lick Company to afford the Commercial Company "free use of all sidings, tipples, building, power plants, machinery and equipment" of mine No. 2 with right to use them in connection with the operation of No. 5, and to remove the same to the latter mine upon the former becoming exhausted. The Commercial Company also agreed to finance the remaining indebtedness of the Black Lick Company, amounting to \$21,723.77, until that sum was paid out of the share of the profits of the mines becoming due and payable to the Black Lick Company.

The principal question in dispute, under the agreement, is the method of computing the compensation the Black Lick Company is entitled to receive. It is first provided that, during the life of mine No. 2, the Commercial Company shall apply annually two-thirds of the net profits of that mine to the reduction of the indebtedness of the Black Lick Company, and, upon cancellation of such indebtedness, the share shall be paid to the Black Lick Company, and further as follows:

"11. The net earnings or profits from the operation of mine No. 5 shall be applied as follows: Until the payment in full of the cost of equipping, developing, and putting in condition for operation of said mine No. 5, with interest at the rate of six (6) per cent. per annum, the same shall be applied to the reduction and payment thereof, the same being applied monthly so far as the same will suffice such payment or reduction. After said indebtedness is liquidated and paid in consideration of the assignment of said lease and use of the machinery and equipment of the Black Lick Company, the Commercial Company agrees to pay to the Black Lick Company during the life of this agreement a sum equal to one-half of the said net profit derived from the operation of said mine No. 5, and also of one-half of the net profit derived from the operation of the adjoining tracts leased or purchased by the Commercial Company in the operation of which the plant and machinery of the Black Lick Company is utilized. This

sum shall be paid to the Black Lick Company quarterly in each year during the continuance of this agreement.

"12. The amount of the profits shall be ascertained and applied as herein provided, at least once in every three months, and a statement thereof rendered by the Commercial Company to the Black Lick Company at that time, and in the month of January in each year during the continuance of this agreement a full statement shall be rendered of the entire operation and transactions hereunder up to the 31st of December preceding. It is understood that the monthly and quarterly statements rendered as herein provided shall be for the purpose of the information of the parties merely and shall not be binding or conclusive. With respect to the annual statement rendered in January, the Black Lick Company shall have the right to have the accounts to which the said statement relates audited within sixty (60) days of the time of the rendition of said statement, and, if not so audited, the same shall be conclusive upon both the parties hereto."

A subsequent paragraph of the agreement requires the Commercial Company to pay the Black Lick Company \$125 on the 20th day of each month "during the continuance of this agreement," such payments to be "charged against its account and to be deducted from the profits which may become due the Black Lick Company," the payments, however, to cease "whenever the earnings from No. 5 mine amount to a sufficient sum to pay the Commercial Company for their expenditures for equipment and development." This provision was apparently inserted to assure the Black Lick Company a certain and steady income or return from the mines during the existence of the old indebtedness and while the profits from mine No. 5 were being applied to the cost of its equipment and development.

The contention of plaintiff is that under the foregoing provisions of the contract, upon ascertaining the profits for the monthly, quarterly, or annual period, no deduction should be made for losses occurring in the preceding period, but such losses should be borne by the Commercial Company. On the other hand, the latter contends the general rule applicable to a division of profits of a partnership should be applied, and losses resulting during one period carried over and deducted from profits earned during a subsequent period, notwithstanding the fixing of a regular time for their calculation and distribution.

In the first place the contract is more in the nature of a lease of coal in place in consideration of a share of profits in lieu of royalties than a partnership agreement. In fact, it accompanied an assignment of a coal lease from the estate of Charles McFadden, deceased, to the Black Lick Company, made pursuant to an oral agreement between McFadden, in his lifetime, and the Black Lick Company, which had been partly carried out before McFadden's death; and to complete the transfer the orphans' court subsequently directed his executors to make a lease afterwards assigned to the Commercial Company with the consent of the trustee of the Mc-

Fadden estate. The assignment being absolute the agreement was necessary to secure the Black Lick Company a proper revenue from its mining rights, which were of considerable value, but which the company, owing to its lack of capital, was unable to properly develop. No liability with reference to the operation of the mine is imposed on the Black Lick Company, and until the happening of a particular event it is entitled to receive \$125 a month, chargeable against the "sum equal to one-half the profits," payable by the Commercial Company. The Black Lick Company reserved the right to terminate the agreement and retake possession of the mines and equipment in case of failure on the part of the Commercial Company to perform the covenants contained therein, and further provided that "nothing in this agreement contained shall be construed as creating or attempting to create a partnership between the parties hereto or as imposing any of the liabilities thereof." Under these circumstances it is difficult to see how a liability for losses can be fastened upon the Black Lick Company in the absence of a provision to that effect in the contract.

Paragraph 11 of the contract, quoted above, contemplates two different plans of applying profits derived from mine No. 5: First, a monthly payment until the cost of equipping and developing the mine is paid; second, after such debt is canceled to pay to the Black Lick Company quarterly "a sum equal to one-half" the net profits. On the other hand, paragraph 8 required the earnings of mine No. 2 to be applied yearly, though there is an apparent conflict between this provision and paragraph 12, which requires the profits to be "ascertained and applied as herein provided at least once in every three months, and a statement thereof rendered" at that time, and a "full statement" made in January of each year. This requirement of paragraph 12 refers generally to the matter of accounting, and must yield to the more specific provisions of paragraph 8, covering the application of profits. The further provision that "It is understood that the monthly and quarterly statements rendered as herein provided shall be for the information of the parties merely, and shall not be binding" is not conclusive of an intention to carry losses to subsequent months throughout the year, but indicates only that particular items of the monthly and quarterly accounts shall not be held indisputable in the final account at the end of the year. The information was evidently needed for the purpose of ascertaining the amount of profits to be credited to the Black Lick Company, as well as the amount of royalties due the McFadden estate, the original lessor; it being provided in the lease that royalties shall be paid monthly and a full account rendered every three months. The monthly accounts between the parties to this action are provid-

ed for in paragraph 9 of the agreement, as follows:

"The Commercial Company shall, on or before the 20th day of each month during the continuance of this agreement, furnish to the president of the Black Lick Company a true and accurate report of the cost of the operation, showing in detail all the expenditures made or indebtedness incurred in said operation during the preceding calendar month. At the same time, also, the Commercial Company shall make a full and accurate report of all coal shipped from No. 2 and No. 5 mines during the preceding calendar month and price received for same. The accounts of sales of coal from No. 2 and No. 5 mines shall be kept separate and apart from each other, and separate and apart from the sales of coal from other mines operated by the Commercial Company, so that the quantity produced and sold from each mine may be ascertained."

Nothing is found in the above provisions, or in other parts of the contract, to indicate the Black Lick Company shall share the losses. If, however, we adopt appellant's theory of construction of the contract, the further question arises: At what time should the profits be finally ascertained, and for what period should the right to apply future profits to past losses continue? There is no more reason under the contract for taking a yearly than a monthly period. Under the partnership theory, since the parties contemplated the contract to last until the exhaustion of the mine, a final accounting is not possible until that time. The terms of the agreement, however, do not warrant such construction, and the parties expressly provide to the contrary. We agree with the court below, and hold the profits should be computed and divided at the periods stated, without deduction for losses sustained in the preceding period.

[2] The next question to be considered is whether the cost of a new electrical equipment for mine No. 5 is properly chargeable as an operating expense. Paragraph 10 of the agreement requires the Commercial Company to develop and equip the mine and provide the necessary funds for that purpose, and stipulates that:

"The expenditure for said machinery and the cost of the development of the said mine No. 5 . . . shall include only labor and cost of material and personal property purchased for that purpose, and there shall be no charge for general superintendent, management, or supervision. The total amount of the expenditure to be made and indebtedness incurred for the purpose aforesaid shall not exceed the sum of twenty-five thousand dollars (\$25,000). All renewals or replacements of original equipment under this clause shall be charged to the cost of production."

Paragraph 13, after stating in detail the expense to be included in the cost of operation, provides that:

"In addition, there shall be charged against the cost of operation the cost of all renewals or replacements of machinery as hereinbefore provided, including as well renewals or replacements of the equipment, machinery, and property of the Black Lick Company loaned hereunder, as that purchased by the Commercial Company."

In paragraph 17 it is provided that:

"If during the life of this agreement any new machinery or new equipment is added, not replacing the old machinery or equipment, the cost of the same being charged to the cost of coal as hereinabove provided, the same shall be valued by three disinterested parties, one to be appointed by the Black Lick Company, one by the Commercial Company, and the two so appointed to choose the third."

Following the statement that both parties shall be given an opportunity to purchase at the appraised value, it is provided that, if neither desire to purchase, the property shall be sold and the proceeds divided equally between them.

The court below found that mine No. 5 had been fully equipped in 1909 by defendant company at an expense of about \$20,000, and the company later decided to re-equip the mine for operation by electrical power to be purchased from a local electric company, and conformably to such plan abandon the boiler house and dynamos then in use, and erect a new substation and install new machinery and equipment at a total cost of \$37,000. The entire expense of the new equipment as charged against the cost of operation, making a total outlay of \$57,000, notwithstanding the expense for this purpose was specifically limited to \$25,000. The term "renewals and replacements," specified in paragraph 10 as a proper charge against cost of operation, contemplates replacements from time to time to take the place of defective or worn parts, and refers only to machinery purchased for that purpose. An expenditure to replace machinery or equipment not unfit for use, but abandoned pursuant to a plan to change the method of operation, is not contemplated by the agreement. Considering the new electrical equipment a "replacement of original equipment" under paragraph 10, the amount chargeable to the cost of production is limited to \$25,000. The property in question was not purchased to replace worn out machinery, but because the Commercial Company believed a more economic operation of the mine would result from the change and it contends results justified the expenditure. While this may be true, the question was one of business policy and a matter for it to decide, and if a saving resulted it received the benefit. While it is true the Black Lick Company also derived a benefit this was one of the incidents of carrying out the agreement of the Commercial Company. In view of the express restrictions in paragraph 10, the parties did not intend to place within the power of the Commercial Company, without limitation, to charge against profits the cost of an entire change in the equipment of the mines.

The remaining question included in the statement of questions involved is whether E. R. Norton, an assignee of the interest of the Black Lick Company in the contract, should have been made a party to the proceeding. On January 24, 1913, the Black

Lick Company assigned to Norton its interest in the contract with the Commercial Company as collateral security for the payment of certain notes. On August 6, 1914, Norton presented a petition to the United States District Court in the bankruptcy proceedings against the Black Lick Company, to have this assignment specifically enforced. The referee found the Black Lick Company was insolvent at the time the transfer was executed, and dismissed the petition and ordered Norton to surrender the assignment, which order was subsequently affirmed by the court. No claim is made under this transfer, but, on January 27, 1916, the Commercial Company was notified that Norton held an assignment dated November 26, 1912, also securing the payment of certain specified notes and indebtedness, and it is on this earlier dated assignment that Norton's position as a party is based. Charles McFadden, who executed the transfer on behalf of the Black Lick Company, testified he personally prepared and forwarded an executed assignment to Norton, dated November 26, 1912, which was, however, not satisfactory to the latter, who then had his counsel prepare the one dated January 24, 1913, which was subsequently executed. In view of the testimony, and of the finding of the court below to the effect there was no delivery of the earlier assignment, but the latter one which was declared void by the bankruptcy court, discussion of the question is unnecessary.

The decree of the court below is affirmed.

(7 Boyce, 125)

STATE v. FRONT & UNION ST. RY. CO.

(Court of General Sessions of Delaware. Kent. July 5, 1918.)

CORPORATIONS. § 896—ANNUAL REPORTS—FAILURE TO FILE—MISDEMEANOR.

General Incorporation Law, § 152, making it misdemeanor for corporation to fail to file annual report, applies to corporation created by special act prior to passage of the General Incorporation Act, especially in view of Const. art. 9, §§ 1, 2, 4, and General Incorporation Law, § 8.

Indictment No. 18, February term, 1916. Argued at the April term, 1918.

Front & Union Street Railway Company was indicted at the February term, 1916, for failing to file with the Secretary of State a copy of its annual report, under section 152, c. 65, Rev. Code 1915 (section 2066) of the General Incorporation Law. On motion to quash the fourth count in the indictment on the ground that the defendant, having been incorporated prior to the passage of the General Incorporation Law, was not bound by the provisions thereof. Motion to quash refused.

Argued before PENNEWILL, C. J., and BOYCE, J.

David J. Reinhardt, Atty. Gen., for the State. Andrew C. Gray, of Wilmington, for defendant.

PENNEWILL, C. J., delivering the opinion of the court:

The Front & Union Street Railway Company was indicted at the February term, 1916, of the Court of General Sessions in New Castle county for "failing to file with the Secretary of State of the state of Delaware, within fifteen days from the expiration of its said fiscal year, to wit, within fifteen days from the thirty-first day of December, A. D. 1914, a certified copy of an annual report to the stockholders of said company * * * as the said company was required to do by the provisions of section 152 of chapter 65 of the Revised Code of the state of Delaware (which formerly was section 122, chapter 394, volume 22, Laws of Delaware, as amended by chapter 190, volume 27, Laws of Delaware)."

No copy of its annual report was filed by the company with the Secretary of State, and the question presented to the court is, whether the defendant company, which was created by a special act of the Legislature prior to the passage of the General Incorporation Act under which this indictment was found, was required to file such report.

The defendant company was incorporated February 20, 1877, by an act of the General Assembly (15 Del. Laws, pt. 2, c. 432). Some time after 1897 it accepted the provisions of the present Constitution, and on June 15, 1910, amended its charter pursuant to the General Corporation Law as found in section 1940 of the Revised Code.

The provisions of the Constitution more or less pertinent to the question before the court may be stated as follows:

Section 1, article 9: No corporation shall hereafter be created, * * * nor shall any existing corporate charter be amended, renewed or revived by special act, but only by or under general law.

Section 2: No corporation in existence at the adoption of this Constitution shall have its charter amended * * * without first filing * * * an acceptance of the provisions of this Constitution.

Section 4: The rights, privileges, immunities and estates of * * * corporate bodies, except as herein otherwise provided, shall remain as if the Constitution of this state had not been altered.

The provisions of the General Incorporation Law material to the present inquiry are the following:

Chapter 65, § 8 (Code, § 1917): In addition to the powers enumerated in the second section of this chapter, every corporation * * * shall possess and exercise all the powers and privileges contained in this chapter, and the powers expressly given in its charter or in its certificate under which it was incorporated, so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation; and shall be governed by the provisions and be

subject to the restrictions and liabilities in this chapter contained, so far as the same are appropriate to and not inconsistent with such charter or act under which such corporation was formed; and no corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the power so given.

Section 152 (Code, § 2066): It shall be the duty of every * * * corporation created under the provisions of this chapter, as well as every corporation operating a railway line under this chapter, to make an annual report to the stockholders. * * * If it be a railway corporation created under the provisions of this chapter, but which has leased or in any manner transferred its property and rights to operate its railway line to another corporation, such report shall state. * * * The secretary * * * shall within fifteen days from the expiration of its fiscal year file a certified copy thereof [said report] with the Secretary of State.

A failure to file such annual report with the Secretary of State within the time stated is made a misdemeanor by said statute.

The state contends that the defendant company was subject to the provisions of section 152 because it "was a railway corporation possessing property and rights to operate a railway line in the city of Wilmington, New Castle county, and did on July 1, 1910, lease its said property and rights to the Wilmington & Philadelphia Traction Company."

The defendant insists that it is not liable to the penalty provided for in said section 152 because that section has reference only to those corporations that were created under the provisions of the incorporation law.

We think the question involved in this case has been passed upon by the Supreme Court of this state in two cases, viz.: Bay State Gas Co. v. Content & Co., 4 Pennewill, 238, 56 Atl. 1114, and another between the same parties reported in 4 Pennewill, 497, 56 Atl. 1120.

In the first case the question raised was whether sections 48 and 29 of the General Corporation Law, which provided respectively for the service of legal process, and the keeping of a duplicate stock ledger in the state were applicable to a corporation created by a special act of the Legislature prior to the enactment of the General Incorporation Law. In the second case the question was whether the duty imposed upon the officers of the company by section 23 of the General Incorporation Law applied to a corporation created by special act. In sections 48 and 29 the duty or requirement in question was imposed upon corporations "organized under this act" or "created under this act," and the court held that under section 3, above quoted, sections 48 and 29 were applicable to corporations created by special act before the passage of the General Incorporation Law.

In the first case the court said:

"It seems to us to be manifest from a mere reading of section 3, that it was intended to

apply to previously existing corporations, as well as to corporations created under the General Corporation Law; and that no argument is needed, or reason required, for such a construction, beyond that found in the plain and natural meaning of the very words of the section." By section 3 the Legislature "intended that every corporation, whether formed under the General Corporation Law, or previously formed under any law of the state, should be subject to the restrictions and liabilities of section 48, as well as other sections of said Corporation Law, so far as the same are appropriate to, and not inconsistent with, the act of incorporation under which the previously existing corporation was formed."

In the second case it was said:

"We are unable to perceive any substantial difference in principle between the requirement of section 23 and that of section 29 in respect to its applicability to pre-existing corporations. If section 3 makes section 29 applicable to pre-existing corporations, it would make section 28 equally so."

And so in the present case, the court are unable to see any difference in principle between the requirements of section 152 and those of sections 48 and 29 in respect to its applicability to pre-existing corporations. It is clearly not inconsistent with the act of incorporation under which the defendant corporation was formed.

The only difference that can be found between the Bay State Case above referred to and the case now before the court is that this is a criminal case.

The defendant very properly says that:

"A penal statute must be strictly construed, and nothing can be taken by intentment against one charged under the act; it will not be extended by implication or construction, but construed strictly according to its language; the intent to make a defendant liable will not be deemed established in case of mere doubt, or an ambiguous state of facts."

But if the liability depends upon the applicability of section 152 to the defendant corporation, we think there can be no doubt or uncertainty after the Supreme Court has decided in two cases similar in principle to the present one that said section does apply. It requires no construction by this court.

The motion to quash is refused.

(7 Boyce, 129)

FOX et al. v. DERRICKSON et al.

(Superior Court of Delaware. Kent.

July 5, 1918.)

1. DISCOVERY §97(1) — PRODUCTION OF WRITINGS—APPLICATION—SHOWING NECESSITY FOR PRODUCTION.

Where application is made for order requiring adverse party to produce books or writings pertinent to the issue, under Rev. Code 1915, § 4228, it must appear from application that documents sought contain material evidence pertinent to issue.

2. DISCOVERY §89—PRODUCTION OF WRITINGS—RIGHT TO INSPECTION—MATERIALITY.

Under Rev. Code 1915, § 4228, providing that court, upon application of party to an action, may order production of writings or books in possession of adverse party, papers and books will be ordered whenever court can fairly sup-

pose facts disclosed by them can be in any way material to cause of action or defense; it being unnecessary that such facts shall in themselves constitute cause of action.

Action by Charles Y. Fox and another, trading and doing business as a copartnership under firm name and style of Githens, Rexsamer & Co., against Joshua W. Derrickson and another, trading and doing business as a copartnership under the name, firm, and style of Derrickson & Martin. On motion by plaintiffs for the production and inspection before trial of certain books and writings in possession and control of defendants. Order made for production of all the books and writings asked for, except invoices.

Argued before PENNEWILL, C. J., and BOYCE, J.

W. Watson Harrington, of Dover, for plaintiffs. Henry Ridgely and Arley B. Magee, both of Dover, for defendants.

On written motion of counsel for plaintiffs, supported by his affidavit, after due notice, for the production and inspection, before trial, of certain books and writings in the possession and control of defendants. Motion granted and order made.

The statute under which the application was made provides:

"At any time during the pendency of actions at law, the court, on motion and due notice thereof, may order a party to produce books or writings in his possession or control, which contain evidence pertinent to the issue, under circumstances in which the production of the same might be compelled by a court of chancery. * * * " Rev. Code 1915, § 4228.

The method of procedure for the production asked for conformed to the requirement of the statute and practice of the court.

The books and writings sought are those kept by the defendants in their business as packers of tomatoes, viz. those (1) showing the number of cases, or the number of cans of tomatoes packed in the year 1916, at their factories at Little Creek and Woodside, Del., and of each of them, and the size of cans in which they were packed; (2) showing the number of cases, or the number of cans of tomatoes of the pack of 1916 that they contracted to sell, and did sell, to any person, firm or corporation, on contracts made prior to the beginning of the packing season of the year 1916, and the date of such contracts and the number of cases or cans, and the size of cans in which they were packed, covered by each of them; (3) showing the number of cases, or the number of cans of tomatoes of the pack of 1916, sold by them, which were not covered by contracts of sale made prior to the beginning of the canning season of the year 1916, the date of any such sales, and the number of cases or cans, and the size of the cans, covered by each sale; (4) showing the number of cases or the number and size of cans of tomatoes packed by the defendants in the year 1916, in excess of those which they had contracted to sell by contracts made subsequent to June 1, 1916; (5) showing the

number of baskets and cans of raw tomatoes shipped by them to Snyder & Co., Greenwood, Del., and the Atlantic Canning Company, at Rehoboth, Del., in the months of August, September, October and November of 1916; and (6) the bills of lading and invoices, or copies thereof, for any tomatoes of the pack of 1916, sold or shipped in the year 1916, or the year 1917.

Counsel for defendants, in opposing the application, contended that books or writings which may be ordered produced under the statute are those "which contain evidence pertinent to the issue"; that is, such as are evidential, and not those which may furnish a clew to evidence, or may merely enable a party to find out whether he has a cause of action. *Falco v. N. Y., N. H. & H. R. Co.*, 161 App. Div. 735, 146 N. Y. Supp. 1024; *Walsh v. Press Co.*, 48 App. Div. 333, 62 N. Y. Supp. 833; *Brownell v. Nat. Bk.*, 20 Hun (N. Y.) 517.

It was objected that the books and writings desired for inspection are not concerning transactions between the parties, but between the defendants and third persons, and are not such as would be admissible in evidence at the trial; also that the application overlooks the fact that it is the powers of chancery as to the production of books and writings only that is contemplated by the statute, and that from the nature of the pending action the books and writings sought do not come within the circumstances under which a court of chancery would compel their production. 1 Pom. Eq. Jur. § 142; *Eschbach v. Lightner*, 31 Md. 528.

Counsel for the plaintiffs, in reply, insisted:

That the books and writings asked for contain evidence pertinent to the issue, and especially so since the action is for breach of contracts for the delivery of canned tomatoes, containing clauses under which evidence may be introduced in defense, viz.:

"Subject to conditions beyond our control."
"Provided we are able to pack."

That although some of the books and writings relate to transactions with third persons, they tend to show shipments by the defendants of both raw and canned tomatoes to other persons than the plaintiffs during the period covered by the contracts.

That equity will grant discovery where the evidence asked to be discovered is to be used in an action at law; if it be in any way material to the issue. 1 Pom. Eq. Jur. §§ 191, 192, 196, and 197; *Peck v. Ashley*, 12 Metc. (Mass.) 478; *Arnold v. Pawtuxet Valley Water Co.*, 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602; *Faircloth v. Jordan*, 15 Ga. 511.

That the right to discovery of documents is as extensive as the right to discovery by oral testimony. *Reynolds v. Fibre Co.*, 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535.

That the right afforded by the statute extends to all books and papers relating to the merits of the action or defense. *Townsend*

v. Lawrence, 9 Wend. (N. Y.) 458; Peck v. Ashley, supra; Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 245; Williams Mower, etc., Co., v. Raynor, 88 Wis. 182.

BOYCE, J., delivering the opinion of the court:

This is an action by the plaintiffs against the defendants to recover damages for alleged breach of contracts, entered into between the parties in the year 1916, for the sale and delivery of canned tomatoes.

[1] The application now before the court is for the production and inspection of certain books and writings before the trial, after declaration and pleas filed. Books or writings that may be ordered produced under the statute are those "which contain evidence pertinent to the issue." The statute and procedure thereunder contemplate evidence, and the fact that the documents sought contain material evidence pertinent to the issue must sufficiently appear so that the court may understand the necessity for their production.

The statute cannot be used, as it has been said for the purpose of "a fishing examination"; for such a purpose is altogether outside of the scope of the statute, so that the inquiry must be, does the application sufficiently show that the books and writings asked for contain evidence pertinent to the issue between the parties to the action? The contracts of sale averred in the declaration contain these, or similar, clauses, viz.:

"Subject to conditions beyond our [defendants'] control." "Provided we [defendants] are able to pack."

Obviously these provisions reserved by the defendants were for their protection, that is, they were intended to safeguard them against unforeseen casualties or happenings that might prevent their packing the quantity of tomatoes which they contracted to deliver to the plaintiffs.

[2] It seems to the court, after a careful consideration of this application, that while the books and writings asked for may not be pertinent in the first instance to support the plaintiffs' cause of action, they do contain evidence material to the merits of the case. It is only necessary within the purview of the statute, the same as in a bill for discovery of evidence, that the evidence to be produced may in any way be pertinent and material in support of plaintiffs' right of recovery. If for any purpose the evidence sought may be introduced at the trial that is sufficient to require its production. In an application of this kind, the statute does not confine a party to evidence contained in books and papers, in itself constituting the cause of action, but it embraces all documents relating to the merits of the case. Indeed production of books and papers will be ordered whenever the court can fairly suppose that facts disclosed by them can be in

any way material to the cause of action or defense. 1 Pom. Eq. Jur. § 191; Thomas et al. v. P. R. R. Co., 2 Pennewill (Del.) 411, 47 Atl. 880. Except as to the invoices which are not presumed to be in the possession of the defendants, sufficient is shown, we think, to enable the court to fairly understand the necessity for the books and writings sought, as containing evidence pertinent and material to the merits of plaintiff's action.

An order will be made for the production of all the books and writings asked for, except the invoices.

(79 N. H. 521)

HOLDEN v. LOVERIN.

(Supreme Court of New Hampshire. Coos. June 29, 1918.)

1. LOGS AND LOGGING \Leftrightarrow 8(7) — STUMPAGE CONTRACT—DUTY TO CLEAR LAND.

Contract of sale of trees on two tracts, with right to remove them from one tract in three years and from other in six years, modified by extension of a year for first tract, provided buyer cuts all but cedar trees from other tract in same time, does not bind buyer to clear the land.

2. LOGS AND LOGGING \Leftrightarrow 8(1) — STUMPAGE CONTRACT—AGREEMENT TO CLEAR LAND.

Mere suggestion by buyer of stumpage to seller to use refuse in manufacture of oil, and promise to investigate the matter, does not amount to contract to clear the land.

Transferred from Superior Court, Coos County; Kivel, Judge.

Action by Ellen D. Holden against Myer Loverin. Nonsuit order, and case transferred on plaintiff's exception. Exception overruled.

Assumpsit, for breach of an alleged contract to clear the plaintiff's land of brush and bushes. At the close of the plaintiff's evidence the court ordered a nonsuit, and transferred the case upon the plaintiff's exception from the September term, 1917, of the superior court. The plaintiff was the owner of land in Colebrook and Columbia, and in July, 1912, conveyed to the defendant "all the trees of fir, spruce, poplar, and cedar standing and growing" thereon, with the right to cut and remove the same from the land in Colebrook until May 1, 1915, and from the land in Columbia until May 1, 1918, with certain reservations. In April, 1915, the defendant had not completed his operations in Colebrook, and he then made an additional contract with the plaintiff as follows:

"This is to certify that I, Ellen D. Holden, have this day received from M. Loverin \$100 for the extension of time in the town of Colebrook from May 1, 1915, to May 1, 1916, provided he, M. Loverin, cuts all trees of fir, spruce, poplar, and cedar, except cedar as mentioned in deed of sale to M. Loverin July 11, 1912, in both towns of Colebrook and Columbia, in the above-mentioned time."

The plaintiff testified that the defendant talked with her about getting a Mr. Bell to put up a mill to make cedar oil from the

brush and bushes, and offered to give her one-half the proceeds; that she told him she would be glad to have the stuff cleaned off without pay, as it was a nuisance in the pasture; that the defendant never did anything about it, except to speak to Bell. The defendant was called as a witness by the plaintiff, and testified that the project was abandoned, after his talk with Bell, because it would not pay.

Horace J. Holden, of Colebrook, and George F. Rich, of Berlin, for plaintiff. Drew, Shurtleff, Morris & Oakes, of Lancaster, Leon D. Ripley, of West Stewartstown, and E. C. Oakes, of Lancaster, for defendant.

PEASLEE, J. [1] Neither the original contract nor the supplemental agreement binds the defendant to clear the plaintiff's land. The parties made, and afterwards changed the time limit in, an ordinary contract for the purchase and sale of stumpage. The provision in the supplemental agreement that the defendant should cut "all trees of fir," etc., before May 1, 1916, was evidently inserted to make it plain that he agreed therein to a shortening of the time given by the original contract for cutting on the part of the land situated in Columbia.

[2] The plaintiff claims further that her dealings with the defendant show that they understood that he was to clear the land. If it were conceded that the plaintiff could thus vary the plain meaning of the written agreements, or if the negotiations as to the brush and bushes were to be treated as additions thereto, the result would be the same. On the plaintiff's own testimony all those negotiations came to was that the defendant suggested using the cedar refuse in the manufacture of cedar oil and promised to investigate the matter. This promise he fulfilled by interviewing the oil manufacturer. Finding that the expense would be too great, the project was abandoned. There is no evidence of any promise being made and broken, or of any understanding conflicting with the written evidence of their agreement.

Exceptions overruled. All concurred.

(79 N. H. 67)

KIER v. PARKS.

(Supreme Court of New Hampshire. Coos. June 29, 1918.)

APPEAL AND ERROR \S 854(1)—EXCEPTIONS—FORM OF QUESTION—RE MOTENESS.

No question of law is raised by exception to court's action in excluding question, where it could properly be excluded on the ground that in the form in which it was put the question was too remote, and the record tended to show that was the ground of decision.

Exceptions from Superior Court, Coos County; Kivel, Judge.

Action by Alexander D. Kier against Norman Parks. On plaintiff's bill of exceptions. Exceptions overruled.

Bill of exceptions. The action was case for negligence, tried before Kivel, O. J., and a jury, with verdict for the defendant. The plaintiff went to the defendant's garage for repairs to his automobile. While searching for a workman in the darkness, he stepped between two cars, which were being repaired and were standing over an open pit, fell into the pit, and was injured. The following question, asked upon direct examination of a witness called by the plaintiff, was excluded, subject to exception:

"Now, what is the practice in the garages where you have been employed, where you have seen pits, with reference to their being guarded or covered?"

Plaintiff's counsel then asked the following question:

"Well, is there any practice or custom in the garages where you have worked, and where you have noted pits in the floors of garages, with reference to how they are taken care of?"

This question was also excluded, no exception being taken; the court remarking that the question was not framed properly. Counsel then said he was asking whether or not there was such a custom; the court replying:

"I don't think that is the form to put your question."

The witness then was asked:

"How are pits in garages where you have worked, and where you have observed pits constructed?"

—and answered without objection:

"Well, there are some of them made of wood, where there are wood floors; others, a cement floor, and the pits are of cement, and there is a groove along the edge of the pit, so that when the pits are not in use, why, they are covered over with plank, I should say two inches thick."

Edgar M. Bowker, of Whitefield, for plaintiff. Drew, Shurtleff, Morris & Oakes and E. C. Oakes, all of Lancaster, for defendant.

PARSONS, O. J. The record shows that the question excluded, subject to exception, was not excluded because its subject-matter was not considered relevant, but because of the form of the inquiry. The court may have found the witness competent to testify to common practice in the matter, and considered he should have been interrogated upon that point, and not as to the practice of particular individuals. *Saucier v. Spinning Mills*, 72 N. H. 292, 56 Atl. 545. It may be the question was thought too indefinite, as failing to distinguish between construction and operation, and in not asking the practice under circumstances like those disclosed at the trial. As to construction and care when the pits were not in use, the witness was permitted to exhaust his knowledge. He was not inquired of as to operation in a situation like that in the case on trial. The question, in the form in which it was put, could be excluded upon the ground of remoteness. The record indicates it was excluded upon that ground. Consequently no question of law is raised by the exception. *Challis v. Lake*, 71 N. H. 90,

95, 51 Atl. 260; Reagan v. Railway, 72 N. H. 298, 56 Atl. 314; Proctor v. Freezer Co., 70 N. H. 3, 4, 45 Atl. 713; Nutter v. Railroad, 60 N. H. 483, 485. Whether the evidence was otherwise incompetent is not considered.

Exception overruled. All concurred.

(117 Me. 232)

STATE v. HOLLAND.

(Supreme Judicial Court of Maine. July 8, 1918.)

1. INTOXICATING LIQUORS. \S 231 — SALES — MEDICINES — EVIDENCE.

In a prosecution against an apothecary for keeping liquors for sale, but which he claimed were medicines allowed to be sold by him as included in the United States Pharmacopœia, Dispensatory, and National Formulary, authorized by Rev. St. 1916, c. 20, \S 17, it was error to exclude the edition of the Pharmacopœia of 1905 and the National Formulary of 1907; they being the editions intended by the statute.

2. STATUTES \S 147 — RE-ENACTMENT — EFFECT.

When a statute is incorporated in a general revision and re-enacted with other statutes, its purpose and effect are not changed, in the absence of some compelling change in the language.

Exceptions from Superior Court, Cumberland County.

William A. Holland was convicted of maintaining a tenement for the illegal sale and keeping for sale of intoxicating liquor, and he excepts. Exceptions sustained.

Argued before CORNISH, O. J., and SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Carroll L. Beedy, of Portland, for the State. William C. Eaton and W. C. Whelden, both of Portland, for respondent.

MORRILL, J. The respondent stands convicted of keeping and maintaining a tenement situated in Portland, used for the illegal sale, and keeping for sale, of intoxicating liquors. The evidence on the part of the state disclosed that the respondent had in his possession, on the 7th day of January, 1917, within the period covered by the indictment, in a building owned and operated by him as a drug store, about four gallons of whisky. He introduced evidence tending to show that during the period covered by the indictment he was a duly examined and registered apothecary, as provided by the laws of the state, and, being such registered apothecary, he claimed the right, under section 17 of chapter 20 of the Revised Statutes, to keep "all medicines and poisons authorized by the United States Pharmacopœia, Dispensatory, and National Formulary, as of recognized medicinal utility," and that whisky was among the medicines and poisons so authorized.

In support of this contention his counsel offered in evidence two books, one stated by counsel in making the offer to be "Dispensatory of the United States of America and the National Formulary in one volume, issued in 1894, 7th Edition," and the other likewise

stated to be the "Pharmacopœia of the United States of America, 8th Decennial Revision, published in 1905." The respondent's counsel claimed that the United States Pharmacopœia and National Formulary, recognized as official in 1907, should be received in evidence; the justice presiding ruled that the revisions of those works in force at the time of the enactment of the Revised Statutes of 1916 would govern, and excluded the evidence. To which ruling the respondent has exceptions.

We think the exceptions must be sustained. The United States Pharmacopœia is a book compiled by or under the supervision of an organization of pharmacists and druggists, and is recognized as authority; it is revised from time to time, perhaps decennially, if we may be permitted to so infer from the offer of the book. The National Formulary is a similar publication, also revised from time to time.

The statute in question (R. S. 1916, c. 20, \S 17) was first enacted in 1877 (Laws 1875-77, c. 204, \S 5) in the form in which it appears in Revised Statutes 1903, c. 30, \S 18. It was amended by P. L. 1907, c. 74, \S 3, and given the form in which it now appears.

[1] We think that, when the Legislature of 1907 referred to the United States Pharmacopœia and National Formulary for the guidance of registered apothecaries in this state, it must have referred to the compilations known by those names, then recognized as authority among apothecaries. It is not to be supposed that the Legislature intended to adopt compilations not then made and of whose contents, as affecting the law of this state against the illegal sale and keeping for sale of intoxicating liquors, it could have no knowledge. It knew what the books then recognized as authority included; it could not know what the revisers of later editions might include or exclude. If the Legislature intended to adopt the later revisions of the works referred to, as they should be made from time to time, that intention should have been made clear by apt words, as was done in Food and Drug Act of 1911, c. 119, \S 11, in which the standard of strength, quality, or purity of a drug is that laid down in the United States Pharmacopœia and National Formulary "official at the time of investigation." R. S. 1916, c. 30, \S 12.

Moreover, the statute, if construed according to the ruling to which exception is taken, may be open to the objection that it is an unauthorized delegation of legislative power, to the revisers of the future editions, as suggested in State v. Emery, 55 Ohio St. 364, 45 N. E. 319; upon that point we express no opinion. It may be noted that in the particular referred to, the language of United States Food and Drug Act of June 30, 1906, c. 3915, \S 7, 34 Stat. 769 (U. S. Comp. St. 1916,

§ 8723), is the same as appears in R. S. 1916, c. 36, § 12.

[2] The adoption of the specific language in the later act strongly indicates that the construction which we place upon the earlier act is the true one, and accords with the legislative intention. The re-enactment of the law as amended in 1907, in the revision of 1916, does not affect its construction. "When a statute is incorporated in a general revision of all the statutes, and re-enacted along with the re-enactment of other statutes, its purpose and effect are not changed unless there be some compelling change in the language. Usually a revision of the statutes simply iterates the former declaration of legislative will." *Cummings v. Everett*, 82 Me. 264, 19 Atl. 456; *Martin v. Bryant*, 108 Me. 256, 80 Atl. 702.

Exceptions sustained.

(117 Me. 314)

G. H. BASS & CO. v. WILTON WOOLEN CO.

(Supreme Judicial Court of Maine. July 12, 1918.)

1. JUDGMENT ¶585(2)—RES JUDICATA.

A decree in an action to enjoin the use of water when it was above the top of a dam until it was $4\frac{1}{2}$ feet below the top was res judicata in an action between the same parties, involving a construction of the same deed, to enjoin the use of the water from the time it reached the top of the dam until it was $4\frac{1}{2}$ feet below the top.

2. DEEDS ¶95—CONSTRUCTION.

Words used to give expression to a deed should be construed according to the common meaning of the language.

3. WATERS AND WATER COURSES ¶156(6)—CONVEYANCE OF RIGHT—"UNTIL."

A deed granting the right to use a certain amount of water "until" the water reaches $4\frac{1}{2}$ feet below the top of a dam limits the right of the grantee, but not the right of the grantor (quoting Words and Phrases, Until).

Report from Supreme Judicial Court, Franklin County, in Equity.

Bill by G. H. Bass & Co. against the Wilton Woolen Company. On report. Bill dismissed.

Argued before CORNISH, C. J., and SPEAR, HANSON, and PHILBROOK, JJ.

Frank W. Butler, of Farmington, and William M. Bradley, of Portland, for plaintiffs. O. N. Blanchard, of Wilton, and E. E. Richards, of Farmington, for defendant.

SPEAR, J. On report. This case involves a controversy over water rights. In December, 1912, the Wilton Woolen Company, defendant in the present case, brought a bill in equity against the present plaintiff, to which an answer was duly filed. In May, 1913, the present plaintiff filed a cross-bill against the present defendant, to which an answer was also duly filed. The Woolen Company bill was sustained, and a decree

filed. The Bass Company cross-bill was dismissed. The defendant contends that the present bill is concluded by the rule of res adjudicata; the whole matter, as it claims, having been determined or open to determination under the former bill and cross-bill. We think this contention must prevail.

The facts involved under the bill and answer are found in *Bass & Co. v. Woolen Co.*, 112 Me. 483, 92 Atl. 612. Briefly rehearsed they are as follows: In 1898 F. J. Goodspeed, of Wilton, was the sole owner of all the water rights and privileges now involved. November 12, 1898, he conveyed certain rights to Gardner C. Fernald. This deed is not now involved. January 15, 1903, Goodspeed conveyed to the Wilton Woolen Company all his land, water rights, and privileges. In September, 1903, the Woolen Company conveyed to the present plaintiff the rights and privileges, upon which his bill is now brought. This deed is as follows:

"The sawmill at outlet of Wilson Lake and yard, subject to any rights of way hitherto reserved, or other reservations or restrictions of use of land heretofore made, and being the same mill described in deed by R. O. Fuller and George R. Fernald to Hiram Holt by deed of Sept. 13, 1883, and of record Book 98, page 352, in Franklin registry, with the following water power and privilege and none other, to wit: The right to draw from Wilson Lake water sufficient to furnish forty (40) horse power with latest improved water wheels, after a reasonable development of the privilege, until the water reaches a point four and one-half ($4\frac{1}{2}$) feet below the top of the dam as now used; but when the water has reached said point his right to use water is limited to one hundred square inches and he is to have that [water] right, and in case the dam furnishing said power is raised, or the power from said lake is in any way increased, the said Bass shall be entitled to his full proportionate benefit. In case at any time when the water is below the four foot and one-half mark, and the grantee is not using the full one hundred square inches of water thereof, the grantor reserves the right to draw sufficient water through its own private waste gate to make up the full one hundred inches including that used by the grantee. Said grantee is to bear one-half of the expense of keeping in repair and maintaining canal on land herein conveyed, headgates and dam."

It will be seen, by comparison, that this is the identical deed, the terms and provisions of which were in controversy in the case reported in 112 Me. 483, 92 Atl. 612. All the other facts are precisely the same. The present defendant was using the water, in 1903, which he conveyed to Bass & Co., just as it was when the former bill and cross-bill were filed, and determined, and as it is now. The dam, the flumes, the flowage rights, are precisely the same. The parties are the same so far as the former and present controversies between the Woolen Company and Bass & Co. are concerned; Fernald not having had at any time any interest in the matter. The plaintiff, however, contends that the point it now raises was not decided, nor necessarily in issue, in the former cases. The point now is that under the

phraseology of the deed, "after it [the water] ceases to run over the top of the dam and before it reaches a point four and one-half feet below the top of the dam," the defendant must cease to draw any more water for his mills below, so that the water may be conserved and prolonged to the use of the plaintiff while it is falling between the top of the dam and the $4\frac{1}{2}$ -foot limit. It claims that the decision in 112 Me. 483, 92 Atl. 612, covered only the question as to who was entitled to the excess of the water after the uses carved out and conveyed by the deeds. But we think the very point now raised was put in issue by the pleadings and discussed in 112 Me. 483, 92 Atl. 612. The court say:

"The great contention between the parties, however, arises during the period before the $4\frac{1}{2}$ -foot limit is reached. That is the burden of the cross-bill brought by Bass & Co., in which they claim that the Woolen Company is not entitled to any water before that limit, that they are entitled to it all, except the Fernald grant, and they ask for an injunction to restrain its use by the Woolen Company. This claim assumes that the Woolen Company retained no water rights after the Bass deed was given, and that assumption we have already shown to be groundless. The maximum ownership of Bass & Co. until the $4\frac{1}{2}$ -foot level is reached is 40 horse power, and all the power in excess of that (excepting of course the Fernald 100 square inches) belongs still to the Woolen Company, and can be used by it in connection with its plant still further down the stream. No other reasonable construction can be given to the deed, viewed in the light of all the facts and circumstances."

The court say "the burden of the cross-bill" was that the Woolen Company is not entitled to any water before that limit— $4\frac{1}{2}$ -foot limit.

By comparison it will be seen in the cross-bill in the former case that Bass & Co. claimed, even though the water was above the top of the dam, that the Woolen Company were not "entitled to draw any water before that limit" ($4\frac{1}{2}$ feet below) was reached. In the present case, Bass & Co. claim that the Woolen Company is not entitled to draw any water "after it ceases to run over the top of said dam and before it reaches a point $4\frac{1}{2}$ feet below the top thereof." The material prayers in the two sets of bills are identical in meaning and nearly so in phraseology. Prayer 1 of the present bill prays:

"That said court will grant a permanent injunction restraining the said Wilton Woolen Company, its officers, agents, servants and employes from opening said waste gate and withdrawing from said pond, through said canal, any water contained in said reservoir after it ceases to run over the top of said dam and before it reaches a point $4\frac{1}{2}$ feet below the top thereof."

Prayer 2 of the former cross-bills prays:

"That a permanent injunction issue restraining the said Wilton Woolen Company, its officers, agents, servants, and employes, from opening said waste gate and withdrawing from said canal any water, until such time as the water in said pond reaches a point $4\frac{1}{2}$ feet from the top of said dam as now constructed."

[1] In fact, as the construction of the same deed is the foundation of all the bills, it is evident that all the clauses of the deed were, or might, by proper pleading, have been, put in issue. Accordingly the only difference in the present and the former claim is that then the Woolen Company should not draw any water from any height until the $4\frac{1}{2}$ -foot limit was reached, and that now it shall not draw any water, after it reaches the top of the dam, until the $4\frac{1}{2}$ -foot limit is reached. It should be here noted that "the power in excess," referred to in the part of the opinion quoted, included the disposition of all the water from the top of the dam, or a higher level, to the $4\frac{1}{2}$ -foot limit below. But the greater includes the less, and the claim in the former case, that the Woolen Company should not draw any water when the water was above the top of the dam, included the claim that they should not draw any water when the water was below the top of the dam. Accordingly the issue now raised was clearly placed before the court in the pleadings in the former bill and cross-bill, and under the well-settled rules of law is res adjudicata.

[2, 3] There is another interpretation of the language of the deed which, we think, concludes the rights of the plaintiff. It is a cardinal rule that words used to give expression to an instrument should be "construed according to the common meaning of the language." The language of this deed confers the right of plaintiff to draw water to furnish 40 horse power "until the water reaches a point $4\frac{1}{2}$ feet below the top of the dam as now used." The controlling term here used is the word "until." "Until" is defined in Words and Phrases as follows:

"'Until' is a restrictive word; a word of limitations. The word 'until' is a word of limitations, used ordinarily to restrict what immediately precedes it to what immediately follows it. Its office is to point out some point of time, or the happening of some event, when what precedes it shall cease to exist or have any further force or effect. The word 'until,' whether found in a contract or in a statute, is the same, and in either case must depend upon the intention of those using it, as manifested by the context, and considered with reference to the subject to which it relates."

Cyc. defines it as a "restrictive word; a word of limitation."

The word "until" does not negative or limit any right of the Woolen Company to use the water. It does, however, manifestly limit the rights of Bass & Co. after the water has reached the $4\frac{1}{2}$ -foot limit. The use of the water by the Woolen Mill and by Bass & Co. is a continuing use, expressed by the word "until," which carries them both, not to the top of the dam, but to the $4\frac{1}{2}$ -foot point; then Bass & Co. are reduced to 100 square inches; and the purpose as well as the effect of the limiting word was to accomplish this reduction. We think this word, when fitted into the background of

the transaction, as it must be to give it a fair interpretation, fully warrants the above conclusion. It is almost inconceivable, if the parties understood the matter as the plaintiff now says, that they would have employed the language used in this deed to give expression to their purpose, when a single sentence properly phrased would have expressed exactly the meaning for which it now contends. It is further inconceivable that the defendant company, having full power to protect its own business, would intentionally deprive itself, for the indefinite time the water might fluctuate between the top of the dam and the 4½-foot limit, of the use of sufficient water to operate its own mills, and thus leave them idle and unproductive.

Bill dismissed, with costs.

(117 Me. 318)

STATE v. SLORAH.

(Supreme Judicial Court of Maine. July 14, 1918.)

CRIMINAL LAW ¶1023(3)—ORDERS APPEALABLE.

Exceptions should not be sent to the law court from an order directing a continuance in a criminal case until the case is fully disposed of.

Exceptions from Supreme Judicial Court, York County, at Law.

John C. Slorah was indicted for murder. From an order directing a continuance, the accused brings exceptions. Exceptions dismissed.

Argued before CORNISH, C. J., and SPEAR, HANSON, DUNN, and MORRILL, JJ.

Guy H. Sturgis, Atty. Gen., and Franklin R. Chesley, Co. Atty., of Saco, for the State. Emery & Waterhouse, of Biddeford, for respondent.

MORRILL, J. The respondent was indicted for the crime of murder at the September term, 1917, of the Supreme Judicial Court, in York county; on the sixth day of the term he was arraigned and pleaded not guilty; his counsel gave written notice that a plea of insanity would be entered, and filed a motion that the respondent be committed to Augusta Insane Hospital for observation; the motion was granted.

At the January term, 1918, the respondent was placed at the bar for trial and a jury was duly impaneled. On motion of the respondent's counsel, and with the consent of counsel for the state, a view of the premises where the alleged crime was said to have been committed was granted. Upon the return of the jury, respondent, and counsel to the courtroom, the Attorney General made known to the presiding justice, in open court, that the respondent fell down on the piazza of the house where the view was to be taken,

and in the presence and in close proximity to the jury made something in the nature of a groan, wept, and made the remark: "My God! Take me away from here, or I shall be insane again." It further appeared that this incident occurred as the jury was about to enter the house, and that thereupon the respondent was taken by the officer in charge to another house and was not present during the remainder of the view.

The presiding justice, being of the opinion that, if the trial were to continue, it would result in a mistrial, made the following order:

"By order of court, and by reason of incidents arising during the view granted by the court, on motion of respondent's counsel, consented to by the state, such incidents being, in the judgment of the court, prejudicial to an impartial trial of the case before this jury, and it being inexpedient to summon another jury at this time, the report of such incidents having been made in open court through the counsel and officer in charge of the prisoner, such report being made a part of this order, it is ordered that this jury be excused from further consideration of this case, and that the respondent be remanded to await trial at the May term of this court in Alfred."

To the foregoing order directing a continuance of the case, the respondent has exceptions, which have been presented and argued by his counsel at the present term of the law court. The respondent was therefore not tried at the term to which the continuance was ordered.

We are of the opinion that the exceptions have been prematurely presented. Exceptions should not be sent to the law court until the case is fully disposed of in the trial court. In accordance with the opinion in *State v. Brown*, 75 Me. 456, which rules this case, the entry must be:

Exceptions dismissed from this court.

(88 Conn. 34)

HAMILTON v. PICKETT.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. INSANE PERSONS ¶64—LIABILITY FOR DEBTS—PURCHASES BY WARD'S WIFE.

A merchant, selling goods to the wife of an aged man, when neither the husband nor his conservator were present, could not recover their value from the conservator, who had made a proper allowance, notwithstanding Gen. St. 1902, § 240, requiring the conservator to apply so much of the net income or the principal of the estate to support the family as may be required.

2. INSANE PERSONS ¶64—CONSERVATORS—ACTIONS—DEBTS.

One selling goods to wife of aged man, when neither he nor his conservator were present, could not recover their value from the conservator, who had made a proper allowance, notwithstanding Gen. St. 1902, § 739, providing that actions may be maintained against an executor, administrator, guardian, or trustee for claims against the estate which should justly be paid therefrom, since the statute cannot be invoked in a suit to which the conservator is not

a party, and since the relationships of conservator and of guardian and ward are similar, the action should have been against the ward, and not the conservator.

3. COURTS \Rightarrow 214—CITY COURT—ACTIONS AGAINST CONSERVATORS—APPEALS.

A conservator of an aged man, against whom a judgment is rendered in the city court of New Haven, has no right of appeal to the court of common pleas for New Haven county.

Appeal from City Court of New Haven; Samuel E. Hoyt, Judge.

Action by William H. Hamilton against Edwin S. Pickett, as conservator of Jerome H. Owens. Judgment on verdict for plaintiff, and defendant appeals. Judgment set aside, and new trial ordered.

The principal question which is controverted before this court by the defendant in the present case is whether the trial court erred in properly applying the law in denying the defendant's motion to set aside the verdict as against the evidence. The most that the evidence of both sides tended to prove was that the appellant is the conservator of Jerome H. Owens, a man over 80 years old, who since the spring of 1916 has been under a conservator. This defendant succeeded a prior conservator, and was appointed March 12, 1917. In January, 1917, Mr. Owens, the incompetent, married a lady considerably younger than himself. He was living with his wife, and receiving support for himself and wife from the defendant conservator, when the purchases in question were made. Between March 24 and April 6, 1917, the wife of Mr. Owens personally purchased from the plaintiff various articles of merchandise, the dates, prices, and descriptions of which are set forth in the bill of particulars as follows:

1917.		
Mar. 24.	House gown	\$ 2.95
	House gown	1.25
	Bath robe	10.50
	Waist	1.95
26.	Gown	30.00
29.	N. gown	1.49
	Chemise	1.49
	Chemise85
Apr. 2.	N. gown	1.95
	Petticoat	2.95
6.	Changes on gown	3.00
	Gown and changes	23.50
		\$81.98
Apr. 8.	Credit bath robe	10.50
		\$71.48

When these goods were purchased, the wife was not accompanied, either by her husband or his conservator. It also appears that these goods were bought by the wife without the knowledge or approval of the conservator. It was conceded that the amount and value of Mr. Owens' estate at this time was about \$14,000. The conservator was making an allowance of \$15 per week to Mr. Owens and his wife for their support. This amount was fixed by Mr. Owens, and it does not appear that either Mr. Owens or

his wife claimed to the conservator that this allowance was not sufficient for their proper maintenance and support. Neither was it shown that Mrs. Owens actually needed the goods which were purchased, or that the conservator had failed to furnish her or Mr. Owens with necessary wearing apparel or means to provide it.

Edwin S. Pickett, of New Haven, for appellant. Sidney C. Rosenberg, of New Haven, for appellee.

RORABACK, J. (after stating the facts as above). The disposition of this case as it now presents itself to this court in part depends upon the construction of section 240 of the General Statutes of 1902, the material portion of which reads as follows:

"The conservator shall return an inventory, under oath, of the estate of the incapable person, and shall manage all such estate and apply so much of the net income thereof as may be required, and, if necessary, any part of the principal of the estate, to support him and his family, and to pay his debts, and may sue for and collect all debts due to him."

[1] It would be a novel construction of this statute and of pernicious tendency to sustain the plaintiff's claim upon the facts before us. It appears that this bill was contracted by the wife of an incompetent person, whose estate was under the management of a conservator, without his knowledge or approval, and when it was not shown that the conservator had withheld from his ward or his wife necessities suitable to their fortune and condition in life. To allow such a claim would be to defeat one of the principal objects for the appointment of a conservator, which is to prevent an incompetent from making reckless and unnecessary expenditures of his money.

[2] The legal obligations and the duties of a conservator are in some respects similar to those of a guardian. An action will not lie against a guardian on a contract made by the ward, but must be brought against the ward, and may be defended by the guardian. 1 Parsons on Contracts, § 136, p. 148. In this case there are no elements of contract, express or implied, as the conservator was not directly or indirectly a party to this transaction.

The plaintiff places reliance upon the provisions of section 739 of the General Statutes of 1902, which provides that actions may be maintained against an "executor, administrator, guardian, or trustee," for claims growing out of moneys paid or services rendered for the estate in his hands and which should justly be paid from said estate. In the construction of this statute, then section 1049, Rev. 1888, this court held that:

"If the statute applied to conservators at all, it could not be invoked in a proceeding to which the conservator was in no way a party." Merwin's Appeal, 72 Conn. 167, 43 Atl. 1055.

In this case (72 Conn. 172, 43 Atl. 1057) we also stated that this is a claim—

"for the reasonable value of necessities furnished to the ward, in the expectation of compensation out of her estate and with the knowledge and assent of the conservator. If its averments can be read as importing that the conservator neglected to make any other provision for watching and nursing her, they are a sufficient foundation for the claim."

In the present case the jury held that the defendant was liable, although it was shown that the purchases in question were made without the assent or approval of the conservator, and when it did not appear that the conservator had acted without due regard to the ward's necessities and liabilities. Such a conclusion could not have been reasonably reached by the jury from the evidence. It follows, therefore, that the defendant's motion to set aside the verdict should have been allowed.

[3] Other questions presented by the appeal do not require consideration, except that we ought to observe that there was no error in the court's denial of the defendant's right of appeal from the judgment rendered to the court of common pleas for New Haven county.

There is error, the judgment is set aside, and a new trial is ordered. The other Judges concurred.

(92 Conn. 664)

McEVOY v. CITY OF WATERBURY et al.
(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. MUNICIPAL CORPORATIONS §821(20) — STREETS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In action for injuries from falling over telegraph pole lying in gutter, where person injured was walking at reasonable gait and it was raining slightly and the weather was misty, whether the injured person was negligent is a jury question.

2. LIMITATION OF ACTIONS §124—PERSONAL INJURY ACTION—NEGLIGENCE.

Where action is brought against city for injury from falling over telegraph pole lying in gutter, and the company owning pole was subsequently made a codefendant, the action as to the company was barred by limitations, where it was not made a defendant within one year from the date of the injury.

3. JUDGMENT §585(3)—MERGER AND' BAR—DISTINCT CAUSES—CITY'S RIGHT OF ACTION FOR INDEMNITY.

In action against city and telegraph company for injuries from pole lying in gutter, direction of verdict for company because action was barred by limitations does not preclude city, on recovery of judgment against it, from suing company for indemnity; plaintiff's cause of action against city being different from city's right of action against company.

4. LIMITATION OF ACTIONS §56(2) — CITY'S ACTION FOR INDEMNITY—PERSONAL INJURIES.

Where, in action against city and telegraph company for injuries from falling over telegraph pole lying in gutter, judgment is against city alone because the action against the company is barred by limitations, the barring of plaintiff's action against the company does not bar city's

action over against the company, city's right of action over not accruing until final judgment is rendered against it.

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Action by Nicholas McEvoy, administrator, against the City of Waterbury and others, to recover damages for personal injuries to the plaintiff's intestate, alleged to have been caused by the negligence of the defendants; verdict and judgment for the plaintiff for \$1,200 as against the defendant City of Waterbury, and in favor of the other defendants, from which said city appealed. No error.

Francis P. Guilfolle, of Waterbury, for appellant City of Waterbury. William E. Thoms, of Waterbury, for appellee McEvoy. Lawrence L. Lewis, of Waterbury, for appellee Postal Telegraph Company.

WHEELER, J. The plaintiff's intestate was injured on July 15, 1915, by falling over a telegraph pole which lay in the gutter near the curb of a sidewalk in a street of the defendant city of Waterbury. The city supports its assignment of error for the denial of its motion to set aside the verdict against it principally upon the ground that the plaintiff's intestate by her own negligence materially contributed to her injuries, since she should, in the exercise of reasonable care, have known of the existence of the pole and safely passed over it.

[1] There was evidence from which the jury might reasonably have found that the plaintiff's intestate was walking at a reasonable gait; that it was raining slightly and the weather was misty. Under these circumstances we think that, even though the jury found she knew of the existence and location of this pole, she was not, as a matter of law, herself negligent in falling over it. The issue of contributory negligence was, under all the surrounding circumstances, one of fact for the jury to find. The court directed a verdict in favor of the defendant Postal Telegraph-Cable Company, upon the second defense of its answer, the statute of limitations. The facts upon which this verdict was directed were these: This action was brought by writ dated October 4, 1915, and came to trial in December, 1916. The Postal Telegraph Company was named as codefendant, but on the trial it developed that the owner of the pole was not this defendant, but was the Postal Telegraph-Cable Company. This company was subsequently, on December 15, 1916, made a codefendant, and it appeared and pleaded, among its defenses, the statute of limitations, because the action against it was not begun within one year from the date when the plaintiff's intestate received her injuries. The direction of the verdict in favor of the Postal Tel-

Telegraph-Cable Company upon the ground stated in this defense is the remaining reason of appeal requiring consideration.

[2] The action by the plaintiff against this defendant was not begun within one year from the date when the plaintiff's intestate received her injuries; and, under the statute, the defense of the statute of limitations was good, and the verdict upon this ground in favor of this company properly directed.

[3] The city of Waterbury contends that the effect of the court's action in directing this verdict was to deny the city its action over against this company. This cannot be true. The cause of action in the plaintiff's case against the city or against the Telegraph-Cable Company is a totally different action from that of the city against the Telegraph-Cable Company. The latter action had not accrued when the accident occurred. Until the final judgment was obtained by the plaintiff against the city, it could not have been known with certainty that the city would ever have a cause of action over against the Telegraph-Cable Company.

[4] The statute of limitations in the action by the plaintiff against the company did not bar the action of the city against this company, since no statute of limitations as to this cause of action began to run in favor of the Telegraph-Cable Company until the final judgment against the city and the right of action over against the Telegraph-Cable Company accrued. The statute of limitations does not begin to run until the accrual of the action. *Hull v. Thoms*, 82 Conn. 647, 652, 74 Atl. 925; *Gay's Appeal*, 61 Conn. 445, 451, 23 Atl. 829.

The authorities upon the precise question are not numerous, but those which we have seen support the conclusion that any cause of action of the city of Waterbury against the Postal Telegraph-Cable Company could not accrue until the final judgment against the city was entered. *Lincoln v. First National Bank of Lincoln*, 67 Neb. 401, 405, 93 N. W. 698, 60 L. R. A. 923, 108 Am. St. Rep. 690; *Ashley v. Lehigh & W. B. Coal Co.*, 232 Pa. 425, 431, 81 Atl. 442; *Louisville v. O'Donoghue*, 157 Ky. 243, 245, 162 S. W. 1110; *Veazle v. Penobscot R. Co.*, 49 Me. 119, 127; *Wood on Limitations of Actions* (4th Ed.) § 179; *Ruling Case Law*, § 130.

There is no error. The other Judges concurred.

(92 Conn. 693)

GRIPPO v. DAVIS.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. VENDOR AND PURCHASER §215—TRANSFER OF CONTRACT—EQUITABLE INTEREST.

An agreement to purchase land, followed by payments upon the purchase price, gave the purchaser an equitable interest to which a transferee of the contract succeeded.

2. VENDOR AND PURCHASER §187—INSTALLMENTS—WAIVER.

Where seller under contract to sell land, providing for weekly payments, accepted payments in varying amounts and at irregular times through a long period, he waived the provisions for weekly payments during such time.

3. TRIAL §136(1)—QUESTIONS OF FACT—"WAIVER."

Waiver must be found as a fact, since the intentional relinquishment of a known right is the foundation of a waiver, but when the intent, though not expressly found, is the necessary inference from the facts found, the intent may be inferred as a matter of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

4. VENDOR AND PURCHASER §187—INSTALLMENTS—WAIVER.

Although seller under contract of sale of land, providing for weekly installments, accepted payments at irregular times in varying amounts, and waived weekly payments during a long period of time, yet the provision of the contract was not abrogated, and the seller could at any time insist upon the resumption of this provision, but only upon reasonable notice.

5. TENDER §16(1)—NECESSITY.

It is not necessary to make a tender where the other party's conduct makes it clear that it would be a useless act.

6. SPECIFIC PERFORMANCE §102—REMEDIES OF PURCHASER.

Where seller under contract for sale of land refused to accept an installment on the ground that buyer was in default, fact being seller had waived provisions as to time of payments, buyer could either wait a reasonable time for defendant to withdraw her rescission, or insist upon his right to carry out the agreement according to its terms, or tender in full the amounts due under the agreement.

7. INTEREST §16—WHEN DUE.

Whether interest on overdue payments shall be added to the principal depends upon the circumstances of the case.

8. PLEADING §127(2)—ISSUE—ADMISSIONS.

Where defendant in the pleadings admits that there was a tender of the "entire balance of the purchase price agreed upon," he cannot insist that the tender was inadequate because not including interest.

Appeal from Superior Court, New Haven County; William S. Oase, Judge.

Action by Gaetano Grippo against Susan L. Davis, to secure a conveyance of land from the defendant, under a contract made with her, or for damages. Judgment rendered for the defendant, and appeal by the plaintiff. Error. Judgment reversed, with directions to enter judgment in accordance with prayer for relief.

The plaintiff succeeded to all rights which his father secured by virtue of an agreement with the defendant for the purchase of certain lots of land on June 26, 1906, and of another agreement with the defendant for the purchase of other lots on May 15, 1907. Both of these agreements contained substantially identical terms except as to the purchase price and as to the terms of payment. Each provided for the payment of the purchase price by weekly payments and for execution of a warranty deed to the buyer

when the purchase price was paid in full. The agreement of June 26th provided that:

"If the weekly payments shall be more than four weeks delinquent, * * * the seller may at his option either declare the entire balance of the purchase price due and collectible, or he may rescind this contract to sell and convey said lots and take possession thereof at his option."

The agreement of May 15th had a similar provision, except that the period of delinquency was two weeks instead of four. The father made payment during his lifetime at irregular intervals and in varying amounts, and not in accordance with these agreements, and these were accepted and receipted for by the defendant. After the transfer to the plaintiff payments were made by him and accepted by the defendant, not in accordance with the agreements, but, as a rule, once a month, in payments of \$10 each. The plaintiff made a payment as usual of \$10 in January, 1916, and on February 1, 1916, tendered the defendant \$10, which she declined to receive, and at this time orally notified him that she rescinded the contract and offered to return the gross amount, \$732, paid to her by the plaintiff and his father, with an additional sum of \$100, but the plaintiff declined this offer. On February 1, 1916, there was due on these contracts \$693, and both contracts were long in default of their final payments under their terms. On April 8, 1916, the plaintiff tendered payment to the defendant of \$693, which was all that was due the defendant under these contracts. The defendant declined the tender, and refused to give the plaintiff a deed of the premises. After this tender the defendant in writing gave the plaintiff notice of her intention to rescind the contracts.

Arthur B. O'Keefe, of New Haven, for appellant. Charles Cohen and Barnett Ber-
man, both of New Haven, for appellee.

WHEELER, J. (after stating the facts as above). The principal grounds of error assigned in the appeal are the overruling of the plaintiff's claims of law that: (1) The defendant had waived the provisions of the agreements as to payments; (2) the acceptance of the payments other than as provided in the agreements amounted to a substitution payment for the payments of the original agreements; (3) the defendant did not have the right to rescind the agreements; (4) the plaintiff was entitled to a decree for specific performance.

[1] The agreements to purchase the defendant's lots, followed by payments upon the purchase price, gave the plaintiff's father an equitable interest in these lots, to which the plaintiff succeeded. *Miller v. Grussl*, 90 Conn. 555, 557, 98 Atl. 90.

The plaintiff, ever since acquiring this interest, and his father for a long period, failed to make the weekly payments as provided in the agreements.

[2] The provision for weekly payments was one which the defendant might waive. This

she might do by express declaration, or by a course of conduct equivalent to such a declaration. The receipt of payments by the defendant on account of the purchase price, in varying amounts and at irregular times through a long period, continued during the period of interest of the plaintiff until the refusal to accept the payment tendered on February 1, 1916, constituted a waiver of the provision for weekly payments during this time.

[3] As a general rule, a waiver must be found as a fact since the intentional relinquishment of a known right is the foundation of a waiver, and this intent to be found must be proved. But when the intent, though not expressly found, is yet the necessary inference from the facts found, as in this case, the intent may be inferred as matter of law. *Hartford First National Bank v. Hartford Life Insurance Co.*, 45 Conn. 22, 44.

[4] While we are of the opinion that these payments constituted a waiver of the provision for weekly payments so long continued, we do not think they abrogated this provision of the agreements and substituted the practice of payments for those provided.

The defendant was at liberty at any time to insist upon the resumption of this provision. Before she could do this she must in fairness give the plaintiff notice of her intention so to insist and a reasonable opportunity to comply. *Black on Rescission and Cancellation*, vol. 2, pp. 1395, 1396. Having received for so long a time payments of substantially \$10 a month, she was not at liberty to decline to receive the payment tendered on February 1st without prior notice of such intent. She had the right at this time to give notice of her intent to thereafter insist upon the weekly payments. This she did not do. On the contrary, she refused the payment tendered, and orally gave notice that she rescinded the contract. Since the defendant had waived the weekly payments by accepting, substantially, monthly payments, and had accepted a payment made in January, 1916, and given no notice of her intention to resume the provision for weekly payments, the plaintiff was not in default on February 1st, when the last tender of payment was refused. Much less was the plaintiff in default for four or two weeks, conditions precedent by the terms of the agreements to her right to rescind.

[5] The defendant's attempt to rescind was wholly nugatory. Neither then nor at any time in the future did the defendant notify the plaintiff of her purpose to require the weekly payments. Her refusal to accept the usual payment and her abortive attempt to rescind the contract relieved the plaintiff from the necessity of subsequently tendering the weekly payments. The plaintiff was not compelled to make this tender, since the defendant's conduct made it clear that this would be a useless act.

[6] In this situation three courses of action were open to the plaintiff. He might wait a

reasonable time for the defendant to withdraw her rescission, or insist upon his right to carry out the agreements according to their terms by making the weekly payments therein provided, or he might tender in full the amounts due under the agreements. He chose the latter course, and made tender of \$693, which sum, the complaint alleged, was the entire balance of the purchase price agreed upon, and the answer admitted this. Having done this, he had done all that he could do. The defendant has an erroneous view of the situation. The plaintiff was not in default on February 1st, nor at any time since. By his attempted rescission the defendant had signified his understanding that the agreements were at an end and his purpose to act upon that understanding, and this relieved the plaintiff from making tender of the weekly payments.

[7, 8] Assuming that the plaintiff had the right to make a tender of the amount due, the defendant insists that the tender was inadequate because it failed to include interest upon the overdue payments. Whether interest shall be added to a principal sum depends upon the circumstances. These may negative such a claim. The admissions of the pleadings in this case recite that the tender was of the entire balance of the purchase price agreed upon. It could not have been this if in addition to this balance a substantial sum by way of interest ought to be added. In view of this admission we think the question of the addition of interest to the weekly payments due did not arise, and that the tender must be held to be adequate. The time of performance was waived by the acceptance of the payments.

There is error; the judgment is reversed, with direction to the superior court to enter judgment in accordance with prayer for relief, upon payment to defendant of \$693. The other Judges concurred.

(132 Md. 491)

BALTIMORE CAR FOUNDRY CO. v. RUZICKA. (No. 33.)

(Court of Appeals of Maryland. April 3, 1918.)

1. MASTER AND SERVANT — §380 — WORKMEN'S COMPENSATION — EXTENT OF LIABILITY — "WILLFUL MISCONDUCT."

Employé of car manufacturing concern, who crosses track between two cars after being warned not to cross track because cars were to be coupled, although negligent, is not guilty of "willful misconduct" within Workmen's Compensation Law (Code Pub. Civ. Laws, vol. 3, art. 101, as amended by Laws 1916, c. 597, § 1) § 46; no act being willful unless intentional.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

2. MASTER AND SERVANT — §375(2) — WORKMEN'S COMPENSATION — "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where shop employé was killed immediately after day's work while walking toward shop exit, his death arose out of and in course of em-

ployment, although on way out of shop he was not using board walk intended to be used by employes going to and from work; there being no enforced rule requiring use thereof.

Appeal from Circuit Court, Anne Arundel County; Robert Moss, Judge.

"To be officially reported."

Proceedings under Workmen's Compensation Law for death of Frank J. Ruzicka by Sophia Ruzicka, opposed by the Baltimore Car Foundry Company, employer. From a judgment of the circuit court, affirming an award of the State Industrial Accident Commission, petitioner appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Edward Duffy, of Baltimore, for appellant. Edward J. Colgan, Jr., of Baltimore (Frank J. Pfitzner, of Baltimore, on the brief), for appellee.

URNER, J. Upon this appeal from a judgment of the circuit court for Anne Arundel county, affirming an order of the State Industrial Accident Commission, the main question to be decided is whether the death of Frank J. Ruzicka, to whose widow an award was made by the commission under the Workmen's Compensation Law (Code Pub. Civ. Laws, vol. 3, art. 101, as amended by Laws 1916, c. 597, § 1), was the result of his "willful misconduct" within the meaning of that statute, which by its forty-sixth section provides that:

"No employé or dependent of any employé shall be entitled to receive any compensation or benefits under this Act, on account of any injury to or death of an employé caused by self-inflicted injury, the willful misconduct, or where the injury or death resulted solely from the intoxication of the injured employé."

Ruzicka was crushed and killed while attempting to pass between two cars on a track in the car erecting shop of the Baltimore Car Foundry Company, in which he was employed as a maker of decks or platforms for the cars there in course of construction. The accident occurred in the evening as the day's work was closing and Ruzicka was starting to leave the shop on his way to his home. The cars between which he tried to pass were two of a number of finished cars, standing at intervals on the track, and ready to be coupled together and drawn out of the shop by an engine which had been brought to the end of the building for that purpose. A trainman had passed along the track, notifying all the workmen that the cars were about to be coupled and moved. At a distance of about 80 feet from the place where Ruzicka had been working there was a board walk over the track referred to, and others parallel with it, which was intended for the use of the workmen in crossing the tracks in going to and from their work. There does not appear to have been any enforced rule, requiring

the employes to use the board walk alone in passing from one side of the building to the other, and they could, if they chose, in going home, cross the tracks at other points. When the trainman, who gave warning as to the coupling and removal of the cars, passed Ruzicka's place of work, the latter was in the act of putting on his coat. It was about five minutes later that the engine, on signal from the trainman, began the movement by which the cars were coupled. An employe who saw the accident testified that he told Ruzicka, as he was about to go between the cars, that he ought not to do so, because they were ready to be moved, but Ruzicka said: "That is all right, I will go through before they start." If he had passed on promptly, he would have crossed in safety, as the cars were not moved during the next five minutes, but as he reached the track he was engaged in conversation by another workman for about the period just mentioned, and then, as he was passing between the couplers, which were three or four feet apart, the movement of the cars was begun, and he was crushed to death.

[1] It is, of course, perfectly clear that the fatal accident we have described was the result of Ruzicka's own negligence. But we agree with the court below and the State Industrial Accident Commission in the opinion that the highly imprudent act which caused the unfortunate man's death is not properly to be characterized as willful misconduct. It lacked the element of intentional impropriety which those words imply. It was a thoughtless and heedless act, but not a willful breach of a positive rule of conduct or duty.

In *Bradbury's Workmen's Compensation Law* (3d Ed.) p. 531, where numerous decisions on the subject are collected and discussed, it is said:

"No general rule of law can be established defining accurately what constitutes willful misconduct. The question is one of fact, and must be determined by the facts presented in each particular case. The conduct must be willful, which means that it must be intentional, that is, deliberate, with an exercise of the will as opposed to accident, negligence, inadvertence, and thoughtless acts on the spur of the moment or an error of judgment."

On the appeal to the House of Lords in *Johnson v. Marshall Sons & Co.*, 94 L. T. 828, Lord Chancellor Loreburg, in defining "serious and willful misconduct," as used in the British Workmen's Compensation Act, said that the word "willful" imports that "the misconduct was deliberate, not merely a thoughtless act on the spur of the moment."

In discussing a provision in the California Workmen's Compensation Act (St. 1913, p. 279), similar to the one with which we are here concerned, the Supreme Court of that state said:

"Willful misconduct involves something more than negligence, and it does not even include ev-

ery violation of a rule." *U. S. Fidelity & Guaranty Co. v. Industrial Accident Commission*, 174 Cal. 616, 168 Pac. 1013.

The contention in that case, which the court overruled, was that the injured employes, who were suffocated in a wine vat, were guilty of willful misconduct in entering the vat without previously testing it for noxious fumes according to the customary method of observing that precaution. It was held in *Gignac v. Studebaker Corporation*, 186 Mich. 574, 152 N. W. 1037, that a checker of automobile shipments whose foot was crushed between the bumpers of freight cars over which he was climbing, without knowing whether the train was about to move, was not, as a matter of law, guilty of such "intentional and willful misconduct" as would defeat recovery under the Michigan Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10). In *Nickerson's Case*, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790, it was decided that the act of a painter in working near machinery while it was in motion, contrary to an order that the painting be done during the noon hour when the machinery was stopped, should not be regarded as "serious and willful misconduct," within the provisions of the Massachusetts Workmen's Compensation Act (St. 1911, c. 751, amended by St. 1912, c. 571); the court observing that willful misconduct "is a very different thing from negligence, or even from gross negligence," and "the fact that the injury was occasioned by the employe's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been willful."

Other illustrative cases on this subject are cited in an elaborate annotation on workmen's compensation laws in *L. R. A.* 1916A, 75, 243.

In the present case it is evident that the death of Ruzicka was due to his erroneous assumption that there was sufficient time for him to pass between the cars before they were moved. There was in fact ample time for that purpose when he started to cross, but when, after his progress had been interrupted by the conversation in which he became engaged with another workman, he resumed his forward movement, he apparently failed to realize how long he had been delayed. This was a very serious lapse of memory and judgment. It led him into an imminent peril which he could readily have avoided by ordinary attention. But in thus neglecting to have proper regard to his safety he was not, in our opinion, guilty of willful misconduct within the purview of the Workmen's Compensation Law, which, except in cases of injury produced by such misconduct, or self-inflicted, or due to intoxication, provides compensation for the disability or death of employes resulting from accidental personal injury arising out of and in the course of the employment "without regard to fault as a cause of such injury."

[2] It was argued that Ruzicka's death did not arise out of and in the course of his employment, since he was killed while leaving the car shop by a route other than the board walk which led to the place of exit. As we have already stated, the workmen were not required to use the board walk, but they could pass elsewhere over the tracks, in going to and from their working places, and we think that the accident, which resulted in Ruzicka's death, and which occurred while he was on the employer's premises and immediately at the close of the day's labor, should be regarded as arising out of and in the course of the employment. This conclusion is fully in accord with the general trend of the many decisions upon questions of this nature which are cited in the annotation heretofore referred to in L. R. A. 1916A, 40, 232.

The specific exceptions in the record were taken to the refusal of the lower court to rule that the death of the plaintiff's husband was caused by his willful misconduct, and to reverse the decision of the State Industrial Accident Commission, which overruled that defense and awarded compensation to the widow on the statutory basis. In our judgment the rulings excepted to were correct.

Judgment affirmed, with costs.

(133 Md. 615)

BUCKNER v. CRONHARDT et al. (No. 59.)
(Court of Appeals of Maryland. April 25, 1918.)

1. MORTGAGES §504—REMEDIES OF MORTGAGOR—RESTRAINING SALE—CONDITIONS.

A bill by a mortgagor to restrain a sale under the mortgage, which fails to allege that the amount admitted to be due has been paid into court, is insufficient under Code Pub. Civ. Laws, art. 66, § 16, requiring such payment as prerequisite to the injunction.

2. MORTGAGES §504—RESTRAINING SALE—SCOPE OF INQUIRY.

Where the mortgagor brings a bill to restrain a sale under the mortgage, and as required by Code Pub. Civ. Laws, art. 66, § 16, pays into court the amount admitted to be due, the question of credits claimed by him must be adjusted on a statement of the account, but cannot be invoked to affect the power of sale.

3. APPEAL AND ERROR §100(2)—ORDERS APPEALABLE.

An order dissolving an injunction to restrain the sale under a mortgage is an appealable order within Code, art. 5, § 27.

Appeal from Circuit Court No. 2 of Baltimore City; H. Arthur Stump, Judge.

"To be officially reported."

Petition by Louis Buckner against Charles Cronhardt, Jr., executor, and Jacob M. Mitnick, trustee. From an order adverse to petitioner, he appeals. Affirmed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

David Ash and Louis Hollander, both of Baltimore, for appellant. S. S. Field, of Baltimore, for appellees.

BRISCOE, J. On the 27th of August, 1912, the plaintiff obtained a decree, in the circuit court of Baltimore city, against the defendants for the sale of certain fee-simple and leasehold property in the city of Baltimore, which had been conveyed by way of mortgage to secure an indebtedness of \$16,600 and interest thereon, with certain credits, appearing from a statement of the mortgage debt filed in the mortgage foreclosure proceedings.

On the 24th of February, 1913, the defendant, Louis Buckner, filed a petition in the case, wherein among other things it is alleged that eleven other mortgage foreclosure proceedings under consent decrees for the sale of mortgaged property were filed and instituted simultaneously with this case, as will more fully appear by reference to the dockets of the court. The petition is quite a lengthy one, and the relief sought thereby is stated in the prayer thereof as follows: (1) That the decree of sale in the mortgage foreclosure suits may be stricken out as improvidently and inadvertently granted; (2) that the plaintiff be required to file his mortgage claim in each of the remaining cases on the docket within 15 days after service of a copy of the order; (3) that an injunction be issued enjoining and restraining the plaintiff and the trustee named in the decrees from advertising the property for sale or proceeding with the foreclosure sale of the property; (4) that the plaintiff be required and compelled to make an accounting of the moneys deposited in trust; and (5) for other and further relief.

Upon the allegations of the petition and exhibits the court below, on the 24th of February, 1913, ordered a writ of injunction in the usual form to be issued upon the filing of a bond in the penalty of \$1,000, reserving the right to the defendants to move for a rescinding of the order and for a dissolution of the injunction at any time after the filing of answers, on giving the petitioner 5 days' previous notice of the motion. The injunction was issued as directed, and on the 10th day of April, 1913, the plaintiff appeared and answered the petition, denying the material allegations thereof.

The answer also denied that the petitioner was entitled to a credit in excess of \$22,000 on the various mortgages, but avers that the true amounts owing on the mortgages in the proceedings are correctly shown by the statements of the mortgage claims in each of the cases herein, and filed at the time of the answer. The answer further denies that the petitioner is ready, willing, and able to pay the amount due under the several mortgages, and since the petitioner admits that the mort-

gages are overdue, and the mortgagee is in default, he is not entitled to the intervention of a court of equity to stay the mortgage sales, without paying or bringing into court the principal and legal interest due thereon, in excess of the credits claimed. The answer then asked that the petition be dismissed, the order be rescinded and discharged, and the injunction as granted be dissolved.

Subsequently, on the 26th of September, 1913, certain exceptions to the answer were filed, which upon hearing were overruled by the court, and the petitioner was directed to proceed further with the case within 10 days. Thereupon the petitioner joined issue on the matters alleged in the answer, so far as the same may be taken to deny or avoid the allegations of the petition. Nothing further appears to have been done in the case until the 8th of May, 1917, when upon application of the plaintiff leave was granted to the parties to take testimony in open court, and at this hearing on the 16th of November, 1917, the following order of court appears to have been passed:

"The matter of the petition filed by Louis Buckner, one of the defendants in the above-entitled case, on February 24, 1913, and the answer filed by Charles Cronhardt, Jr., thereto on April 10, 1913, and the replication thereto, coming on for final hearing in open court under the thirty-fifth rule, and before taking of any testimony, the matter of the failure of the petitioner to pay into court the balance of the mortgage debt and interest over and above the credit claimed by the petitioner was suggested by the solicitor for the mortgagee, and, being argued by counsel for the respective parties, it is thereupon this 16th day of November, 1917, ordered by the circuit court of Baltimore city that the said Louis Buckner, within 60 days from this date, bring into this court the balance of the mortgage debt and interest due under the various mortgages mentioned in the petition, over and above the credit claimed by the petitioner, and to pay the same into this court into the hands of the clerk thereof to the credit of the said Charles Cronhardt, Jr., executor, the interest whereon shall be subject thereafter to the further order of court; and that in default of such payment by the petitioner the injunction heretofore issued in this case shall be and it is hereby dissolved."

From this order the petitioner, Louis Buckner, on the 8th of January, 1918, directed this appeal. The appeal, it will be seen, is from an order of court dissolving an injunction upon failure of the defendant to bring into court within 60 days from its date the balance due on certain and various mortgages set out in the case, over and above the credits claimed by the petitioner. While the order is unusual in form, and the proceeding somewhat irregular, it, in effect, gave the defendant 60 days from its date to bring into court the balance due on the mortgage debts, over and above the credits claimed by him, and in default of such payment it was provided the injunction heretofore issued in the case shall be and it is hereby dissolved. The single question presented on the appeal is whether this order was properly passed, and whether the objections urged against it can

be entertained upon the state of the record now before us.

[1] It is quite clear that the averments of the defendant's petition were not sufficient to entitle him to the relief sought against the plaintiff, and that the order for an injunction on the 24th of February, 1913, was improperly passed. The petition not only fails to allege that the mortgages are not in default, or that the entire amount of the mortgage debt and interest has been paid, but admits that the mortgage debt and interest amounts in excess of \$40,000, but claims a credit in excess of \$22,000. It is well settled upon all the authorities that the mortgagor must pay the amount admitted to be due into court before the court will grant an injunction to restrain the sale upon a default in the mortgage. Revised Charter of Baltimore, § 721; Code, art. 66, § 16; *Powell v. Hopkins*, 38 Md. 1; *Neurath v. Hecht*, 62 Md. 221; *Thrift v. Bannon*, 111 Md. 803, 73 Atl. 660.

[2] The question of credits relied upon by the defendant could be adjusted and settled upon a statement of the account and a distribution of the fund between the parties by the auditor of the court, but cannot be invoked to affect the power of sale under the mortgage. *Walker v. Cockey*, 38 Md. 75; *Roberts v. Loyola Bldg. Ass'n*, 74 Md. 1, 21 Atl. 684.

The case was heard in open court upon petition, answer, and replication, and was argued by counsel for the respective parties. The question of the payment of the admitted debt into court before the injunction could have issued was relied upon as a defense in the eleventh paragraph of the answer. And by the twelfth paragraph the court was asked to rescind the order as passed, dissolve the injunction, and to dismiss the petition.

By section 164 of article 16 of the Code, it is provided:

"And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defense in law or equity, to the merits of the bill, of which he may be entitled to avail himself by a demurrer, or plea in bar."

It is difficult to see upon what legal or equitable principle, under the facts and circumstances of this case, that the appellant can complain of the order of court below dissolving the injunction, or in what respect he is injured thereby. He admits there is a large balance due upon the mortgages and both the interest and the credits claimed by him are reserved for the further consideration of the court. The court gave him 60 days from the date of the order to bring in the money before a default, and before a dissolution of the injunction would become effective, but he not only failed to avail himself of his rights under the order, but waited until within a few days of the expiration of the 60 days, and then took this appeal. To permit the appellant's contentions to prevail in this case and at this stage of the proceed-

ing would be, as stated by this court in *Belt v. Blackburn*, 23 Md. 227, "to grant not only an indulgence unreasonable in itself but to encourage vexatious delays in the prosecution of suits, but it would be manifestly unjust to the" parties in interest.

[3] The motion to dismiss the appeal will be overruled. Treating the order of the 16th day of November, 1917, as an order dissolving the injunction, it is clearly an appealable order, under section 27 of article 5 of the Code.

It follows, from the conclusion we have reached, that the order of the circuit court of Baltimore city, dated the 16th day of November, 1917, dissolving the injunction, which had been granted on the 24th of February, 1913, will be affirmed. *Cherbonnier v. Goodwin*, 79 Md. 55, 28 Atl. 894; *Equitable Ice Co. v. Moore*, 127 Md. 324, 96 Atl. 444; *Carrington v. Basshor*, 121 Md. 76, 88 Atl. 52.

Order affirmed, and cause remanded, with costs to the appellee.

(122 Md. 511)

UNITED STATES FIDELITY & GUARANTY CO. v. TAYLOR. (No. 39.)

(Court of Appeals of Maryland. April 3, 1918.)

1. MASTER AND SERVANT §383—WORKMEN'S COMPENSATION ACTS—INSURANCE.

Where plaintiff insured "all" defendant's employes, both believing that employes in different work in a different county were not covered, the policy stating that the work was in one county only, defendant thinking no insurance for the different work was required, but the Industrial Accident Commission awarded compensation to such a workman and required plaintiff to pay it, plaintiff could recover the amount from the employer.

2. MASTER AND SERVANT §383—WORKMEN'S COMPENSATION ACTS—INSURANCE.

Where master took insurance limited to servants employed in one county, and afterwards began new work in a different county and a new servant was awarded compensation to be paid by the insurer, who sued to recover it from the master, the master could not take advantage of policy clause permitting adjustment of premium for new risk by pleading willingness to pay the increased premium.

3. MASTER AND SERVANT §383—WORKMEN'S COMPENSATION ACTS—INSURANCE.

Where plaintiff insured "all" defendant's employes, both believing that employes in different work in a different county were not covered, the policy stating that the work was in one county only, defendant thinking no insurance for the different work was required, but the Industrial Accident Commission awarded compensation to such a workman, the policy nevertheless, as between plaintiff and defendant, did not cover the workman injured.

4. TRIAL §136(3)—CONSTRUCTION OF WRITING—QUESTIONS FOR JURY.

In insurer's action to recover amounts paid as compensation under order of the Industrial Accident Commission, it is for the court to construe the policy and determine the meaning of the clauses relied on, and not for a jury or for the court sitting as a jury.

5. TRIAL §386(4)—TRIAL BY COURT.

On trial without a jury, prayers should specifically refer to statements submitted to consideration of the court, and not require it to look through the pleas to discover the grounds for the prayers.

6. MASTER AND SERVANT §383—WORKMEN'S COMPENSATION ACTS—INSURANCE.

A master having two separate and distinct occupations, both of which require insurance under the Workmen's Compensation Act, may take out two policies, each covering one occupation and not the other.

Appeal from Circuit Court, Calvert County; B. Harris Camaller and Fillmore Beall, Judges.

Action by the United States Fidelity & Guaranty Company against Frederick Taylor. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

John B. Gray, Jr., of Prince Frederick, and Edgar Allan Poe, of Baltimore (John B. Gray, of Prince Frederick, and Bartlett, Poe & Claggett, of Baltimore, on the brief), for appellant. L. Allison Wilmer, of Leonardtown (J. Frank Parran, of Prince Frederick, on the brief), for appellee.

BOYD, C. J. While Charles E. Briscoe was in the employ of the appellee, who was engaged in road construction work in St. Mary's county, Md., he was killed. The appellant had issued to the appellee a compensation insurance policy which the appellant and the appellee understood did not cover and protect Briscoe, but his widow, Margaret Briscoe, filed a claim for compensation before the State Industrial Accident Commission, and after a hearing the commission passed an order that the appellee, employer, and the appellant, insurer, pay to her, until the further order of the commission, compensation at the rate of \$3.60 per week, payable weekly, for the period of eight years from the 21st of July, 1915, and such further sum, not to exceed \$75, as the widow had paid for funeral expenses. The appellee and the appellant appealed from the order and the award of the commission, and the appellant further appealed, independently and on its own behalf, to the superior court of Baltimore city, but that court confirmed the decision of the commission.

The appellant had paid the \$3.60 weekly, up to the time of bringing this suit, and also \$47 for funeral expenses, and it sued the appellee to recover the payments so made by it. There are five counts in the narr., the first being for money paid by the plaintiff for the defendant at its request, and the other four being special counts. The defendant (appellee), in addition to the general issue pleas, filed a special plea to each of the five counts; but as the questions before us are presented by the rulings on the prayers and a demurrer

to the plea to the fifth count, we will not set out the pleadings at length.

The theory of the plaintiff (appellant) is that, although by reason of certain provisions in the Workmen's Compensation Law (Laws 1914, c. 800), which is now article 101 of volume 3 of the Code, and in the policy issued by it in conformity with that law and the requirements of the State Industrial Accident Commission, it was liable to the widow of Briscoe under the award of the commission, affirmed by the superior court of Baltimore city on appeal, it was not liable to the appellee, and hence is entitled to recover from him what it has paid by reason of the award of the commission. It denies any attempt to impeach that award, but claims that, as it was not intended to insure such employes as Briscoe, and that was so understood by the appellee, he should be required to return to it what it has paid to Briscoe's widow, who was his only dependent.

The record shows that the appellee was about to have awarded to him a contract for road construction work in St. Mary's county, when an agent of the appellant called upon him and proposed to insure him in that company against loss on account of accidents to his employes under that contract. The appellee replied that his road construction work was not of such a hazardous nature as to require him, under the law, to take out insurance. The agent told him that he was satisfied that the work was such as to require insurance, but the appellee insisted that it was not, and said that he would not take out insurance for that, but he told the agent that he was the owner of a number of automobiles which he was operating in Calvert county, in transporting the mail and passengers, and that he would take a policy from the plaintiff company for protection against accidents to his employes in that enterprise.

The premium was adjusted upon the basis of the number of employes of the defendant engaged in the automobile business, and was paid, and a policy dated January 20, 1915, was issued.

The appellee did not begin the road work until the following April. He testified that he did not think it was of such nature as to require him to insure, and had no intention when the policy was taken out, nor after he commenced the road work, of insuring against accidents to his employes on that work; and he thought he was not insured against accidents to such employes by the policy mentioned in the declaration until the decision of the commission, but when the commission and the court said he was so insured he accepted the decision.

Briscoe was at the time he was killed at work on a gravel pit, used in connection with the road construction work, which seems to be covered in terms by section 32, subsec. 19, of article 101, as an "extrahazardous employment." In the policy the company

agrees with the employer "as respects personal injuries sustained by employes, including death at any time resulting therefrom," as follows:

"*Compensation.* 1. To pay in the manner provided by chapter 800 of the Acts of the General Assembly of Maryland, 1914, and all amendments thereto (hereinafter called 'Maryland Workmen's Compensation Law') any sum due or to become due from the employer because of any such injuries or death, and the obligation for compensation therefor imposed upon the employer by such law," etc.

"*Liability.* 2. To indemnify the employer against loss by reason of the liability imposed upon the employer by law for damages on account of such injuries or death."

"*Employes Covered.* 6. This policy shall cover all employes of the employer, legally employed."

There are also certain conditions which the policy is subject to, amongst which are the following:

"Condition A. The premium is based upon the entire remuneration earned during the term of the policy by all employes of the employer. * * * If there shall be any change in or extension of the employer's trade, business, profession or occupation, the earned premium therefor shall be adjusted at the company's manual rates respectively applicable thereto. If the earned premium thus computed is greater than the advance estimated premium paid, the employer shall immediately pay the additional amount to the company; if less, the company shall immediately return the unearned premium to the employer."

"Condition M. The employer, by the acceptance of this policy, declares the statements in items numbered 1 to 11, inclusive, in said declaration to be true, except such as are declared to be matters of estimate only; and this policy is issued in consideration thereof and the provisions of the policy as respects its premium and the payment of such premium; provided, however, that nothing in this condition and no default on the part of the employer with respect to any of the provisions or conditions of this policy, shall in any way affect the right of any employe, or his dependents, to recover from the company the compensation provided for in the Maryland Workmen's Compensation Law and intended to be insured hereunder."

In the declaration, which was made a part of the policy, there are eleven items numbered from 1 to 11, as referred to in Condition M, above. Item 8 is as follows:

"Location of all factories, shops, yards, buildings, premises or other work places of the employer, by town or city, with street and number: *Calvert County, Maryland.*"

Then, under a column of "Divisions of Operation," there are a number of classifications lettered from (a) to (i) inclusive. Opposite these are three columns for "Estimated Pay Roll of Employes for Policy Term," "Manual Premium Rate per \$100 of Employes' Pay Roll," and "Estimated Advance Premium." The only one filled up is "(g) Chauffeurs and Helpers, Wherever Engaged," and the figures "1200," "1.79," "21.48" are in the three columns just referred to. Item 4 states:

"The estimated pay roll as stated above included the entire remuneration of whatsoever kind earned by all persons employed in the service of the employer in connection with the employer's trade, business, profession or occupation, as provided in Condition A, to whom remuneration of any nature in consideration of

service is paid, allowed or due, except that the remuneration of officers of a corporation whose duties or practices do not expose them to any operative hazards of the business may be excluded."

Item 9 is:

"No operations of any nature not herein disclosed will be conducted by the employer, except as follows: *No exceptions.*"

"Calvert County, Maryland," at the end of Item 8, and "No exceptions," at the end of Item 9, were the answers of the employer. (Italics ours.)

We have thus set out at some length the provisions of the policy, including the conditions and declarations, which are a part of it, which seem to be most applicable to the questions involved in this case; but the provisions of the Maryland Workmen's Compensation Law are expressly made a part of the policy "so far as they apply to compensation for any personal injury or death covered by this policy while it shall remain in force"—being a part of paragraph 1 as to compensation, quoted in part above. Under section 15 of article 101 of the Code, the employer is required to secure compensation to be paid his employes in one of the three ways: (1) By insuring in the state accident fund; (2) by insuring with a stock corporation or mutual association authorized to transact the business of the workmen's compensation insurance in this state; or (3) with the approval of the commission, insuring the payment of compensation himself. Ample provision is made for the protection of employes when the third plan is adopted, which was doubtless authorized for the benefit of railroads and other companies or persons who employ a great many employes, and concerning whose ability to pay the commission can readily determine. In this case the employer adopted the second plan. The form of such policy is approved by the commission; indeed, no company or association can enter into such policy of insurance until it obtains from the insurance commissioner of Maryland a license for the purpose, "and until the form of such policy shall have been approved by the State Industrial Accident Commission." Section 29 of article 101.

This case is a very peculiar one, and we have not been referred to any decision that is very apposite. So far as the liability of the appellant to the widow for the compensation is concerned, there can no longer be any question. That was determined by the commission and affirmed by the superior court of Baltimore city, no appeal having been taken to this court. In its opinion the commission referred to the contention of the insurance company that the "coverage provisions" were limited by the "declarations" of the employer contained in his application for insurance, which declared that he employed no other employes except chauffeurs and helpers, and that therefore only such employes were covered by the policy, and said:

"If the rights of third parties were not involved, we might accept this view as correct; but, however the terms of the application and the declarations of the employer may affect the question as between the insurer and the employer, they cannot affect the right of the injured employe, or his dependents, in case of death, to the security of payments of compensation stipulated in paragraph 1 of the policy, and this is so because of Condition M, of the policy."

After quoting Condition M, the opinion went on to say that:

"The proviso clause in this condition of the policy was inserted by the commission for the express purpose of defeating any such contention as that now made by the insurance company, and we are of the opinion that it does have that effect, and that, notwithstanding the 'declarations' of the employer, the policy is effective in securing the payment of compensation to which the employe, or his dependents, may be entitled, regardless of the statements or declarations made by the employer in his application for insurance."

[1] That is practically the position now taken by the appellant; and, after giving the matter thorough consideration, we have reached the conclusion that the appellant is not barred by the award of the commission, but is entitled to recover from the appellee the payments it has made, and is required to make by reason of the award. There are two distinct obligations upon the insurance company; one to secure payment of the compensation to the employe, and the other to indemnify the employer against loss for the liability imposed upon him by law for damages on account of such injuries or death. By reason of the provisions of Condition M, the company cannot rely on the statements of the employer in the items in the declaration, so far as they affect the right of an employe or his dependents, to recover compensation; but that ought not and does not prevent it from requiring the employer to live up to his declarations and the terms of the policy, in so far as the rights between them are concerned. As we have seen, by Item 8, he expressly said that the location of all of his work places was in Calvert county and limited his operations to "chauffeurs and helpers, wherever engaged." The estimated payroll of the employer was with reference to that occupation, and the premium was paid accordingly.

It is true that at the time the policy was issued the appellee had not commenced the road construction work in St. Mary's county, but he further declared in declaration 9 that:

"No operations of any nature not herein disclosed will be conducted by the employer, except as follows: *No exceptions.*" (Italics ours.)

That is in accordance with what was intended and what he believed, as he testified that he did not think that it was necessary to insure his employes engaged on the road construction work, did not intend to do so, and thought that he was not so insured until the commission held otherwise. But the commission only held that he was insured so far as the rights of the employes were concerned,

and it did not and could not change his rights as between the insurance company and himself, but it made the insurance company security for the compensation he had to pay.

[2] But the appellee contends that Condition A relieves him. In the first place, it might well be contended that the language, "If there shall be any change in or extension of the employer's trade, business, profession or occupation, the earned premium therefor shall be adjusted at the company's manual rates respectively applicable thereto" was only intended to apply to a change, etc., of the business named in the policy, and would not be applicable to some other business or occupation, in another county and not in any way connected with that mentioned in the policy. But, at any rate, if the earned premium thus computed was greater than the advance estimated premium paid, the employer was required to pay it immediately. The evidence shows that the estimated pay roll for the road construction work was very much more than for his automobile business, and it would be in a different classification. In the defendant's fifth plea, he said that he had been ready and willing at all times since the decision of the commission, and was still ready and willing to pay the earned premium, adjusted at the company's usual rates, as set forth in Condition A; but that would not answer. We know of no authority which would excuse an insured and authorize him to come in after a decision of the question and get the benefit of the policy by coming into court and offering to pay, etc. These statements were very material, and the agent of the company was in no wise responsible for them. The appellee cited section 213 of article 23 to show that no misrepresentations or untrue statement in an application, made in good faith, by the applicant, should effect a forfeiture or be a ground of defense, "unless such misrepresentation or untrue statement relate to some matter material to the risk." We have already said that these statements were material, but beyond that we could not say that the answer to Item 3 was a misrepresentation or untrue statement of the facts as they existed when the policy was applied for and obtained, and Item 9 had reference to the future. It is only just to the appellee to say that we do not think he was guilty of fraud or misstating facts. Unfortunately, he did not think that he was going to engage in an operation which required insurance, and that is, of course, what Item 9 has reference to, and the agent knew from him that he did not intend to and would not take out insurance for the road work. The agent did not withhold anything from him or in any way impose on him. On the contrary, he told him he thought he would have to take out the insurance and endeavored to get him to do so. It was not the intention of either of them to cover that work with this policy, and it is only because the commission, affirmed by the superior

court, has found that it did cover it, in so far as the employes and their dependents are concerned, that he and the company were held. The long line of cases cited by the appellee, including *Patapasco Ins. Co. v. Briscoe*, 7 Gill & J. 293, 28 Am. Dec. 319; *Md. Ins. Co. v. Bossiere*, 9 Gill & J. 121; *National Fire Ins. Co. v. Crane*, 18 Md. 280, 77 Am. Dec. 239; *A. & E. R. R. Co. v. Balto. Ins. Co.*, 32 Md. 37, 8 Am. Rep. 112; *Keystone Benefit Ass'n v. Jones*, 72 Md. 363, 20 Atl. 195; *Globe Life Ins. Co. v. Duffy*, 76 Md. 293, 25 Atl. 227; *Dulaney v. Fidelity & Cas. Co.*, 106 Md. 17, 66 Atl. 614; and others—do not seem to us to aid the appellee, for, in so far as they relate to the intention of the parties, he testified most positively that he had no intention of insuring the employes in the road work, and there was no intention on the part of the appellant to do so by this policy. The appellee's main trouble is that it is conclusively shown, and not denied, that there was no intention of including such employes as Briscoe, or such work as he was engaged on, and the policy clearly carried out that intention, in so far as the appellant and appellee are concerned, and is only effective for the benefit of the widow of Briscoe by reason of the award of the commission, which expressly distinguished the liability to her from that to the appellee.

[3] Without meaning in any way to criticize, or to express an opinion as to the correctness of the award of the commission, as that is not before us for review, we cannot hesitate to hold that as between the appellant and the appellee the policy did not include Briscoe, and the appellant is simply in the position of a surety for the compensation allowed by the commission, as it is relieved from liability to the appellee for reasons we have stated. So far as the appellant and appellee are concerned, paragraph 6 must under the other provisions and the evidence in the case be construed to mean that:

"This policy shall cover all employes of the employer, legally employed in the business mentioned in the declarations, made a part of the policy."

It may be well to add here with emphasis that this is a wholly different case from such an one as *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 Atl. 999, Ann. Cas. 1917D, 33, where the question was whether the provisions of the Workmen's Compensation Law included such an employe as Fitzhugh. He was admittedly an employe of the ice company, as a driver of an ice and coal wagon, in the regular business of the company, which the insurance was intended to cover. There was no such question as there is here, and this case must not be confounded with those in which the question arises as to whether an employe of an employer in the business intended to be insured is covered by the policy. That may often arise in cases under this law; but the question here is a wholly different one, as it was distinctly

understood that this policy was not to cover the employes on the road work.

In view of what we have said, it is apparent that the appellant is entitled to recover. If it was not, then we would have the remarkable condition that an insurance company would be required to pay insurance which both the insured and the insurer agree was never intended to be paid, and neither of them understood or intended that the policy should cover the insurance in question, and the peculiar part of it is that the only ground for the contention is the award, while the commission making it distinctly said that it did not mean to hold that the policy was effective between the appellant and the appellee, and sustained the award in favor of the third party by reason of the provisions in the policy and the law which, under their interpretation, entitled her to it.

In *Turner v. Egerton*, 1 Gill & J. 430, 19 Am. Dec. 235, Chief Judge Buchanan said: "Where one is compelled to pay the debt of another, he may recover against him in an action for money paid, etc., upon the promise which the law implies, as in the case of money paid by a surety on a bond, which is considered as paid to the use of the principal, and may be recovered in an action against him for money paid, etc."

In *Baltimore v. Hughes*, 1 Gill & J. 480, 19 Am. Dec. 243, the same judge said:

"If one is compelled, or is in a situation to be compelled, to pay the debt of another, as in the case of a surety, and does pay it, the law implies a promise on the part of him for whom the money is paid, on which an action may be sustained, for in such case it is not a voluntary but a compulsory payment."

See, also, 1 Poe, §§ 107-111, where the question is fully considered under the count for money paid. As there is such a count in the narr., it will not be necessary to discuss the special counts.

[4, 5] The first prayer of the plaintiff was properly rejected. That prayer, if good, would enable an insurance company to recover from the employer compensation paid by it in almost any case. It is altogether too general. The second is rather broad also. There may be cases in which the insurer and employer did not intend to insure some particular employe, not supposing he was covered by the law; but that of itself would not be sufficient to authorize the recovery by the insurer from the insured. If the policy is broad enough to cover all employes in the business or occupation which the policy is intended to cover, then merely because the insurer and employer thought that some particular employe or class of employes was not covered by the law, but the commission and the court on appeal decided the contrary, that would not be sufficient to relieve the insurer of its liability to the employer. The theory of the third and fourth prayers, as we understand it, may be correct; but they do not sufficiently cover the case. It is for the court to construe the policy and determine the meaning of the clauses relied on,

and not for a jury or for the court, sitting as a jury. The appellee's second prayer, which was granted, left it to the court, sitting as a jury, to construe the clause of the policy referred to. Then the provision at the end of the prayer makes it bad. It should have specifically referred to such statements as the appellee desired to submit to the consideration of the court, sitting as a jury, and not require it to look through the pleas for the reasons the appellee had for his declarations, even if they be assumed to be good reasons.

[8] The demurrer to the fifth plea should have been sustained. Readiness on the part of the appellee since the decision of the commission was not sufficient, and the addition to the plea, that the plaintiff had knowledge at the time of the issuance of the policy that the defendant was engaged or about to be engaged in the road work, did not make it better. It may have had knowledge of the fact that the appellee intended to engage in such work, but it might well have assumed that, if he intended to engage in hazardous work in another county, he would take out a policy to cover that. We are not aware of any reason why a party having separate and distinct occupations, both of which require insurance under this law, could not take out two policies, each covering one of them and not the other.

It follows that the judgment must be reversed.

Judgment reversed, and new trial awarded; the appellee to pay the costs.

(132 Md. 618)

MAYOR AND CITY COUNCIL OF BALTIMORE v. MACHEN et al. (No. 22.)

(Court of Appeals of Maryland. May 8, 1918.)

1. STATUTES \S 221 — CONSTRUCTION — PRESUMPTION OF LEGISLATIVE KNOWLEDGE.

It is presumed that Legislatures succeeding passage of a taxing statute not only had knowledge that bank deposits, to which it is now claimed the statute applies, were to be found in many banks, but that they also knew of the construction generally placed upon the statute that such deposits were not regarded as taxable under it.

2. STATUTES \S 218 — CONSTRUCTION — LAPSE OF TIME.

Any unvarying construction of a taxing statute for such a lapse of time as 20 years should be disregarded only on the most imperious grounds.

3. TAXATION \S 73 — BANK DEPOSIT — STATUTE.

If a deposit with a trust company is money, it is not taxable under Code Pub. Civ. Laws, art. 81, § 2, unless it be the proceeds of the sale of stock, bonds, or other property disposed of to evade and escape taxation.

4. TAXATION \S 73 — BANK DEPOSIT — "CERTIFICATE OF INDEBTEDNESS OR EVIDENCE OF DEBT."

A deposit with a trust company, evidenced by a written receipt for the amount, signed by the treasurer, if an indebtedness, as distinguished from money, is not taxable under Code Pub.

Civ. Laws, art. 81, § 214, not being a "certificate of indebtedness or an evidence of debt."

Appeals from Baltimore City Court; Carroll T. Bond, Judge.

Action by the Mayor and City Council of Baltimore, a municipal corporation, against Mary Gresham Machen and Arthur W. Machen, Jr., executors of the last will and testament of Arthur W. Machen, deceased. From an order affirming the action of the State Tax Commission vacating and annulling an assessment made by the appeal tax court of Baltimore city, for state and city taxation, the Mayor and City Council appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

R. Contee Rose, Asst. City Sol., and S. S. Field, City Sol., both of Baltimore, for appellant. Arthur W. Machen, Jr., of Baltimore (Machen & Williams, of Baltimore, on the brief), for appellees Mary Gresham Machen and Arthur W. Machen, Jr., executors.

PATTISON, J. This is an appeal from an order of the Baltimore city court affirming the action of the State Tax Commission of Maryland, vacating and annulling the assessment made by the appeal tax court of Baltimore city for the purpose of state and city taxation for the years 1913, 1914, 1915, and 1916 upon a deposit in the Safe Deposit & Trust Company of Baltimore, made by appellee's testator, Arthur W. Machen, in his lifetime.

By the agreed statement of facts found in the record, Arthur W. Machen, deceased, on or about June 8, 1896, deposited with the Safe Deposit & Trust Company of Baltimore, a corporation incorporated under the laws of Maryland, the sum of \$25,000, and received for such deposit the following receipt:

"Safe Deposit & Trust Company of Baltimore, 13 South Street, Baltimore, June 8, 1896. Received of Mr. A. W. Machen, twenty-five thousand dollars (\$25,000) on deposit returnable on demand. [Signed] Francis M. Darby, Treasurer."

On the back of said receipt was indorsed the following:

"\$13,000 of this has been repaid to me some time ago. [Signed] A. W. Machen. Oct. 6, 1909."

That Arthur W. Machen in his lifetime withdrew \$13,000 of said deposit, leaving a balance of \$12,000 on deposit at the time of his death, which occurred on December 19, 1915, and for more than four years prior thereto. That interest at varying rates was paid by said trust company to said testator on said deposit, but at no time at a higher rate than 3 per cent. per annum. That the receipt remained in his possession until the time of his death, and has since been in the possession of his executors. That some time after the payment of the \$13,000, a portion of the deposit, the testator made in pencil in

his own handwriting the entry which appears on the back of the receipt. That the whole amount of the deposit was withdrawn by his executors, the appellees, upon the death of the testator, to wit, in or about July, 1916, and was used by them in paying pecuniary legacies and expenses.

The only question presented by this appeal is whether the above-mentioned deposit is taxable under the laws of this state.

The valuation and assessment was made by the appeal tax court under section 214 of article 81 of the Code of Public Civil Laws of this state (Code of 1912), which is as follows:

"All bonds, certificates of indebtedness or evidence of debt in whatsoever form made or issued by any public or private corporation incorporated by this state or any other state, territory, district or foreign country, or issued by any state (except the state of Maryland,) territory, district or foreign country not exempt from taxation by the laws of this state, and owned by residents of Maryland, shall be subject to valuation and assessment to the owners thereof in the county or city in which such owners may respectively reside, and they shall be assessed at their actual value in the market, and such upon which no interest shall be actually paid shall not be valued at all, and upon such valuation the regular rate of taxation for state purposes shall be paid, and there shall also be paid on such valuation thirty cents (and no more) on each one hundred dollars for county, city and municipal taxation in such county or city of this state in which the owner may reside."

The city contends that the deposit is taxable under the foregoing section of the Code, in that the aforesaid receipt is a "certificate of indebtedness or an evidence of debt" within the meaning of the provision of the statute, and as such is taxable; and, as we understand the city's contention, the deposit would be taxable if the acknowledgment of its receipt were evidenced by the usual certificate of deposit, or by bank passbook, or by the mere entry of such deposit upon the ledger of the bank if interest is paid on such deposit. In other words, any evidence in writing of a deposit, in whatever form it might appear, is a "certificate of indebtedness or an evidence of debt" within the meaning of the statute and taxable thereunder, as contended by the appellant.

This construction of the statute is not the one that has been placed thereon by those whose duty it has been, since the passage of the act in 1896 (Laws 1896, c. 120), more than 20 years ago, to value and assess the taxable property included within its provisions. It was not, so far as we are informed, until 1911, 16 years after the statute was passed, that any doubt was entertained as to the meaning of the statute in respect to the question here raised. To such time the deposits were never regarded as taxable.

In 1911 this identical question was submitted to the circuit court for Carroll county for its decision, and the arguments there made were the same as those made in this court

in the case now before us. That court held, however, that deposits were not taxable, and no appeal was taken therefrom.

The statute has remained the same, and since that time no further attempt has been made to tax bank deposits except in some instances, where it had been disclosed in the settlement of estates in the orphans' court of Baltimore city that the decedent had money on deposit in bank, the city authorities, without resistance, valued and assessed the same for taxation.

In *Baltimore v. Johnson*, 96 Md. 737, 54 Atl. 646, 61 L. R. A. 568, the attempt was made to value and assess, for taxable purposes, a seat in the Baltimore Stock Exchange. In speaking of the effect of the long acquiescence in the construction of the statute, by the city's taxing authorities, by which a seat in that body was not held taxable, the court, speaking through Chief Judge Boyd, said:

"That it is not necessarily conclusive of the question, but it is an important circumstance when we remember that the language now relied on is in substance the same that has been in the statutes for so many years. The value of a seat may change from year to year, but if it is property now, within the meaning of our tax laws, it has been during all those years. If it was, not only have the owners of those seats been placed in a position, by the construction put on the law by the tax officers, by which they omitted them from their schedules of personal property, as provided for in section 178 of article 81 (Code Pub. Gen. Laws), although each swore that his schedule contained 'a true, full and complete list of all real and personal property held or belonging to me,' etc., but the tax officers themselves have failed to discharge their duties. Not only the original assessors were required to add any property omitted from the schedules, but the appeal tax court and assessors appointed by them are required to take steps to place unassessed property on the books. * * * We certainly can assume that all of the holders of such seats would not intentionally have violated the law in making up their schedules, and we are equally positive that the tax officers throughout all those years would not have willfully failed to discharge their duties. * * * During these years the Legislature has frequently had questions of taxation before it, and has passed many laws in relation thereto. * * * And although the members of the Legislature and the city and state tax officers may be presumed to know that these seats have not been assessed, the Legislature has not attempted, in terms, to have them taxed, and, as we have seen, the constructions placed on the tax laws during this great length of time seems to have been that they were not taxable. It was said in *Hays v. Richardson*, 1 Gill & J. 366, in speaking of the construction of a statute: 'This contemporaneous unvarying construction of the act of Assembly for 60 years ought not to be disregarded, but upon the most imperious and conclusive grounds.' See, also, *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115; *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869. When therefore the language of the statute relied on is not now more comprehensive than it has been for half a century, and the thing sought to be taxed has been in existence during all that time, but has never been taxed, there ought to be some valid and substantial reason assigned before the new construction of

the statute, now contended for, should be adopted."

What we said in that case is particularly applicable to the case before us.

As we have said, bank deposits, with the exception above mentioned, have never been regarded and treated as taxable under the unvarying construction placed upon the act of 1896 by those who have been intrusted with its enforcement.

[1] It is presumed that the Legislatures, succeeding the passage of the act, not only had knowledge of the fact that deposits such as the one before us were to be found in the many banks of this state, but that they also knew of the construction generally placed upon this statute that such deposits were not regarded by the taxing authorities of the state as taxable thereunder (*Baltimore City v. Johnson*, supra); nevertheless we find no amendments to the statute passed more than 20 years ago, by which bank deposits are unanimously brought within its provisions. This any one of the Legislatures that have convened since its passage had the power to do, and no doubt would have done had they thought that the construction placed thereon was inconsistent with the intention of the Legislature that passed the act, or had they wished to bring bank deposits unmistakably within the provisions of the statute.

[2] Applying the principles announced in *Hays v. Richardson*, supra, and quoted in *Baltimore City v. Johnson*, supra, that any unvarying construction of a statute for such lapse of time "ought not to be disregarded, but upon the most imperious grounds," we do not feel warranted or justified in placing upon the statute a construction differing from that placed thereon by the taxing authorities of the state.

It is further contended by the appellant that, should we hold that deposits are not taxable under section 214 of article 81, then such deposits cannot escape taxation under section 2 of said article, because of the clause therein contained that:

"All other property of every kind, nature and description within this state, except as provided by section 4, shall be valued and assessed for the purpose of state, county and municipal taxation to the respective owners thereof in the manner prescribed by this article," etc.

[3, 4] The deposit is claimed by appellees to be money and by the appellants to be an indebtedness. If it be money, it is clearly not taxable, unless it be "the proceeds of the sale of stock, bonds or other property disposed of for the purpose of evading and escaping taxation," and that is not shown in this case. Section 2 of article 81. And if it be an indebtedness it does not fall within the clause named, as it is not property within the meaning of that section, to be valued and assessed in the manner therein provided. Discrimination is therein made as to debts liable to taxation thereunder, and it is evident that it was not the intention of

that statute to impose taxes upon every kind of debt. *Buchanan v. Commissioners of Talbot County*, 47 Md. 293.

For these reasons and those already stated, the order of the court below will be affirmed.

Order affirmed, with costs to the appellee.

(123 Md. 625)

MAYOR AND CITY COUNCIL OF BALTIMORE v. HUTZLER et al. (No. 23.)

(Court of Appeals of Maryland. May 3, 1918.)

Appeal from Baltimore City Court; Carroll T. Bond, Judge.

Action by the Mayor and City Council of Baltimore, a municipal corporation, against Ella G. Hutzler, Albert David Hutzler, Jacob H. Hollander, and Henry Oppenheimer, executors of the estate of David Hutzler. From an order affirming the action of the State Tax Commission vacating and annulling an assessment made by the appeal tax court of Baltimore city for state and city taxation, the Mayor and City Council appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

R. Contee Rose, Asst. City Sol., and S. S. Field, City Sol., both of Baltimore, for appellant. Charles Markell, of Baltimore (Haman, Cook, Chestnut & Markell, of Baltimore, on the brief), for appellees Ella G. Hutzler and others, executors.

PATTISON, J. The order of the Baltimore city court affirming the action of the State Tax Commission of Maryland vacating and annulling the assessment made by the appeal tax court of Baltimore city for the purposes of taxation for the years 1914 and 1915 upon the deposits mentioned in the records will be affirmed, for the reasons given in the opinion filed in the case of *Mayor and City Council of Baltimore v. Mary Gresham Machen and Arthur W. Machen, Jr.*, Executors, 104 Atl. 175, No. 22 of the January term of this court.

Order affirmed, with costs to the appellees.

(133 Md. 36)

ADY v. JENKINS. (No. 2.)

(Court of Appeals of Maryland. June 19, 1918.)

Motion for Rehearing Denied July 30, 1918.)

1. CONTRACTS §261(1)—RESCISSION.

When one party makes a substantial breach of contract, the other may rescind or refuse to perform and sue for his damages.

2. CONTRACTS §321(1)—BREACH—REMEDIES.

A breach of but one of the subsidiary provisions or promises of a contract will not, as a rule, relieve the other party from such further performance as may be due from him under the contract, and he is left to his remedy by an action for compensation in damages.

3. SALES §98—BREACH—RIGHT TO RESCIND.

Where plaintiff purchased goods to be canned and labeled with his name, agreeing to deliver the labels by a certain date, but the goods were not packed before such date and were never delivered, the mere fact that he failed to send the labels by such date did not constitute such breach as warranted rescission by the other, especially where plaintiff wrote, asking when he should send the labels, and received no reply.

4. SPECIFIC PERFORMANCE §120—EVIDENCE—ADMISSIBILITY.

A letter, confirming a sale and purchase of canned goods embodying the terms of the contract and referred to in the bill for specific performance, is admissible in evidence.

5. CUSTOMS AND USAGES §15(1)—REQUISITES.

In bill for specific performance of contract to sell and deliver canned goods, binding plaintiff to furnish labels by a certain date, offer to introduce evidence as to the custom among brokers in the vicinity concerning delivery of labels was properly excluded.

Appeal from Circuit Court, Harford County; Wm. H. Harlan, Judge.

"To be officially reported."

Bill by Samuel J. Ady against Frank B. Jenkins. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Harry S. Carver, of Bel Air, and Edward H. Burke, of Towson, for appellant. John L. G. Lee, of Baltimore, for appellee.

BRISCOE, J. This is an application by a bill in equity for an injunction and for the specific performance of a contract for the sale of a pack of canned corn for the season of 1917, known as "Hyde's Egyptian Corn." The injunction was granted, and the defendant was decreed to specifically perform the contract and to deliver the corn, according to the contract. From this decree, the defendant has taken an appeal.

The contract between the parties is in writing and is evidenced by the following letter:

"Hyde, P. O., Md., 3/29/1917.

"Saml. J. Ady, Esq., Sharon, Md. Confirming my telephone conversation of last night regarding your offer of March 21st that you will pack for me all your packing of this season, 1917, except 1,000 cases for your own requirement. The price to me is 1.30 per dozen f. o. b. Sharon, shipment to be made as soon as ready. Labels to be in your place or shipped by Aug. 1st. Payment to be made in 10 days & bill of lading furnishing with each shipment with usual discount for cash. Kindly acknowledge this by return mail. The maximum amount of your pack for my brand not to exceed 5,000 cases.

"Yours truly,

Frank B. Jenkins."

This letter was mailed to and received by the defendant, and it is admitted that the contract was accepted by him.

The defense of the appellant rests on two grounds: First, that the failure of the appellee to deliver or ship the labels by the 1st of August was a sufficient reason for him to rescind the contract; and, second, that the appellant did not use the seed corn stated in the bill. On the other hand, while it is admitted that the labels were not shipped to the appellant by the 1st of August, 1917, it is contended that this failure to deliver was not such a breach of the contract, under the facts of the case, as to give the appellant a right to rescind the contract.

[1] The law is well settled that when there

has been a substantial breach of a contract, the other party has a right to rescind the contract or to refuse to perform his part, and sue for damages. *Koch v. Wimbrow*, 111 Md. 22, 73 Atl. 896; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814. In *Brantly on Contracts*, page 415, it is said:

"It is not, however, every breach of contract, or failure exactly to perform, which justifies a rescission. If the promise which is broken is subsidiary, that is, one which does not go to the root of the matter, defeating the object of the contract, and where the breach can well be compensated by damages, the other party cannot rescind for this reason."

In 6 R. C. L. pp. 925, 926, under title, Contracts, the rules of law upon this subject and the authorities in support thereof are collected and stated at length. In section 311 it is said:

"It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once. For partial derelictions and nonperformance in matters not necessarily of first importance to the accomplishment of the object of the contract the party injured must seek his remedy upon the stipulations of the contract itself. Before partial failure of performance of one party will give the other the right of rescission, the act failed to be performed must go to the root of the contract, or the failure to perform the contract must be in respect to matters which would render the performance of the rest a thing different in substance from that which was contracted for."

[2] A breach of but one of the subsidiary provisions or promises of a contract will not, as a rule, relieve the other party from such further performance as may be due from him under the contract, and he is left to his remedy by an action for compensation in damages. *Brantly on Contracts*, 415, 439, 300, 401; 6 R. C. L. §§ 312, 313, pp. 927, 928.

[3] While, as a general rule, in mercantile contracts stipulations as to time are regarded as essential, we cannot hold, under the facts of this case, that the failure of the plaintiff to deliver the labels by the 1st of August was such a breach of the contract as to justify the defendant in rescinding and abandoning the contract. An examination of the evidence will show that time could not have been regarded as such a substantial part of the contract, or one of its essential terms, as to bring this case within the authorities relied upon by the appellant, and to have justified the defendant in refusing to perform his part of the contract. The plaintiff testified that he wrote several letters to the defendant, one in July, 1917, and one in August, 1917, requesting him to advise the plaintiff when he would begin packing corn and how many labels he required to be sent, but that he received no reply to either letter, and no application at any time for labels; that on or about the 27th of September, 1917, he visited the defendant at his canning house near Sharon, in Harford county, and made inquiry as to the pack, and that he was told by the defendant that he would pack 4,500 cases of the corn,

but to his surprise was informed that he would not deliver the 3,500 cases as agreed upon, and that he was about to sell the pack elsewhere, and that he would not deliver the pack to the plaintiff; that he informed the defendant that he had sold the goods to others, and that canned goods had increased considerably in price since the contract was made in March, 1917. While the defendant denied he had received the letter of July, 1917, and gave no reason why he had not replied to the letters, he admitted that he could not have used the labels, on the 1st of August, 1917, even if they had been delivered on or before that date. He also admitted that he packed only 900 cases in August, and that he had three or four bunches of labels left over for the previous year, which he could have used. The labels for the year 1916, under a similar contract between the parties, had not been furnished or delivered until October and November of that year. The labels, it appears, were to be pasted on the cans after the corn had been packed in them, cooked, and cooled; and, so far as the packing operations were concerned, that could have been done at any time even after the close of the season, as it had been done, under similar contracts, for previous years, with the defendant. As stated by the court below in its opinion, if the defendant was now allowed to repudiate the contract, the result would be that he would make some 70 cents a dozen additional profit on the goods, while the plaintiff would be obliged, if he in any way could find the special quality of goods he had sold, to go into the market and buy at an advance of probably 70 cents a dozen. It has been frequently held by this court that where time is not of the essence of the contract, a mere failure to perform within the period specified will not avoid or justify the rescission of a contract. *Scarlett v. Stein*, 40 Md. 526; *Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383. It is clear, we think, that the contract in this case is of a nature that a court of equity should specifically enforce, and that the court below was clearly right in so directing and in granting an injunction in its decree of the 20th of October, 1917. *Sullivan v. Tuck*, 1 Md. Ch. 59; *Fardy v. Williams*, 38 Md. 502; *Eq. Gas L. Co. v. Balto. Tar Co.*, 63 Md. 285; *Neal v. Parker*, 98 Md. 266, 57 Atl. 213; *Brantly on Contracts*, p. 252.

There was no reversible error, in the ruling of the court, upon exceptions to testimony, set out in the record.

[4] The admission of the letter which contained the terms of the contract was entirely proper. It was the real contract between the parties, and was referred to in the bill of complaint "as the contract which was reduced to writing in a letter from the plaintiff to the defendant, which was mailed to and received by the defendant, and the said contract was accepted by the defend-

ant." It was the basis of the suit, made a part of the bill, and was clearly admissible in evidence.

[5] As the case is now presented, it is quite certain that the proffer to introduce evidence as to the custom among brokers, in Bel Air, as to the delivery of labels, was properly excluded by the court, and there was no error in this ruling. *Foley v. Wm. Mason & Son*, 6 Md. 37; *Gibney v. Curtis*, 61 Md. 192; *Balto. Baseball v. Pickett*, 78 Md. 386, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304.

For the reasons we have given, the decree of the court below will be affirmed.

Decree affirmed, with costs.

(132 Md. 442)

CREAGHAN et al. v. MAYOR, ETC., OF BALTIMORE et al. (No. 25.)

(Court of Appeals of Maryland. April 8, 1918.)

1. INJUNCTION §85(2) — ENFORCEMENT OF ORDINANCE.

Enforcement of a void ordinance may be enjoined at the instance of a party whose interests will be injuriously affected by its execution.

2. STATUTES §64(1) — PARTIAL INVALIDITY.

A statute may be valid in part and void in part, even where the two parts are contained in the same section, provided that the valid part is independent of and severable from that which is void.

3. MUNICIPAL CORPORATIONS §111(4) — ORDINANCES — PARTIAL INVALIDITY.

A city ordinance may be valid in part and void in part, even where the two parts are contained in the same section, provided that the valid part is independent of and severable from that which is void.

4. INJUNCTION §118(4) — ENFORCEMENT OF ORDINANCE — PLEADING.

Where ordinance enforcement of which is sought to be enjoined as unconstitutional contains many provisions, and is amendment of article of City Code, containing numerous other provisions on same subject-matter, plaintiff must point out provisions claimed to be unconstitutional, showing his interest would be injuriously affected.

5. FOOD §1 — ORDINANCE REGULATING PRODUCTION OF MILK — AUTHORITY OF MAYOR AND COUNCIL.

Under Baltimore City Charter (Acts 1898, c. 123) the mayor and city council had authority to pass Ordinance No. 262 of 1917, regulating the production and distribution of milk and milk products in the interests of cleanliness and health.

6. CONSTITUTIONAL LAW §278(4) — REGULATION AND DISTRIBUTION OF MILK — DUE PROCESS.

Ordinance No. 262 of 1917 of city of Baltimore, regulating the production and distribution of milk and milk products in the interests of cleanliness and health, is not unconstitutional as depriving milk dealers of their property without due process of law.

7. FOOD §1 — REGULATION AND DISTRIBUTION OF MILK — VALIDITY.

Ordinance No. 262 of 1917 of city of Baltimore, regulating the production and distribution of milk, held not invalid.

8. FOOD §1 — DISTRIBUTION OF MILK — VALIDITY OF ORDINANCE.

Such ordinance is not invalid as attempting to confer on the commissioner of health unlimit-

ed discretion in granting, refusing, and revoking permits to and of milk dealers.

9. CONSTITUTIONAL LAW §309(1) — DISTRIBUTION OF MILK — VALIDITY OF ORDINANCE — NOTICE.

Ordinance No. 262 of 1917 of city of Baltimore, regulating production and distribution of milk and milk products, is not invalid as failing to provide for proper notice and hearing before commissioner of health as to issuance or revocation of milk dealers' permits.

10. CONSTITUTIONAL LAW §316 — DISTRIBUTION OF MILK — ORDINANCE — DUE PROCESS.

Ordinance No. 262 of 1917 of city of Baltimore, regulating production and distribution of milk and milk products, is not invalid as failing to provide an appeal from exercise of discretion of commissioner of health.

11. CONSTITUTIONAL LAW §62 — DISTRIBUTION OF MILK — DELEGATION OF LEGISLATIVE POWER.

Ordinance No. 262 of 1917 of the city of Baltimore, regulating distribution of milk in interest of health, is not invalid as attempting to delegate legislative power to commissioner of health in that it attempts to empower him to make regulations for sale of milk, etc.

12. INJUNCTION §85(2) — ORDINANCE — IMPOSSIBILITY OF COMPLIANCE — WAR CONDITIONS.

Because milk producers and distributors, owing to war conditions, have not been able, in the months allowed by a city ordinance, to make the changes in dairies and farms required by it, is no ground for holding unreasonable or enjoining enforcement of ordinance deemed necessary for discharge of city's duty to preserve public health.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Suit by Thomas J. Creaghan and Samuel G. Imwold against the Mayor and City Council of Baltimore and John D. Blake, Commissioner of Health. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Isaac Lobe Straus, of Baltimore, for appellants. Alexander Preston, Deputy City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellees.

THOMAS, J. This appeal is from a decree of the circuit court of Baltimore city sustaining a demurrer to and dismissing the bill of complaint filed by the appellants against the mayor and city council of Baltimore and John D. Blake, commissioner of health, to have Ordinance No. 262 of the mayor and city council of Baltimore declared null and void, and for an injunction restraining the enforcement of the same.

The bill alleges:

That the plaintiff Thomas J. Creaghan was a resident and taxpayer of Baltimore city, and at the time of the filing of the bill, and for 28 years prior thereto, was engaged in the retail milk and dairy business in Baltimore city, during all of which time he had conducted the business in a proper and sanitary manner, and had delivered to his customers healthy milk and dairy products; that the plaintiff Samuel G. Imwold was a resident and taxpayer of Baltimore county, and owned and operated a dairy farm in that county, having in his herd about

100 cows, and at the time of the filing of the bill milking 60 cows; that he retailed loose milk, the product of his own herd and the herds of others; that he maintained his herd in a healthy and sanitary condition, "and that the herds of the others from whom he produces milk" were likewise kept in a healthy and sanitary condition; that his plant in Baltimore county, which was of great value, had been inspected by city inspectors and state inspectors; that he had never had any "trouble under such inspection"; "that for 28 years past he has retailed milk to the consumers in Baltimore city from the churn, properly iced, of high grade, healthy, and fit for human consumption; that all of the assistants at said dairy farm and engaged in delivery of the product thereof are also kept in a clean, healthy, and sanitary condition."

The bill further alleges:

That on the 1st day of June, 1917, the mayor and city council of Baltimore passed an ordinance, known as Ordinance No. 262, which provided, in section 6, that it should take effect five months after the date of its passage; that there was no statute of the state authorizing the ordinance, and that the same is "unconstitutional and in contravention of the twenty-third paragraph of the Bill of Rights of the state of Maryland and the Fourteenth Amendment of the Constitution of the United States, in that it deprives citizens of Baltimore city and nonresidents of Baltimore city of their property without due process of law, and without any warrant or authority whatsoever, and interferes with their personal liberties"; that "many portions of said ordinance are void in that it attempts to empower said commissioner of health to use unlimited and unbounded discretion in granting or refusing or revoking permits therein provided for, and does not undertake to provide any general rules or regulations limiting the exercise of said discretion"; that it "fails to provide for proper notice and hearing or appeal from the results of the exercise of such discretion as therein provided to any properly constituted judicial tribunal, so that the powers attempted to be granted to said commissioner of health may be exercised in a whimsical, capricious, ignorant, fraudulent, or dishonest manner without any opportunity to your orators or either of them for an appeal from or a correction of such action on the part of such commissioner of health"; "that such regulations as are prescribed by said ordinance are arbitrary, unreasonable, unfair, unjust, and the provisions thereof provide for the exercise of the will or discretion of a municipal officer unrestrained by any prescribed general rule of law, placing him in a position where he may give permits to some and refuse permits to others under the same conditions, and permit such citizens as he may like to conduct their lawful business and prevent others from so conducting their lawful business to the great hurt and detriment of such others, to their ruin and the confiscation of their property"; that the "ordinance attempts to delegate legislative power to the commissioner of health, in that it attempts to empower him to make regulations for the sale of milk or cream below the requirements for standard milk pasteurized and standard cream pasteurized, for sterilization of milk, for standardization or adjustment of milk, for the requirement for the production of the aforesaid grades of milk, for the production, pasteurization, and handling of all milk, skimmed milk, or cream held, kept, or offered for sale, sold or delivered for consumption in the city of Baltimore, or used for the manufacture of ice cream or butter, buttermilk, or other fermented milks, whey, or curd in the city of Baltimore, for the increasing of temperature for pasteurization, for the application of the tuberculin test, for the making of the grades of milk es-

tablished or attempted to be established by said ordinance, for excusing from compliance with the expressed terms of said ordinance, for the naming of the conditions under which selected milk pasteurized or selected cream pasteurized may be sold in Baltimore city, for excusing compliance otherwise necessary under rule 5, section 59E of said ordinance, for keeping, offering for sale, selling, delivering, or using in the city of Baltimore milk or cream below standard milk or cream, for discoloring or denaturing milk or cream, for keeping milk at a higher temperature than otherwise by said ordinance allowed, for inspecting or investigating the herd, the farm, and its equipment of the producer outside of Baltimore city and the jurisdiction of the defendants and each of them, for producing, handling, selling, or distributing raw milk and cream, for removing infected cattle from herds outside of Baltimore city, for regulating and fixing the character and equipment of the farm for the production of raw milk outside of Baltimore city, for declaring the conditions under which any condensed milk, condensed cream, evaporated milk, evaporated cream, or other milk or cream products may be sold in Baltimore city, and, generally, to transact many other things without legislative assent"; that the "enforcement of the powers thus attempted to be conferred upon the commissioner of health will unequally affect the rights of your orators and of other persons engaged in like trade or business * * * and cause other irreparable damage," and "that all and each of said powers so attempted to be conferred are ultra vires"; "that, although the respective business of your orators, as aforesaid, are not now and never have been nuisances in fact or in law, nevertheless, under the terms of said ordinance, they may be so declared by the mere dictum of said commissioner of health, and your orators may be deprived of their business and means of livelihood," that the ordinance, if enforced, will forbid the entrance of perfectly clean and healthy milk into the city of Baltimore, "except at the pleasure of the commissioner of health"; that under the provisions of the ordinance it will take effect on the 1st day of November, 1917, and that the defendants had given notice to the plaintiffs and others that the ordinance would be enforced at that time; that the enforcement of the ordinance would be ruinous to the established business of the plaintiffs and each of them, and of the milk business of the majority of milk dealers in Baltimore city, and the damages arising from such enforcement would be irreparable; and that, "owing to war conditions," and the scarcity of labor and metal, it had been impossible ever since the passage of the ordinance to make such "changes in the plants of dairies operating in Baltimore city and in milk-producing farms and plants as are necessary in order to comply with its provisions."

The bill then prayed that the ordinance referred to, "and each and every part thereof," be declared null and void, and that the defendants be enjoined from enforcing or attempting to enforce it.

The ordinance, which was filed as an exhibit with the bill, is entitled:

"An ordinance to repeal sections 55A, 56A, 56B, and 59 of article 14 of the Baltimore City Code of 1906, title 'Health,' subtitle 'Food, Food Products and Milk,' as amended by Ordinance 103, approved May 6, 1908, and to reordain said sections with amendments, and to add twelve new sections to said article, to be designated sections 55E, 59A, 59B, 59C, 59D, 59E, 59F, 59G, 59H, 59I, 59J and 59K; and to further regulate the production, manufacture, handling, sale and distribution of milk and cream products in Baltimore city."

Notwithstanding the ordinance itself covers more than 26 printed pages, and is an amendment of and an addition to article 14 of the Baltimore City Code of 1906, as amended by Ordinance 103 of May 6, 1908, containing many other provisions dealing with the same subject-matter, the plaintiffs nowhere in their bill refer to the particular section or sections of the ordinance claimed to be open to the objections urged against it, and the enforcement of which would operate to their injury. Nor have counsel for the appellants, in their brief, pointed out the particular sections, or provisions thereof, falling within the condemnation of the rules for which they contend.

[1-4] While the enforcement of a void ordinance may be enjoined at the instance of a party whose interests will be injuriously affected by its execution (Page v. Balto., 34 Md. 558; Deems v. M. & C. C. of Balto., 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339), the well-established rule in this state is that a statute may be valid in part and void in part, even where the two parts are contained in the same section, "provided that the valid part is independent of, and severable from, that which is void." Steenken v. State, 88 Md. 708, 42 Atl. 212; Welch v. Cogan, 128 Md. 1, 94 Atl. 384. And the same rule applies to ordinances. Field v. Malster, 88 Md. 691, 41 Atl. 1087. As we have said, the bill alleges that "many portions of said ordinance are void," without specifying the particular provisions or sections objected to, while the prayer of the bill is that the "ordinance and each and every part thereof" be declared null and void. Where an ordinance contains many sections and provisions, and is an amendment of and an addition to an article of the Code containing numerous other sections and provisions dealing with the same subject-matter, in connection with which the ordinance must be construed, good pleading would at least require the plaintiff to point out the sections and provisions claimed to be unconstitutional, with sufficient averments to show that his interests would be injuriously affected by their enforcement.

The main objections urged against the ordinance in question, as gathered from the very general allegations of the bill, are: (1) That the mayor and city council of Baltimore had no authority to pass it; (2) that it is unconstitutional in that it deprives the plaintiffs of their property without due process of law; (3) that it attempts to confer upon the commissioner of health unlimited discretion in granting, refusing, and revoking permits therein provided for; (4) that it fails to provide "for proper notice and hearing or appeal from the results of the exercise of such discretion"; (5) that it attempts to delegate legislative power to the commissioner of health "in that it attempts to empower him to make regulations for the sale of milk," etc.

[5] 1. The Baltimore city charter (Acts of 1898, c. 123) expressly authorizes the mayor and city council of Baltimore "to provide by ordinance for the proper inspection of milk or any and all other food products offered for sale in the city of Baltimore or intended for consumption therein," and further declares that the city shall "have and exercise within the limits of the city of Baltimore all the power commonly known as the police power to the same extent as the state has or could exercise said power within said limits." The ordinance in question was passed in the exercise of the police power thus expressly conferred upon the mayor and city council, and cannot, therefore, be said to be without legislative sanction and authority. Deems v. Balto., supra.

[6-11] 2. All of the other objections, as we have enumerated them above, are fully covered and disposed of by the decisions of this court.

In the case of Boehm v. Balto., 61 Md. 259, Judge Miller, speaking for the court, said:

"Under the power 'to pass ordinances to preserve the health of the city, to prevent and remove nuisances, and to prevent the introduction of contagious diseases,' the mayor and city council of Baltimore enacted, among others, two ordinances. * * * By the first of these ordinances it is provided that no person shall remove the contents of any privy, well, or sink, within the limits of the city, without having first obtained a license so to do, and every person who may obtain such license 'shall be considered as subject to the orders of the board of health in all matters relating to the opening and cleaning of privies or vaults, time and manner of removal, and the presentation of statistics connected with the cleaning of privies, as also the place or places to which night soil may be removed, and for any refusal or neglect to obey the orders of the board of health as herein provided it shall be the duty of the comptroller, upon the written request of the commissioner of health, to revoke the license of the person or persons so refusing or neglecting to obey.' By the second it is enacted that every person desiring such license shall make a written application therefor to the comptroller, who, after conference with the board of health, and on being satisfied with the character of the applicant, the security and tightness of his carts, that he is the owner of such as are specified in his application, and that he is not in collusion or combination with others to defraud the city, may grant him a license for one year, and renew the same from time to time, upon his paying for such license, and each renewal of the same, the sum of \$2.50 for each and every cart; * * * 'and the comptroller upon complaint of the health commissioner may revoke or suspend any such license.' * * * The validity of these ordinances was not seriously questioned in argument. That they are lawful and proper exercise of the power 'to preserve the health of the city and to prevent and remove nuisances' does not admit of doubt. Such powers have been universally granted to municipal corporations in this country. In fact the preservation of the health and safety of the inhabitants is one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England, as within the incidental authority of such corporations. Under such a power a municipal corporation has the undoubted right to pass ordinances creating boards of health, appointing health commission-

ers, with other subordinate officials, regulating the removal of house dirt, night soil, refuse, of-fal, and filth, by persons licensed to perform such work, and providing for the prohibition, abatement and suppression of whatever is intrinsically and inevitably a nuisance. * * * There is no similarity between these ordinances and the one pronounced inoperative and void in *Radecke's Case*, 49 Md. 217 [33 Am. Rep. 239]. The mischief against which they are directed, and the object sought to be attained by their enactment, are altogether different from those with which the ordinance in that case professed to deal, and we have no hesitation in declaring them not only free from the objections which were held fatal to that ordinance, but in every respect reasonable and proper. The subject-matter dealt with by these ordinances required the adoption of very stringent rules and regulations, and such is the character of their provisions. Every person obtaining a license to perform this offensive, but necessary, work is very properly subjected to the orders of the board of health in all matters pertaining to the manner of doing it. By one of the ordinances it is provided that 'for any refusal or neglect to obey the orders of the board of health, as herein provided, it shall be the duty of the comptroller, upon the written request of the commissioner of health, to revoke the license,' and by the other power is given him to revoke or suspend the license upon the complaint of the same officer. We do not interpret these provisions as requiring the comptroller, before he acts, to investigate and determine the reasonableness or truthfulness of the charges or complaints made by the health commissioner. Prompt and decisive action is what is contemplated and required, for it is manifest that such work could not be done, even for a short time, in an improper manner without serious danger to the public health. In the one case it is made his duty to act immediately 'upon the written request,' and in the other he may act upon the simple complaint of the health commissioner. The plea avers there was in this case both the 'complaint and written request,' and we are of opinion it is a bar to this action against the city."

In the case of *Commissioner of Easton v. Covey*, 74 Md. 262, 22 Atl. 266, the court had to deal with the validity of an ordinance passed by the commissioners of Easton, which provided:

"It shall not be lawful for any person or persons to erect or build any dwelling house, barn, shed, stable, storehouse, warehouse or shop within the limits of this town, or any porch on any part of the sidewalk, without first obtaining a permit from the commissioners of the town, through their clerk, to erect the same, for which one dollar shall be paid for each and every permit so granted," etc.

In that case it was argued by counsel for the appellee:

"The ordinance does not profess to regulate the erection of buildings, or to lay down general rules governing their construction, or to prescribe limits within which any given business can be conducted. But the construction sought to be placed upon it by the defendants 'would commit to the unrestrained will of the commissioners the power to say whether or not any building, of any character whatsoever, should hereafter be erected in the town of Easton.' It 'lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented.' Such a construction would make the ordinance one which in the language of Mr. Justice Miller, hardly falls within the 'domain of law.' *Balto. v. Radecke*, 49 Md. 230 [33 Am. Rep. 239].

After holding that the commissioners had the power to pass the ordinance, this court then said:

"We also think it equally clear that an ordinance passed under this clause to regulate the erecting of any buildings within the corporate limits, by providing that no such building shall be erected without a permit therefor, first obtained from the commissioners, is not only reasonable, but useful, if not essential to the welfare and prosperity of the town. Like ordinances have been passed by the corporate authorities of other towns and cities under just such general grants of power as this, and we have found no case in which their validity has been denied. The ordinance which was declared unreasonable and void in *Radecke's Case* was one which gave to the mayor the unrestrained and absolute power at his own mere will and pleasure to revoke any and every permit which had already been granted for the use of steam engines and boilers in the city of Baltimore, but at the same time the court was careful to say that in deciding that ordinance to be void they were not to be understood as expressing any disapproval of a previous one which required a permit for the erection of every such engine within the city limits."

In *Deems v. M. & C. O. of Balto.*, supra, the court had under consideration an ordinance of the mayor and city council of Baltimore making it unlawful for any person to sell or offer for sale any impure, adulterated, sophisticated, or unwholesome milk or other food products, and providing that only pure, unadulterated, unsophisticated, and wholesome milk should be sold, and that such article should be understood to be the natural product of healthy cows which had not been deprived of any part of its cream, and to which no additional liquid or solid preservative had been added, and having the specific gravity therein mentioned. It also provided for the appointment of a competent chemist, who should make such chemical and microscopical examinations as might be required under the ordinance, and for the appointment also of three inspectors of foods, and by section 6 further provided:

"And milk or food products in the possession of the person or persons so violating, disobeying, refusing, or neglecting to comply with the provisions of this ordinance may be confiscated and destroyed by the inspector examining the same."

The bill was filed by a dairyman, who conducted a retail business for the sale of milk, and alleged that a certain inspector, etc., without making any chemical or microscopical examination thereof, and without due process of law, poured his milk out upon the streets and down the gutters of the city, thereby wasting and destroying the same. It further alleged that the ordinance, and particularly section 6 thereof, was void, and prayed for an injunction restraining the mayor and city council and the other defendants "from taking and destroying, without chemical or microscopical examination first made, and without due process of law first had, any milk or other dairy product, the property of the complainant." It was urged by counsel in that case that a municipal corporation could not impose a forfeiture of property

without expressed legislative authority; that the power conferred upon the mayor and city council did not authorize an unlimited control over the business occupations of the people, and that the power to regulate did not include a power to confiscate and destroy; that the municipal authorities had no power to declare any particular business a nuisance in a summary mode and enforce their decisions at their pleasure; that by the ordinance there in question the determination of the quality of all milk offered for sale in Baltimore city was left to the arbitrary decision of an inspector, from whom there was no appeal, who was licensed to destroy the property of the citizen at his pleasure, and by spilling the milk to render impossible any investigation respecting the honesty of his conclusions; that by the exercise of such a power any dairyman conducting an honest and legitimate business could, under color of law, be absolutely ruined, and his business be destroyed, or the inspector could secure the consignment of all shipments of milk from the counties to himself in the city of Baltimore, thereby guaranteeing the shipper against the destruction of his property for a pecuniary consideration, and that the ordinance attempted to confer an absolute and irresponsible power controlling the entire trade. In sustaining the ordinance, Chief Judge Robinson said:

'Nor can there be any question as to the power of the appellee to provide by ordinance for the inspection of milk offered for sale within its corporate limits, and to forbid the sale of any milk which does not come up to the standard or test prescribed by the ordinance. And the real question, it seems to us, under the demurrer, is whether it has the power to direct that milk which is found upon inspection not to come up to the standard, as thus prescribed, shall be destroyed. * * * Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public, and as no one can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised. * * * 'Property of every kind,' says Mr. Justice Story, 'is held subject to those general regulations which are necessary for the common good and general welfare. And the Legislature has the power to define the mode and manner in which every one may use his property.' 2 Story, Const. And in the late case of *Mugler v. Kansas*, 123 U. S. 62 [8 Sup. Ct. 273, 31 L. Ed. 206], after considering the constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law, the Supreme Court says these limitations 'have never been construed as being incompatible with the principle equally vital, because so essential to the peace and safety, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' To justify such interference with private rights, its exercise must have for its immediate object the promotion of the public good, and, so far as may be practicable, every effort should be made to adjust the conflicting rights of the public and the private rights of individuals. At the same time the emergency

may be so great, and the danger to be averted so imminent, that private rights must yield to the paramount safety of the public, and to await, in such cases, the delay necessarily incident to ordinary judicial inquiry, in the determination of private rights, would defeat altogether the object and purposes for which the exercise of this salutary power was invoked. Whatever injury or inconveniences one may suffer in such cases, he is, in the eye of the law, compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public. The use of milk as an article of food enters largely, as we all know, in the daily consumption of every household, and there is no more fruitful source of disease than the use of adulterated and unwholesome milk. And if the appellant's contention be right that the question whether or not milk, which is daily offered for sale in every part of a large and populous city, comes up to the standard prescribed by the ordinance, must be determined by the ordinary process of judicial investigation or by chemical analysis, it would be impossible to prevent the danger to the public health necessarily resulting from impure and unwholesome milk. * * * It is in the exercise of this power that quarantine laws, which not only interfere with private rights, but with the liberty of persons, are passed, and also laws which provide for the destruction of infected clothing to prevent the spread of contagious diseases. And as to the extent and the summary manner in which this power may be exercised to protect the public health, we may refer to *Boehm's Case*, 61 Md. 264, *Train v. Boston Disinfecting Co.*, 144 Mass. 523 [11 N. E. 929, 59 Am. Rep. 113], and *Newark v. Hart*, 50 N. J. Law, 308 [12 Atl. 697]."

In the case of *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. Rep. 201, the appellee, a dairyman engaged in supplying milk to cities, towns, and villages within this state, was indicted under Acts of 1893, c. 306, for failing, neglecting, and refusing to register his herd of cattle with the live stock sanitary board, and he demurred to the indictment upon the ground that the statute was unconstitutional in that it deprived "the individual of the due process of law secured by" the Fourteenth Amendment to the federal Constitution, and article 23 of the Maryland Declaration of Rights, etc. In disposing of the case, Chief Judge McSherry, after stating that the entire act was strictly a police regulation, enacted for the purpose of preserving the public health, and after referring to the danger arising from the use of impure milk, said:

"Thorough inspections of cattle and dairies may reduce the frequency of infection. The preservation of the public health by preventing the sale of infected milk, or of milk that may come from infected sources, when milk by reason of its almost universal use in one form or another as an article of food is especially likely to spread disease, is one of the most imperative duties of the state, and obviously one most incontestably within the scope of the police power. As a means to that end—the preservation of the public health—a requirement that every person selling milk for consumption in cities, towns, and villages shall cause his herd of cattle to be registered with the live stock sanitary board is a reasonable and an appropriate enactment; and the subsequent provisions are necessary parts of the scheme. The nineteenth section no more deprives the individual of due process of law than did the ordinance in *Easton v. Covey*,

74 Md. 262 [22 Atl. 266], which prohibited the erection of any building without a permit from the commissioners of the town, or an ordinance forbidding the keeping of swine without a permit in writing from the board of health (Quincy v. Kennard, 151 Mass. 262, 563 [24 N. E. 860]), or an ordinance requiring the written permission of the mayor of a town before any person was allowed to move a building along the streets (Wilson v. Eureka City, 173 U. S. 32 [19 Sup. Ct. 317, 43 L. Ed. 603], decided February 20, 1899), or the ordinance requiring a license for the removal of the contents of privies, and subjecting the holders of such license to the orders of the board of health (Boehm v. Mayor, etc., Balto., 61 Md. 259). The constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law have never been construed as being 'incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. * * * The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.' Mugler v. Kansas, 123 U. S. 623 [8 Sup. Ct. 273, 31 L. Ed. 203]."

In *M. & C. C. of Balto. v. Wollman*, 123 Md. 310, 91 Atl. 339, this court, speaking through Judge Briscoe, said:

"The right to delegate power by municipal authorities rests upon the same principle and is controlled in the same way as the delegation of the legislative power by the state. * * * We think that fixing the rent of market stalls in the city of Baltimore is an administrative, and not a legislative, function, and may be delegated to the clerks of the markets, as provided by the ordinance in question."

In the case of *State v. Normand*, 76 N. H. 541, 85 Atl. 899, Ann. Cas. 1913E, 906, the Supreme Court of New Hampshire, dealing with a provision authorizing the state board of health "to make all necessary rules and regulations for the enforcement of the provisions of" an act forbidding "the existence or maintenance of any unclean, unhealthy or unsanitary condition or practice in any establishment or place where food is produced, manufactured, or stored or sold, or any car or vehicle used for the transportation or distribution thereof," said:

"The delegation of such power is not unusual. The state board of cattle commissioners is authorized to make such 'regulations as the board deems necessary to exclude or arrest' diseases in cattle. * * * Each board of medical examiners 'may make any by-laws and rules not inconsistent with law necessary in performing its duties.' * * * The inspector of steamboats may make rules and regulations. * * * Similar power is given to the commissioners of pilotage. * * * And numerous other instances might be cited of powers given to public administrative officers to make rules for the enforcement of specific laws. If such rules are not unreasonable, and if they are not repugnant to the laws of the state or the Constitution, they are usually upheld as the exercise of power specially conferred by the Legislature for the more efficient enforcement of the statutes to which they relate. 'As the possessor of the law-making power,' the Legislature may confer authority and impose duties upon others and regulate the exercise of their several functions. It

may pass general laws for that purpose, giving them expressly or by necessary implication an incidental discretion to employ the proper means to fill up and regulate the details for themselves and subordinates, though the exercise of that discretion be quasi judicial. * * * It cannot be said that every grant of power to executive or administrative boards of officials, involving the exercise of discretion and judgment, must be considered a delegation of legislative authority. While it is necessary that a law, when it comes from the lawmaking power, should be complete, still there are many matters relating to methods or details, which may be, by the Legislature, referred to some designated ministerial officer or body. All such matters fall within the domain of the right of the Legislature to authorize an administrative board or body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision. *Blue v. Beach*, 155 Ind. 121, 132, 56 N. E. 89, 93 (50 L. R. A. 64, 80 Am. St. Rep. 195). In that case it was held that, under a general statutory authority to prevent the spread of contagious and infectious diseases, a rule of the state board of health upon the subject of vaccination was not legislation. In *Isehour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, it was held that a provision of the pure food law that the board of health should adopt measures necessary to facilitate the law's enforcement and prepare rules regulating minimum standards of foods and defining specific adulterations was not a delegation of legislative power."

Without attempting to refer to the various sections of the ordinance, or the many provisions contained therein, a reference to section 55A will serve to show the general character of the provisions made by the ordinance and of the powers conferred upon the commissioner of health. Section 55D, as ordained by ordinance No. 103 of 1908, declares:

"The commissioner of health shall have power to adopt such regulations as may be deemed proper and necessary to insure all milk and cream intended for consumption in Baltimore city being produced, transported, stored, kept, distributed, retailed, and delivered under conditions rendering them suitable for consumption as human food, and to compel perfect hygienic and suitable conditions of all cow stables, creameries, and dairies from which milk and cream so intended for consumption in Baltimore city are produced; such regulations not to be inconsistent with existing laws or ordinances, and copies of the same to be printed and kept for free distribution to the public; and said commissioner of health shall have power to prohibit the sale within the corporate limits of Baltimore city of milk or cream produced, transported, stored, kept or distributed, retailed or delivered contrary to such regulations, whether such milk or cream be produced within or outside of the corporate limits of the city of Baltimore; and to the end that said regulations may be enforced in cases of milk or cream produced outside of the corporate limits of the city of Baltimore, but intended for consumption therein, said commissioner of health may require such of the city milk inspectors as he may designate for the purpose to make inspections at such intervals and times as he may deem expedient of all dairy farms, stables, and other places outside of the city of Baltimore from which milk or cream are shipped for consumption in Baltimore city. In case full access to such premises or full opportunity to investigate all the conditions under which milk is there produced or kept shall be denied said inspectors, or in case upon such inspection the conditions are found such as in the opinion of the said commissioner of health render such milk or cream unsuitable

or unsafe for human food and warrant the exclusion of said milk or cream from sale in Baltimore city, said commissioner of health shall have power to absolutely prohibit the sale thereof at any place in Baltimore city until such time as the reason for their exclusion shall in his opinion have ceased, and he shall adopt such means of identifying such milk or cream as to him may seem proper and expedient," etc.

Section 55A of the ordinance in question in this case provides:

"Every person or corporation desiring to bottle or handle for sale, or to offer or expose for sale, or to sell, dispose of, exchange or deliver milk or cream (the words 'milk or cream' as herein used being intended to mean milk, cream, skimmed milk, buttermilk or other fermented milk) or to manufacture for sale ice cream or butter, in the city of Baltimore, shall make application to the commissioner of health for a permit so to do."

It provides that the application shall be made on a printed form to be furnished by the commissioner of health, and what the application shall contain, and then provides:

"The commissioner of health, upon receipt of such application, shall cause to be investigated the place of business described in such application and the wagons or other vehicles, if any, intended to be used by such applicant. If such places of business and such wagons and other vehicles are found, upon such investigation, to be in a sanitary condition and fit for the uses and purposes to which they are intended to be put, said commissioner of health shall forthwith register said applicant in a proper record to be kept for the purpose, and issue a permit authorizing such applicant to carry on, engage in, and conduct the business applied for in Baltimore city at the place designated in such application. Such permits shall specify the kind or kinds of business to be conducted. All permits granted pursuant to this ordinance may at any time be revoked by the commissioner of health, for the persistent, repeated, or willful violation of any law or ordinance, or any regulations of the commissioner of health, governing the handling or sale of milk or cream, or the manufacture for sale of ice cream or butter in Baltimore city: Provided, however, that no such permit shall, at any time, be revoked by the commissioner of health, unless he shall first have given the holder of the same not less than ten days' notice in writing of his intention to revoke such permit, and an opportunity to be heard by him as to why such should not be done, this proviso not to be taken to apply to cases where the sale of milk or cream or the manufacture for sale of ice cream or butter may be temporarily prohibited by the commissioner of health because of disease, temporary unsanitary conditions or similar causes."

This section further provides that the permits shall not be transferable, and if the person or corporation having the permit shall change the location of his place of business, notice of such proposed change shall be given to the commissioner of health, and also provides that any person who sells or offers for sale milk, etc., in Baltimore city without having a permit to do so shall be subject to a fine of not less than \$5 nor more than \$100 for each offense.

It would seem clear that the provisions of this section are entirely within the reasonable exercise of the powers conferred upon the mayor and city council of Baltimore. The permits provided for are issued to those com-

plying with its provisions, and whose places of business, wagons, etc., are found, upon investigation, to be in a sanitary condition and fit for the purposes for which they are intended, and are revokable by the commissioner of health for the persistent, repeated, or willful violation of any law or ordinance, or any regulation of the commissioner of health, governing the handling or sale of milk or cream, or the manufacture for sale of any ice cream or butter in Baltimore city, after notice to the holder of the permit, and after he has had an opportunity to be heard. The ordinance does not attempt to delegate legislative power to the commissioner of health, but authorizes him to exact compliance with the provisions thereof and with such regulations as he has adopted for their enforcement, and gives him only such discretion as is necessary in the proper execution of a law or regulation designed to prevent the introduction and sale of impure milk, etc., in Baltimore city.

[12] In reference to the averment that, "owing to war conditions," and the scarcity of labor and metal, the plaintiffs have not been able within the five months allowed by section 6 to make the changes in their dairies and on their farms required by the provisions of the ordinance, it is sufficient to say that it presents no ground for holding unreasonable, or enjoining the enforcement of, an ordinance deemed necessary for the proper discharge of the imperative duty of the city to preserve the public health.

Radecke's Case, 49 Md. 217, *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394, and *Hagerstown v. B. & O. R. R. Co.*, 107 Md. 178, 68 Atl. 490, 126 Am. St. Rep. 382, upon which the appellants largely rely, deal with ordinances entirely unlike the one now under consideration. *Radecke's Case* was referred to by Judge Miller in *Easton v. Covey*, supra, as not in conflict with the latter decision, and in *Hagerstown v. B. & O. R. R. Co.*, supra, Judge Briscoe, after observing that *Easton v. Covey*, supra, was unlike that case, said:

"And in holding this ordinance void and invalid for the reasons stated, we contravene no decisions in our own state, and impose no unnecessary restraints upon the action of municipal bodies" within proper and constitutional limitations."

The cases from which we have quoted have not been overruled by the later decisions of this court, and they fully sustain the provisions of the ordinance in question.

Decree affirmed, with costs.

(132 Md. 473)

MAYOR, ETC., OF BALTIMORE et al. v. GAMBLE et al. (No. 30.)

(Court of Appeals of Maryland. April 3, 1918.)
INJUNCTION §110—JURISDICTION—CIRCUIT COURTS.

The circuit court of Baltimore county has no jurisdiction to enjoin enforcement of a Balti-

more city ordinance wholly within the city for inspection of dairies, under Code Pub. Civ. Laws, art. 16, § 86, confining jurisdiction in injunction suits to the circuit.

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

"To be officially reported."

Bill by Robert James Gamble and another against the Mayor and City Council of Baltimore and another. From an order granting the injunction prayed for, the defendants appeal. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Alexander Preston, Deputy City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellants.

THOMAS, J. The bill of complaint in this case is like the one filed in No. 25 Appeals, January term, 1918, *Oreaghan v. Mayor, etc.*, of Baltimore, 104 Atl. 180, and prays that Ordinance No. 262 of the mayor and city council of Baltimore, approved June 1, 1917, "and each and every part thereof," be declared null and void, and that the mayor and city council of Baltimore and John D. Blake, commissioner of health, be enjoined from enforcing or attempting to enforce the same.

The bill was filed in the circuit court for Baltimore county on November 8, 1917, and on the same day that court granted a preliminary injunction as prayed. Thereafter the defendants appeared for the purpose of filing a plea to the jurisdiction of the court, and then brought this appeal from the order of the court granting the injunction.

Section 86 of article 16 of the Code provides:

"Each of the circuit judges may grant injunctions, or pass orders or decrees in equity, at any place in his circuit, to take effect in any part of his circuit, and may require in writing the original papers in any case, or abstracts and transcripts to be produced before him, wherever he may be in his circuit."

The ordinance provides, among other things, that a producer of milk who desires to sell the same in Baltimore city must obtain a permit; and, as one of the conditions for obtaining the permit, he must consent to an inspection of his dairy herd and premises, etc., in order that the commissioner of health may determine whether the milk is produced under the sanitary conditions required by the ordinance and from healthy cows. But compliance with this condition is purely voluntary on the part of the dairyman, and the ordinance operates only in Baltimore city, and to prevent the sale therein of impure or unhealthy milk.

The bill does not seek to enjoin the inspection of the plaintiffs' herds or premises in Baltimore county; for that is not authorized by the ordinance except with the consent of the plaintiffs. But the object of the bill is to restrain the enforcement in Baltimore city of an ordinance regulating the sale of milk

therein. The injunction prayed for and granted by the court below was not intended therefore to take effect in Baltimore county or any part of that circuit, but only in Baltimore city.

The question of the jurisdiction of the court below to grant the injunction is so completely disposed of by the decision and reasoning of this court in *Graham v. Harford County*, 87 Md. 321, 39 Atl. 804, that a further discussion of it would only lead to a repetition of what was there said. Following the construction placed upon the section of the Code referred to in that case, we must reverse the order appealed from and dismiss the plaintiffs' bill.

Order reversed, with costs above and below, and bill dismissed.

(122 Md. 681)

CASTLE v. SWIFT & CO. (No. 44.)

(Court of Appeals of Maryland. May 15, 1918.)

1. FRAUDS, STATUTE OF §129(4)—SALE OF GOODS—ACCEPTANCE AND RECEIPT.

Sales Act (Code Pub. Civ. Laws, art. 83) § 25, providing that a contract to sell goods worth \$50 or more shall not be enforceable by action unless buyer shall accept part of goods and actually receive it, requires both acceptance and receipt, two separate acts, either of which may precede the other.

2. SALES §129(4) — ACCEPTANCE AND RECEIPT—QUESTION FOR JURY.

That eggs worth more than \$50 were ordered and placed in seller's cooler at buyer's request, subject to order, was evidence of acceptance and receipt, within Sales Act (Code Pub. Civ. Laws, art. 83) § 25, providing that contract to sell or sale of goods worth \$50 shall not be enforceable unless buyer shall accept and receive part; question being for jury.

3. FRAUDS, STATUTE OF §160—INSTRUCTION—RECEIPT OF GOODS.

Prayer of seller of eggs that if evidence showed defendant purchased at a given price, eggs to be placed in seller's cooler and that, on eggs being placed there and invoice sent, he was to pay for them, then placing of eggs in cooler vested title in buyer, was erroneous, as failing to recognize requirement of actual receipt, under Sales Act (Code Pub. Civ. Laws, art. 83) § 25.

4. APPEAL AND ERROR §1062(2)—HARMLESS ERROR—EVIDENCE.

Error in wrongful admission of evidence was harmless, where same fact was testified to by another witness without objection or contradiction.

Appeal from Superior Court of Baltimore City; John J. Dobler, Judge.

Action by Swift & Co. against Frederick C. Castle. Judgment for plaintiff, and defendant appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Willis E. Myers, of Baltimore, for appellant. Alfred J. Carr, of Baltimore, for appellee.

PATTISON, J. The action in this case was brought by the appellee, Swift & Co., to

recover the loss sustained by it in the resale of eggs claimed to have been sold by it to the appellant, Frederick C. Oastle, and which he refused to take under such alleged sale. This appeal presents the question whether, under the statute known as the "Sales Act," there was a sale of the eggs by the appellee to the appellant that can be legally enforced.

J. Frederick Conrad, salesman for Swift & Co., testified that on Friday night, November 24, 1916, the defendant, a dealer in butter and eggs in the city of Baltimore, called the plaintiff over the phone at its Eutaw Market, Baltimore, Md., and asked the price of eggs. Witness quoted them to him at 37 cents per dozen, whereupon the defendant first offered 36 cents, but finally offered to purchase 200 cases and to pay therefor 36½ cents per dozen, if, as stated by the witness, "I would put them in our upstairs butter cooler, and he would order them out as he needed them." The eggs were to be placed in the butter cooler to save him the cost of storage. This offer was accepted, but, as Saturday was "a half holiday," the eggs were not put aside for the defendant until Monday, when, as requested by him, they were put in the butter cooler and designated as his eggs. On Tuesday morning the eggs were billed to him. On Wednesday morning the defendant again called the plaintiff over the phone, and Conrad, who answered the phone, was told by him that "the egg deal was off." Castle assigned as a reason therefor that the plaintiff's Pratt Street Market, as well as another dealer, had offered eggs to him at a lower price. The plaintiff refused to treat the deal as off, and upon the defendant's refusal to take the eggs and to comply with the terms of said agreement, they were resold by the plaintiff; the sum received therefor being less than the amount at which they had been sold to the defendant at such alleged sale.

Other witnesses testified that the defendant admitted to them that he had bought the eggs, and that he told them that he repudiated the sale for the reason stated by Conrad. It is also shown by the uncontradicted evidence of the plaintiff that the defendant, prior to the alleged sale, had purchased eggs from the plaintiff on terms similar to those under which Conrad testified the eggs in this case were bought by the defendant, and that the plaintiff had at times extended credit to the defendant to the amount of \$2,500 or \$3,000; "that is [as stated by plaintiff's credit man], we recognized it was credit because, although he would buy a couple hundred cases of eggs, or something like that, although he did not take them out at one time, we considered it credit just the same." The defendant admitted talking to Conrad, the plaintiff's representative, over the phone, but denied that he bought or agreed to buy the eggs, or that he had asked that they be put in the butter cooler for him, but that he asked plaintiff the price of eggs, just as he asked others,

to ascertain their price, as he himself had eggs to sell, and wished to know their market value.

The "Sales Act" above referred to (article 83, § 25, of Code 1912) contains the following provisions:

"A contract to sell or a sale of goods or choses in action of the value of fifty dollars or upward shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually received the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

"The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

"There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

At the conclusion of the case the plaintiff offered one prayer which was granted. The defendant offered two; the first was rejected, and the second granted. By the plaintiff's prayer the court declared as a matter of law that if it, sitting as a jury, should—

"find from the evidence that the defendant purchased from the plaintiff 200 crates of eggs at 36½ cents per dozen, and that said eggs were to be placed in the plaintiff's butter cooler, so as to save the defendant the cost of storage, and it was a part of the agreement that, upon said eggs being so placed and an invoice sent for the same, the defendant was to pay for the same, then the placing of said eggs in said butter cooler and the sending of said invoice vested the title to the said eggs in the defendant. And if it shall further find that the plaintiff requested payment for the eggs, which was not complied with, and further that the plaintiff notified the defendant that unless he paid for the eggs the same would be sold at his risk, and in conformity with such notice the plaintiff did sell at the risk of the defendant said 200 crates of eggs, and advised him of the loss resulting therefrom, and requested payment of such loss, that said request was not complied with, then the verdict should be for the plaintiff for such sum as the court shall find, from the evidence, was the actual loss of the plaintiff, with interest in the discretion of the judge."

It is conceded that there was nothing given in earnest to bind the contract, or in part payment of the purchase money for the eggs said to have been bought by the defendant, and that there was no note or memorandum in writing of the contract or sale signed as required by the statute; consequently, in order to hold the contract or sale binding and enforceable against the defendant, the alleged buyer, it must be shown that he accepted at least a part of the eggs contracted to be sold or sold, and that

he actually received the same. Therefore in this case we are concerned only in the meaning of the statute in respect to the provisions requiring acceptance and receipt by the buyer of the goods sold.

[1] It is clear that the terms of the statute require two distinct acts on the part of the vendee; he must accept, and he must actually receive, a part of the goods, in order to render the contract binding on him. There may be an actual receipt without any acceptance, and there may be an acceptance without any receipt. An acceptance may precede or follow the receipt, or it may be contemporaneous therewith; and at times even a receipt may be evidence of acceptance, but it is not the same thing. *Hewes & Co. v. Jordan*, 39 Md. 472, 17 Am. Rep. 578. As defined by the statute (section 25) there is an acceptance of the goods "when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to become the owner of those specific goods." By section 69 of the same article he "is deemed to have accepted the goods when he intimates to the seller that he has accepted them." In *Williston on Sales*, § 483, it is said:

"The ways of manifesting acceptance may be reduced to the three enumerated in the section of the Sales Act under consideration, namely: (1) Intimation of acceptance. (2) Exercising acts of ownership. (3) Retaining the goods. Under the first head will be included both cases where the buyer receives goods and expresses his acceptance of them, and also cases where by the terms of the bargain the buyer agreed to accept goods, whether specified at the time of the bargain or to be afterwards selected by the seller, without inspection."

All cases admit that the term "actually receive," found in the statute, means the acquisition of possession by the buyer, and whatever difficulties exist in regard to its meaning are largely due to the inherent difficulty of determining what is, in fact, possession. This court, however, has said, speaking through Judge Alvey, that:

"The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them." *Hewes & Co. v. Jordan*, supra.

It is said, however, upon good authority, that goods may be received by the buyer within the meaning of the statute, and yet allowed to remain in the hands of the vendor, if it be shown that the seller has ceased to hold in the character of unpaid vendor and holds wholly as bailee for the buyer. *Williston on Sales*, § 91, and the numerous cases cited in note thereto.

[2] In this case we think there is evidence of both acceptance and actual receipt of the goods, which should be submitted as a question of fact to the jury under proper instructions of the court; thus we find no error in the ruling of the court in its rejection of the defendant's first prayer, asking that the case be taken from the jury.

[3] But the court in our opinion erred in granting the plaintiff's prayer, in which it is said that, if it be disclosed by the evidence that the defendant purchased the eggs at the price named, and the same were to be placed in the butter cooler to save him storage, and that upon the eggs being placed therein and an invoice sent to him he was to pay for the eggs, then the placing of the eggs in the butter cooler under such circumstances vested the title to said eggs in the defendant. This prayer fails to recognize, or at least within sufficient clearness, the essential requirements of the actual receipt of the goods by the buyer and the intention of the parties as to the same. It was not only necessary to find that the eggs were placed in the butter cooler, but it was also to be found that by so doing the unrestricted control of the eggs passed to the buyer, and that such was the intention of the parties.

[4] There is also found in the record an exception to the evidence. If this evidence was wrongfully admitted, there was no injury to the defendant caused thereby, as the same fact was testified to by another witness, to which no exceptions were taken, and which stands uncontradicted.

Because of the error of the court in granting the plaintiff's prayer, the judgment of the court below will be reversed.

Judgment reversed, and new trial awarded, with costs to the appellant.

(133 Md. 97)

SEIDL v. MAYOR AND CITY COUNCIL OF BALTIMORE. (No. 20.)

(Court of Appeals of Maryland. June 19, 1918.)

1. MUNICIPAL CORPORATIONS \S 705(10)—USE OF ALLEY—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Where a pedestrian endeavoring to pass through a narrow alley obstructed by the city's horse and cart stood about a foot from the horse's head and remained there while the driver attempted to move the horse so that she could pass, the horse's front hoof striking her on the instep she was negligent.

2. TRIAL \S 258(1)—INSTRUCTIONS—DIRECTED VERDICT.

Prayers instructing that the uncontradicted evidence showed plaintiff had been guilty of contributory negligence, and that she had offered no evidence legally sufficient to entitle her to recover, were not in accordance with the form approved, where a prayer of the kind is offered at the conclusion of all the testimony.

Appeal from Superior Court of Baltimore City; Chas. W. Heulsler, Judge.

"To be officially reported."

Suit by Lydia V. Seidl against the Mayor and City Council of Baltimore. From judgment for defendant, plaintiff appeals. Affirmed.

Argued before BRISCOE, THOMAS, PAT-TISON, URNER, STOCKBRIDGE, and CON-STABLE, JJ.

William H. Lawrence, of Baltimore, for appellant. Robert F. Leach, Jr., Asst. City

Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellee.

THOMAS, J. This suit was brought against the mayor and city council of Baltimore to recover for an injury alleged to have been caused by the negligence of the defendant's agent or servant. The declaration alleges:

"That on July 2, 1917, while the plaintiff was lawfully upon a public highway in the city of Baltimore, to wit, Griffith's court, using due care and caution, a horse hitched to a cart and being driven by an agent or servant of the defendant ran into and upon the plaintiff, injuring her about the feet seriously and permanently."

At the conclusion of the testimony, the court below granted prayers instructing the jury: (1) That the uncontradicted evidence in the case showed that the plaintiff had been guilty of contributory negligence; and (2) that the plaintiff had offered no evidence legally sufficient to entitle her to recover, and this appeal is from a judgment in favor of the defendant for costs, entered upon a verdict rendered in accordance with said instructions.

The plaintiff testified that on the 2d day of July, 1917, she went to see her sister, who lived at No. 720 Eastern avenue. While she was there, her sister, who was sick, asked her to go to the store for her. She went out the "back alleyway," which runs between Eastern avenue and Fawn street to President street, to a grocery store on High street near Fawn street. High street is east of and runs parallel with President street. In returning from the store by way of the alley, she had to cross President street. The alley was paved with "cobblestones," with the gutter in the middle, and was very narrow—just wide enough for a person to pass on either side of a wagon or cart standing in the middle of the alley. When the plaintiff was returning from the store, between 3 and 4 o'clock in the afternoon, as she entered the alley from President street she saw a horse, attached to one of the "city street carts," standing in the alley near and facing President street. They were not in the middle of the alley, but so far to one side that she could not pass them on that side. The driver was on the other side, in a "stooping position," putting dirt in the cart. She approached the horse and wagon on the side of the alley where there was not room for her to pass, and when she reached the horse's head she stopped. When the driver raised up and saw her, he told her that he would move the horse so she could pass. He took hold of the bridle on the horse, and, instead of moving the horse to the other side of the alley, he pushed the horse towards her, and the horse's foot came down on her foot and caused the injury complained of. She further testified that the horse and wagon did not move after she entered the alley, but remain-

ed in the same position on one side of the alley, and that she did not attempt to pass on the other side because the driver was on that side; that she stopped when she was about a foot from the horse's head and remained in that position while the driver was attempting to move the horse, until he pushed the horse towards her and the horse stepped on her foot; that she did not step back or move out of the way when the driver went to move the horse; that the horse did not move forward, or move his hind feet, and that the wagon did not move, but that the horse simply "shoved" his right front foot "over" and it "happened" to strike her foot; that the front of the horse's shoe struck her instep and bruised it; that the driver followed her into her sister's house, and she said there in his presence, and in the presence of others, that it was not his fault; and that she made that statement because she did not want him to lose his position. Dr. Onnen, who attended the plaintiff, and who saw her on the day the accident occurred, stated that the condition of her foot indicated that she had received a "glancing blow." The driver of the cart testified that he moved the horse so that the plaintiff could pass; that he did not move the horse towards her, but towards the opposite side of the alley; that the alley was very narrow; and that even after he moved the horse "she could just barely get through." Other evidence in the case shows that the alley from President street to the place where the accident occurred was ten feet wide, and that the width of the cart, "from hub to hub," was six feet.

[1] Assuming the truth of the plaintiff's testimony, and that the driver of the cart was guilty of negligence in moving the horse towards the side in which she was standing instead of towards the opposite side, we think the evidence clearly shows that she was also guilty of negligence which directly contributed to the injury complained of. Even if it can be said that she was not negligent in attempting to use the alley in going from President street to her sister's home while the horse and cart were in the alley, or in attempting to pass on the side of the alley on which, according to her testimony, the horse and cart were standing, instead of passing on the other side, she was clearly negligent in remaining so close to the horse while the driver was attempting to make room for her to pass. There is not a suggestion in the evidence that the driver intentionally caused the horse to move in her direction. On the contrary, the only inference to be drawn from her testimony and the testimony of the driver is that what he did was done in an effort to move the horse out of her way. According to her own statements, the horse did not move forward, or move his hind feet, but simply moved his right front foot, and the evidence furnishes no excuse for her having remained standing so close

to the horse as to expose her to the risk of an unexpected movement of his foot, or for her failure to step back to a point of safety when the driver undertook to change the position of the horse. Ordinary care on her part would have avoided the accident, and she cannot complain of the consequences of her failure to exercise it.

[2] The prayers instructing the jury that the plaintiff had offered no evidence legally sufficient to entitle her to recover are not in accordance with the form approved where a prayer of that kind is offered at the conclusion of all of the testimony in the case; but as we think the case was properly withdrawn from the jury on the ground that the plaintiff was guilty of contributory negligence, and as the only exception in the case is to the ruling of the court on the prayers, we will affirm the judgment in favor of the defendant.

Judgment affirmed, with costs.

(133 Md. 164)

TULL v. STERLING, Circuit Court Clerk.
(No. 27.)

(Court of Appeals of Maryland. June 20, 1918.)

1. DISTRICT AND PROSECUTING ATTORNEYS & 5(1)—COMPENSATION—FEES.

The state's attorney for Somerset county is not entitled to an appearance fee in any civil case brought by him as state's attorney, under Local Code for Somerset County, enacted by Acts 1906, c. 280.

2. MANDAMUS & 3(6)—PAYMENT OF FEES—CLERK OF COURT.

Mandamus is not the proper remedy to be used by a state's attorney to require a clerk of the circuit court to pay over appearance fees, the remedy by ordinary action being adequate.

Appeal from Circuit Court, Somerset County; Henry L. D. Stanford, Judge.

Mandamus by Gordon Tull, State's Attorney for Somerset County, to compel William Jerome Sterling, Clerk of the Circuit Court for Somerset County, to pay certain fees. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Gordon Tull, of Princess Anne, in pro. per.

URNER, J. In pursuance of a statutory duty, imposed upon him as the state's attorney for Somerset county, the appellant instituted, and conducted a trial and judgment, in the name of the state, 38 separate proceedings in the circuit court for that county for the condemnation of certain natural oyster bars and areas for the use of the public. The costs of the proceedings as taxed by the clerk of the court, and paid to him out of the state treasury, included an appearance fee of \$5 in each case for the appellant as attorney for the state. The Local Code for Somerset

County contains the following provision, enacted by chapter 280 of the Acts of 1906:

"The state's attorney of said Somerset county in lieu of the fees * * * received by him, as provided for in any local law for Somerset county, or in any general law of the state, shall receive a salary of one thousand dollars per annum as full compensation for his entire services as required of him by law or which may hereafter be required of him by any law of this state, to be paid to him by the county commissioners of Somerset county."

In view of this provision the clerk was advised that he could not legally pay any appearance fees in the condemnation cases to the appellant, and his demand that they be paid to him was accordingly refused. A petition for mandamus to compel the payment was then filed, but it was dismissed on demurrer and the pending appeal has resulted.

It is provided by the Constitution of the state, by section 9 of article 5, in part, as follows:

"The state's attorney shall perform such duties and receive such fees and commissions' or salary, not exceeding three thousand dollars, 'as are now or may hereafter be prescribed by law, and if any state's attorney shall receive any other fee or reward than such as is or may be allowed by law, he shall, on conviction hereof, be removed from office.'"

The expressed purpose of the local law for Somerset county, which we have quoted, was to provide for the compensation of the state's attorney for that county by means of a specified salary in lieu of the fees theretofore received by him for the performance of his official duties. If this change had not been made in the method and measure of his compensation, and the fee system had continued to apply to his office, the appearance fees in question would have had to be reckoned as part of the fees for which he would be accountable and out of which he would be paid for his services to the amount limited by the Constitution or by statute. It is made the duty of every person holding office under the Constitution or laws of this state (except justices of the peace, constables, and coroners), "whose pay or compensation is derived from fees or moneys coming into his hands for the discharge of his official duties, or in any way growing out of or connected with his office," to "keep a book in which shall be entered every sum or sums of money received by him, or on his account, as a payment or compensation for his performance of official duties a copy of which entries," verified by his oath, "shall be returned yearly to the Comptroller of the State for his inspection," and when the amount so received by such officer for the year "shall exceed the sum which he is by law entitled to retain, as his salary, or compensation for the discharge of his duties, and for the expenses of his office," he is required to "yearly pay over to the treasurer of the state the amount of such excess." Constitution, art. 15, § 1. The Code of Public Civil Laws, by section 24 of article 10, provides

that accounts of state's attorneys against the county commissioners of their respective counties "may include a reasonable trial fee for each case actually tried, to be allowed in the discretion of the court, as well as the appearance fee provided by law," and the next succeeding section of the same article of the Code authorizes the Comptroller of the Treasury to adjust and settle the claims of any of the state's attorneys "for appearance fees in civil cases due them by the state, and for all fees similarly due for services rendered under the opinion of the Attorney General in the matter of cases removed from said county for trial or otherwise." It seems perfectly clear from these provisions that appearance fees received by state's attorneys were intended to be treated, like other fees, as items of compensation for official service, and as such were required to be reported to the Comptroller and the excess over the prescribed salary paid annually into the state treasury.

The salary of the state's attorney for Somerset county is not payable from fees, which he is authorized to charge and collect, but by direct payment from the county in equal quarterly installments. There is a provision in the Local Code that in all criminal cases in the circuit court for the county, in which the state's attorney shall appear for the state, an appearance fee as allowed by existing law shall be taxed as part of the costs, and when collected from the party liable therefor shall be paid over by the clerk to the county commissioners to be applied by them to the payment of the state's attorney's salary, for which, also, to such extent as may be necessary, they are directed to provide by taxation. It was in "full compensation for his entire services" under existing or future laws that the stated salary was to be paid. It was declared to be "in lieu of the fees heretofore received" by the state's attorney "as provided for in any local law" for the county "or in any general law of the state." There could hardly be a more plain and positive statement of the legislative purpose to limit the state's attorney's compensation, for all of his official services, to the amount of the annual salary which the statute substituted for the fees which he had theretofore been accustomed to receive.

[1] The cases in which the state's attorney claims to be entitled to appearance fees were instituted by him in the performance of a duty which was imposed upon him in his official capacity by section 960 of article 72 of the Code of Public Civil Laws. It was a duty clearly within the purview of the provision which defined the services for which the prescribed salary was intended to afford an ex-

clusive compensation. Whether the salary was adequate in view of the nature and number of the cases in which the appearance fees are claimed is a question with which the Legislature has full power to deal, but which we have no authority to consider for the purposes of our decision. The only inquiry we can properly entertain is whether the appellant has a legal right to the appearance fees in dispute and to the writ of mandamus to enforce their payment. To that question our answer must be in the negative.

The fact that the amount of the appearance fees was paid to the clerk by the state is not a consideration which can affect our conclusion. The fees were doubtless taxed and paid in the usual routine of such transactions, without reference by the state's financial officers to the limitations as to the source and amount of the compensation of the state's attorney for Somerset county, and we see no reason to hold that their act of paying the fees to the clerk has had the effect of conferring upon the appellant a right to the fees which the statute has denied.

The case of Worcester Co. v. Melvin, 89 Md. 37, 42 Atl. 910, upon which the appellant relied to some extent, involved a very different question. It was there held that when a claim against the county for services rendered by counsel duly appointed to defend or prosecute a criminal case had been approved by the judge of the circuit court of the county, as provided by a local statute, it was the duty of the county commissioners to pay the claim, and the fact that the counsel had received an appearance fee in the same case, as authorized by law (Code, art. 36, § 10), was not a valid ground for the refusal of the commissioners to pay the fee which the judge had approved.

As the question here presented is governed by the special terms of the organic and statutory laws of our own state, to which we have referred, it is not necessary to discuss the cases in other jurisdictions which are cited in the appellant's brief.

[2] If we could have reached a conclusion that the appellant is entitled to the appearance fees in controversy, we should nevertheless have concurred in the dismissal of his petition for the extraordinary writ of mandamus for the reason that his claim could have been adequately enforced by an ordinary suit at law. *Goldsborough v. Lloyd*, 86 Md. 378, 38 Atl. 773; *Caroline School Com'rs v. Hinson*, 126 Md. 472, 95 Atl. 48; *Brown v. Bragunier*, 79 Md. 234, 29 Atl. 7; *McEvoy v. Baltimore*, 126 Md. 124, 94 Atl. 543; *Hummelshime v. Hirsch*, 114 Md. 39, 79 Atl. 38.

Judgment affirmed, with costs.

(89 N. J. Eq. 233)

GOFF et al. v. GOFF ELECTRO-PNEUMATIC BRAKE CO. (No. 45/14.)

(Court of Chancery of New Jersey. July 15, 1918.)

1. CORPORATIONS §=684—FOREIGN CORPORATIONS—RECEIVER.

Corporation Act, § 96, does not authorize appointment of a receiver for a foreign corporation which is solvent.

2. CORPORATIONS §=684—FOREIGN CORPORATIONS—RECEIVER.

The Chancery Court will not, under its general powers, appoint a receiver for a solvent foreign corporation, for such relief is to be administered in the state of the corporation's domicile.

Bill by Howard Goff and others against the Goff Electro-Pneumatic Brake Company. Hearing on return of order to show cause for appointment of receiver for defendant. Order advised, dismissing order to show cause.

Patrick H. Harding, of Camden, for complainants. Norman Grey, of Camden, for defendant.

LEAMING, V. C. The bill herein is filed by complainants as stockholders and creditors of the Goff Electro-Pneumatic Brake Company, a corporation of the state of Delaware, and prays for an injunction restraining that corporation and its officers and agents from exercising any of its privileges or franchises or transacting its business, and for the appointment of a receiver of that corporation.

The bill discloses corporate assets in this jurisdiction and charges, not only neglect of duty upon the part of the officers and directors of the corporation, but also wrongful diversion of assets by them, and alleges that the business of the corporation is being conducted at a great loss, and greatly prejudicial to the interests of its creditors and stockholders, and that its business cannot be continued with safety to the public and advantage to the stockholders. The several averments of the bill are verified by a specific affidavit of one of the complainants.

An order to show cause was issued, without restraint, and at its return an answer was filed by defendant corporation, in which practically all of the essential facts on which relief is based are denied; the answer is supported by specific affidavits of verification, and also embodies a counterclaim against complainants, alleging that certain patents belonging to defendant corporation are in the name and under the control of complainants, and should be assigned to defendant corporation, and praying for a decree directing the assignment of these patents.

The bill does not allege that defendant company is insolvent. It alleges that its assets are \$18,000, of which \$10,500 is cash,

and its liabilities about \$4,000. The allegation of danger of future insolvency is based upon the claim that nothing is being done to promote the interests of the company and no revenues are being received, while its expenses are \$250 per month for salaries. The answer discloses as assets cash to the amount of \$8,289.38, bills receivable of the nature of quick assets to the amount of \$1,791.55, and the patents which were made the basis of the capitalization of the corporation, and denies that it has liabilities to the amount of \$4,000; its total expenses are stated as \$300 per month, including rent. It accordingly is clear that a condition of insolvency neither exists nor is presently threatened.

In the adjudication of applications for the appointment of receivers of corporations the Court of Chancery of this state is required to observe certain well-defined limitations upon the exercise of that power.

[1] The statutory power found in our Corporation Act has reference only to corporations which are actually or potentially insolvent. Section 96 of that act (2 Comp. St. 1910, p. 1657) subjects foreign corporations doing business in this state to the provisions of the act, so far as they can be applied to foreign corporations; accordingly, in the appointment of receivers of foreign corporations, that section can only be understood to contemplate insolvent foreign corporations, and, as is pointed out in *Minchin v. Second Nat. Bank*, 36 N. J. Eq. 436, there are provisions of the act relating to insolvent corporations which obviously cannot be applied to insolvent foreign corporations, since the Court of Chancery of this state cannot prevent a foreign corporation from exercising its franchises in another state. As there stated it can, under our statute, through the medium of a receivership, sequester the property in this state of an insolvent foreign corporation and administer it here for the benefit of creditors and stockholders, but it can do but little more; thus the efficacy of the provisions of section 96 of our Corporation Act, so far as it relates to receivers of foreign corporations, is confined to securing to creditors and stockholders, citizens of this state, a just proportion of the property in this state of foreign corporations when insolvent. See, also, *Albert v. Clarendon Land Co.*, 53 N. J. Eq. 623, 23 Atl. 8. Whether under our statute a receiver of an insolvent foreign corporation may be appointed without an adjudication of insolvency first being made in the state of the domicile of the corporation need not be here considered. See *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375. It follows that any relief that may be herein awarded to complainant must emanate from the general powers of this court.

[2] The recent case of *Morse v. Metropoli-*

tan Steamship Co., 87 N. J. Eq. 217, 100 Atl. 219, reviews at some length the circumstances which may appropriately call into activity the general powers of a court of equity to appoint a receiver of a solvent domestic corporation. But, as already stated, the present application is for the appointment of a receiver of a solvent corporation of another state and for an injunction restraining the corporation and its officers and directors from exercising any of its privileges or franchises.

It is clear that the measure of relief here sought cannot be properly awarded, even though the verified denials and affirmative averments of the answer be wholly disregarded. Not only is this court unable to enforce a decree of that nature out of this state, but such decree, could it be enforced, would clearly be operative to regulate the management of the internal affairs of a foreign corporation, since it would wholly deny to that corporation the exercise of its corporate functions. *Jackson v. Hooper*, 76 N. J. Eq. 592, 604, 75 Atl. 568, 27 L. R. A. (N. S.) 658. Nor does it seem that any lesser degree of relief can be here administered in behalf of complainants, with due regard to the rule that a court should not take jurisdiction of the internal affairs of a foreign corporation. Cases are to be found in which peculiar circumstances have been deemed adequate to justify relief against certain proposed acts of solvent foreign corporations within the state where relief has been sought (see *Corry v. Barre Granite Co.* [Vt.] 101 Atl. 38, and cases there cited), but relief of the nature here desired should be administered in the state of the domicile of defendant corporation.

I will advise an order dismissing the order to show cause.

(92 N. J. Law, 233)

ROSE et al. v. SLOUGH. (No. 58.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

1. MUNICIPAL CORPORATIONS ⇨808(7)—DEFECTIVE SIDEWALK—FAILURE TO TRIM SHADE TREES—PENALTY.

An ordinance fixing a penalty on abutting owners for failure to trim shade trees would not create a right of action against the owner for personal injuries from defective sidewalk, caused by failure to trim roots of a tree.

2. MUNICIPAL CORPORATIONS ⇨818(11)—DEFECTIVE SIDEWALK—LIABILITY OF ABUTTING OWNERS—EVIDENCE.

Liability of abutting owners for personal injuries from raising of paving stone in sidewalk by shade tree roots would not be shown by his removal of the roots thereafter, as any person may abate a nuisance in a highway.

3. MUNICIPAL CORPORATIONS ⇨808(2)—DEFECTIVE SIDEWALK—PERSONAL INJURIES—LIABILITY OF ABUTTING OWNERS.

Where a city, pursuant to Act March 8, 1893 (P. L. p. 130), assumes control of shade trees within its territory, an abutting owner on a city street is exempted from liability to an in-

dividual injured by tripping over paving block of sidewalk raised by roots of a shade tree in the walk.

Appeal from Supreme Court.

Action by Anna M. Rose and Theodore F. Rose, her husband, against Mary Cooper Slough. From a judgment for plaintiffs, defendant appeals. Reversed.

Bleakly & Stockwell, of Camden, for appellant. Wescott & Weaver, of Camden, for appellees.

KALISOH, J. The respondents, husband and wife and plaintiffs below, were permitted to recover a judgment against the appellant, defendant below, upon the following state of facts: The defendant was the owner of certain premises abutting a public highway in the township of Pesauken. A sidewalk paved with patent composition paving blocks extended along the front of the premises. On this sidewalk stood and grew a shade tree, the roots of which, from natural growth, spread under the paving blocks and caused them to bulge up several inches, thereby rendering the sidewalk uneven and broken in several places. The female plaintiff, while walking along on this sidewalk, stumbled and fell, as a result of its uneven and broken condition, and sustained injury. These facts are the gravamen of the amended complaint filed in the cause, with the additional averment that the defendant maintained the "shade tree for use, pleasure, and comfort, and for the beautification of her property."

With the exception of this averment, the material facts of the present case are not dissimilar to those set forth in *Rupp v. Burgess*, 70 N. J. Law, 7, 56 Atl. 166. In the case cited there was a demurrer to the first count of the declaration, which averred "that the defendant was the owner of a certain lot fronting on Newton street, in the city of Newark, and while owning and occupying this lot he wrongfully and knowingly permitted the flagstones with which the sidewalk in front of his property was covered to become and remain in a broken, insecure, and dilapidated condition," and that by reason thereof the female plaintiff, who was walking along upon that portion of the sidewalk, stumbled and fell, etc. Mr. Chief Justice Gummere, speaking for the Supreme Court (70 N. J. Law, on page 9, 56 Atl. on page 166), said:

"The first count, plainly, discloses no cause of action. It is based upon the assumption that the owner and occupant of premises abutting upon a public street is under a legal duty to keep in repair the sidewalk in front of his property. But no such obligation rests upon him, unless by virtue of the requirements of a city or municipal ordinance (Dill. Mun. Corp. par. 1012; *Weller v. McCormick*, 18 Vroom, 397 [1 Atl. 516, 54 Am. Rep. 175]), and the declaration fails to allege the existence of any such requirement. And even when the duty of repairing sidewalks is imposed upon the abutting owner by statute or ordinance, the failure to perform that duty does not render the owner responsible

to individuals for injuries received by them, resulting from defects in the sidewalk due to want of repair. The only liability which rests upon the property owner for the nonperformance of such a duty is the penalty provided by the statute or ordinance. *Fielders v. New Jersey Street Railway Co.*, 39 Vroom, 843, 352 [53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552], and cases cited."

Counsel of respondents argue that the doctrine enunciated in *Weller v. McCormick* supports the theory upon which the plaintiffs were permitted to recover in the present case. It is true that the case referred to, in many of its features, is like the present. It is, obviously, materially unlike in one important respect, and that is that the injury sustained by the plaintiff was the result of a decayed branch of a tree, which stood in front of the defendants' premises, falling upon the plaintiff while passing along the sidewalk, whereas in the present case the injury to Mrs. Rose resulted from a fall on a sidewalk, by reason of its being out of repair. The bearing of this difference in the facts upon the legal aspects of the present case will be considered later.

In *Weller v. McCormick*, Dixon, J., in a careful and well-reasoned opinion, points out with characteristic perspicuity the essential facts necessary to be established by the plaintiffs, in order to cast a liability upon the landowner to respond in damages for the injury sustained. In 47 N. J. Law, on page 398, 1 Atl. on page 517, 54 Am. Rep. 175, the learned judge said:

"It must be conceded that ordinarily, when a person, for his private ends, places or maintains, in or near a highway, anything which, if neglected, will render the way unsafe for travel, he is bound to exercise due care to prevent its becoming dangerous. If, therefore, from the fact that the tree in question stood on a portion of George street owned by the defendant, it is to be inferred that the tree was placed or maintained there by him for his private benefit, it would follow that the alleged duty existed. But we think that in the present case this fact is not sufficient to warrant such an inference against the defendant."

It is to be observed that this alleged duty of the abutting owner is qualified by a condition, that the tree was placed or maintained in the public highway for his benefit, and that the mere fact of the presence of the tree on a portion of the highway in front of the owner's premises gave rise to no presumption that it was there for the private benefit of the defendant, and hence created no legal duty regarding it. The learned justice then proceeds (47 N. J. Eq. on page 398, 1 Atl. on page 517) to state his reason, as follows:

"Shade trees in the streets of a city are of public as well as private utility. They protect and ornament the way for public use, as they also do the adjoining property for private enjoyment. It is therefore clear that, by virtue of the ordinary public right in highways, the public may plant and maintain shade trees therein. Whether the Legislature, to whom this power primarily belongs, has in a given case delegated it to a subordinate, depends, of course, upon the terms by which authority is granted. In the charter of the city of New Brunswick the mat-

ter is not left in doubt. That instrument (P. L. 1863, p. 347, § 31) gives the common council power to make, modify, and repeal ordinances, rules, regulations, and by-laws for directing and regulating the planting, rearing, trimming, and preserving of ornamental shade trees in the streets, parks, and grounds of the city. It thus appears that since 1863 the municipality has had the power of planting and preserving shade trees in the streets, and therefore the presence of any such tree in a street may be attributed to the exercise of this power, as well as to any other cause. Under these circumstances, the most that the plaintiffs can properly claim to have proved is that the tree was planted or maintained either by the defendant for private purposes or by the city for public purposes."

The result reached was that the verdict could not be maintained upon an inference that the tree was planted or maintained by the defendant, and that, if the tree in question was planted or preserved by the city, the defendant owed no legal duty concerning it, except such as was imposed by the by-laws of the corporation.

Now, in the case under consideration, the uncontroverted proof is that the tree was on the sidewalk when the defendant acquired ownership of the premises. There is an utter absence of any proof tending to establish that the tree was planted or maintained for the private benefit of the owner. On the contrary, there is a perfectly legitimate inference from the facts that when the tree was set out it was in conformity to a plan to beautify the public highway. It is clear, from an act entitled "A further supplement to an act entitled 'An act to increase the powers of township committees' approved March 11, 1880" (P. L. 1893, p. 130), that the Legislature conferred the power upon township committees "to direct and regulate the planting, rearing, trimming and preserving the shade trees" in the highways of the townships, and "to authorize or prohibit the removal or destruction of the same." The plaintiffs introduced an ordinance, in evidence, passed by the township committee, regulating the trimming of shade trees standing along the streets, roads, avenues, and highways of the township, and fixing a penalty of \$5 for a violation of the ordinance by the owner, and reserving to the municipality the power to direct such shade trees to be trimmed at the cost and expense of the owner. This situation was not present in *Weller v. McCormick*, supra. The legal effect of the ordinance in the present case is that it is an affirmative act of the municipal authority, by which it has taken under its care and control the regulation and preserving of shade trees for the public benefit.

[1] The fact that a failure of the owner to observe the behest of the ordinance subjects him to a penalty does not, according to well-settled authority, create a right of action against such owner, by an individual who has sustained an injury arising from the non-observance, because the ordinance belongs to a class of ordinances, as was well said by

Pitney, J., in *Fielders v. North Jersey St. Ry. Co.*, supra, 68 N. J. Law, on page 352, 53 Atl. on page 407, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552—

"intended, not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, as legislative intent is indicated that a breach of such ordinance shall be remedial only at the instance of the municipal government, or by enforcement of the penalty prescribed therein, and that there shall be no right of action to an individual citizen especially injured in consequence of such breach."

[2] The circumstance that the defendant, a few days after the accident, employed a contractor to cut away the roots of the tree in order to repair and level the sidewalk, and thus to make it safe, is wholly unimportant. It was not evidential of any legal duty owing from the defendant to the plaintiff, by reason of the presence of the tree in the highway before and at the time the plaintiff was injured. Any citizen may lawfully abate a public nuisance in the highway. The fact, therefore, that the defendant abated a public nuisance created in front of her premises, after the plaintiff was injured, cannot properly raise an inference that she created it, or had any especial control over it. She was under no legal duty to put the sidewalk in repair. The fact that she undertook to do so after the accident cannot properly raise an inference of individual responsibility for the creation of the nuisance, if such existed.

[3] Reverting, now, to the marked distinguishable feature of this case from *Weller v. McCormick*, supra, we find that in the case cited the undisputed fact was that it was the falling of a decayed limb of a tree upon the plaintiff that caused his injury. In the present case it is not pretended that the roots of the tree were the proximate cause of the injury to the plaintiff. The testimony is ample to the effect that the pavement of the sidewalk was made uneven by the spreading of the roots of the tree underneath, and that the paving blocks were kicked out of position by some of the public using the sidewalk. It is therefore the defective condition of the sidewalk, partly caused by the roots of the tree and the use made of the sidewalk by the public in general, which is made the basis of the defendant's liability. As has already been pointed out, there was no legal duty resting upon the defendant to keep the sidewalk in repair. It would seem, therefore, that the causes which operated to put the sidewalk in a defective condition are inconsequential, unless it is established that the defendant by some act of her own contributed to such defective condition. There is no proof in the case showing when the pavement was laid, or that the defendant caused it to be put down, or that at the time the paving was

done there were any indications of any roots of a tree in the ground likely to disturb the pavement.

The defendant was therefore in a similar position to that of an owner of premises, whose sidewalk becomes defective because of buckling in extreme hot weather, or becomes depressed by heavy rains, or becomes out of repair by reason of any other action of the elements, or by the destructive acts of pedestrians, and permits such sidewalk to remain in that condition. There being no legal duty cast upon the owner to repair, there can be no recovery for an injury sustained by reason of such defective sidewalk, arising from a failure to repair. In the present case, the growing and spreading of the roots, which caused the sidewalk to become uneven, were nature's work, and over which the defendant had no control, and concerning which she owed no duty.

But, irrespective of this fact, where a municipality, in pursuance of state legislative sanction, assumes control of the trees within its territory, an abutting owner, on a street of such municipality, is relieved from the care of a tree standing on the sidewalk in front of his premises, to the extent that he will be exempt from liability to respond in damages in a civil action to an individual who has suffered an injury of which the tree was the producing cause.

The refusal of the learned trial judge to grant defendant's motion for a nonsuit was error, and therefore the judgment must be reversed.

(39 N. J. Eq. 307)

In re BOWERS. (No. 44/554.)

(Court of Chancery of New Jersey. April 24, 1918.)

1. CONTEMPT ¶27—REQUESTING WIFE TO CONSENT TO DIVORCE.

Where husband sued for divorce on ground of desertion, and wife answered, denying desertion, and charged constructive desertion, a letter written to the wife by husband's father, requesting her to consent to the divorce, having the effect of fraudulently imposing on the court, is a clear contempt.

2. CONTEMPT ¶2—THREATENING SOLICITOR—ATTEMPT TO INDUCE SOLICITOR TO WITHDRAW.

Where the father of the husband, plaintiff in divorce action, goes to the wife's solicitor and threatens to bring political and other pressure to compel the solicitor to withdraw from the case, such act being effort to deprive court of services of one of its officers and a step toward collusion, is a clear contempt.

3. CONTEMPT ¶31—STATUTORY PROVISIONS—CHANCEERY.

Act March 15, 1917 (P. L. p. 71), providing that no power of any court to punish for contempt shall be construed to extend to any case, except the misbehavior of any person in its actual presence, the misbehavior of any officer of court in his official transactions, and the disobedience or resistance by any officer or other person to any lawful writ, process, order, rule, decree, or command of the court, is unconstitutional.

tional, in so far as it may be claimed to apply to the Court of Chancery.

4. CONTEMPT \S 70—PUNISHMENT—STATUTORY PROVISIONS—COURT OF CHANCERY.

1 Comp. St. 1910, p. 442, § 82, providing punishment for contempt for disobedience of orders of the Court of Chancery, does not apply to a contempt committed by attempting to induce defendant in divorce action to consent to a divorce, or by threatening the defendant's solicitor with political disfavor upon refusal to withdraw from case.

5. CONTEMPT \S 28(3)—DEFENSES—IGNORANCE OF LEGAL EFFECT OF ACTS.

A person who attempted to induce defendant in divorce case to consent to a divorce, and threatened her solicitor in attempt to compel him to withdraw from case, was in contempt, although he was not an attorney and did not know legal effect of his acts, although such ignorance is a mitigating circumstance, to be considered in determining degree of his culpability.

Proceeding to punish William Bowers for contempt. On order to show cause. Respondent adjudged guilty.

Nelson B. Gaskill, of Trenton, for the order. King & Vogt, of Morristown, opposed.

LANE, V. C. This is a proceeding instituted at the request of the court to punish the respondent, William Bowers, for contempt, in that he did commit acts which tended to obstruct, interrupt, prevent, and embarrass the proper administration of justice.

A divorce suit was pending in this court, brought by one Edmund H. Bowers, petitioner, against Mabel B. Bowers, defendant. The respondent is the father of the petitioner. The acts alleged to be contemptuous were two in number:

First. On or about December 17, 1917, the respondent called at the office of the solicitor of Mabel B. Bowers and threatened the said solicitor that, unless he should cease his opposition to the efforts of the petitioner to obtain a divorce from the defendant, Mabel B. Bowers, or withdraw from the then pending divorce action, he, William Bowers, would bring political and other pressure to bear upon the said solicitor to compel him to sever his connection with the case. The divorce action was based upon the ground of desertion. There had been an answer filed, denying the desertion and charging constructive desertion. At the time the threat was made the solicitor was a candidate for reappointment as attorney and counsel for the town of Boonton, and the respondent, Bowers, either had or thought he had, through his acquaintance with those who had, some political influence.

Second. On January 11, 1918, the respondent wrote to the defendant in the divorce petition a letter containing the following language:

"I wish now to request you to allow Ed his divorce (on grounds of desertion only), no alimony, no lawyer's fees, and no defense to be put in by you whatever. These present impossible conditions must be changed at once, for good.

These two dear children must be cared for properly and immediately. We have Marguerite here, and have arranged for her to start in school Monday a. m. Ed will have Edrew, and with Mrs. Barker's and our help he will have the best of care. These arrangements will permit you to live your own life in your own way. There is no reason why Ed cannot take them to N. Y. to stay with you over a Sunday occasionally as you may desire, in the same manner as you allowed them to come here. Finally, I assure you that nothing will be said by any of us concerning the reasons of your living apart. When they are old enough to realize, *incomprehensibility* will answer all questions. Kindly reply promptly, and greatly oblige."

The matter was referred by the Chancellor by formal order of reference to me as Vice Chancellor. The respondent appeared and was examined. He admitted the writing of the letter, admitted the visit to the office of the solicitor, but denied that the conversation was as related by the solicitor. I find against him on the issue of fact.

[1] The law of this state provides, that no divorce shall be obtained by collusion; the very jurisdiction of the court depends in part upon there being annexed to the petition an affidavit of noncollusion. The extent to which this court has gone in endeavoring to prevent a divorce being obtained by collusion is well illustrated by the case of Sheehan v. Sheehan, 77 N. J. Eq. 411, 77 Atl. 1063, 140 Am. St. Rep. 566. The attempt of the respondent to induce the wife to consent to a decree, which as in this case might have the effect of fraudulently imposing upon the court, is a clear contempt.

[2] The act of the respondent in threatening the solicitor for the defendant in order to compel him to withdraw from the case is a clear contempt. It tends to deprive the court of the services of one of its officers. It was intended also in this case as a step in deceiving the court, to the end that a collusive divorce might be granted. The Chancellor (In re Merrill, 102 Atl. at page 402) said:

"It is a contempt of the dignity of the court for one of the litigants before it to denounce and abuse to the judge the lawyers representing the adversary party, because lawyers are officers of the court."

[3] The statute (P. L. 1917, p. 71), which provides that no power of any court to punish for contempt shall be construed to extend to any case, except the misbehavior of any person in its actual presence, the misbehavior of any officer of court in his official transactions, and the disobedience or resistance by any officer or other person to any lawful writ, process, order, rule, decree, or command of the court, is unconstitutional in so far as it may be claimed to apply to the Court of Chancery. The Chancellor doubted (In re Merrill, 102 Atl. at page 408) whether it applied to the Prerogative Court. That it does not apply to chancery is too clear for argument. Flanigan v. Guggenheim Smelting Co., 63 N. J. Law, 647, 44 Atl. 762. See,

also, *In re Thompson*, 85 N. J. Eq. 221, 236, 96 Atl. 102.

[4] The act providing for punishment for contempt for disobedience of orders of the Court of Chancery (1 Comp. Stat. p. 442) does not apply to the class of contempt now under discussion. See *Frank v. Herold*, 64 N. J. Eq. 371, 51 Atl. 774.

[5] The respondent upon the hearing denied any intent to contemn the authority of the court, stated that he did not realize that his acts were contemptuous, and apologized to the court. He must at least be held to have known that his act in threatening the solicitor was, whether it constituted a contempt or not, a wrong. He deliberately and without respect to the rights of the parties endeavored to secure that which he desired by every means within his power, legal or illegal. The headnote of *Seastream v. N. J. Exhibition Co.*, opinion by Vice Chancellor Pitney, 61 Atl. 1045, expresses the law, as I understand it, as follows:

"The fact that one accused of contempt in attempting to improperly influence the administration of justice was not an attorney, and was therefore possibly ignorant of the legal effect of his acts, did not excuse him or purge him of the charge of contempt, although it was a mitigating circumstance to be considered in determining the degree of his culpability."

I have consulted with the Chancellor as to the punishment to be inflicted, and after taking into consideration all of the circumstances of the case, including the disavowal on the part of the respondent to contemn the court and his apology to the court, and the fact that the case is novel, at least in the sense of publicity and trial, we have concluded that in this instance there will be inflicted only a penalty of \$50 and the costs of the prosecution. The extent of the punishment in this case is not to be considered in any wise as a precedent, should a case of similar nature come before the court.

I adjudge the respondent guilty of contempt upon both counts, and impose upon him a penalty of \$50 and costs of this prosecution. Let him be committed to the common jail of the county of Morris until the penalty and costs are paid.

**FOWLER et al. v. WESTERHOFF BROS.
CO. et al. (No. 44/558.)**

(Court of Chancery of New Jersey. June 10, 1918.)

1. ACTION \Leftrightarrow 69—STAY—RES JUDICATA.

An action will not be stayed because of the existence of a former action, in which judgment has been obtained, but which has not been settled, where such former action is not conclusive of all the issues involved in the second action.

2. JUDGMENT \Leftrightarrow 883(11)—COMPELLING SET-OFF OF JUDGMENT—ACTION IN OTHER JURISDICTION.

A New Jersey equity court will not enjoin party before it from proceeding to enforce in

New York judgment for costs rendered by federal court in latter state on ground that New Jersey suit will produce a recovery, which may be set off against judgment for costs, where no motion for relief is made in the New York court.

Bill in equity by George Fowler, individually and as trustee, and another, against the Westerhoff Bros. Company and others. Hearing on bill, etc. Injunctive feature of bill held open for further showing.

McDermott & Enright and John M. Enright, all of Jersey City, for complainants. Forster W. Freeman and William B. Gourley, both of Paterson, for defendants.

LANE, V. C. In 1906 the complainant Thomas S. Napier commenced a suit in the Supreme Court of the state of New York, in equity, against Peter D. Westerhoff, Henry Westerhoff, Harris J. Westerhoff, and Westerhoff Bros. & Napier Company. The suit was removed to the federal court for the southern district of New York. Testimony was concluded some time in 1912; final judgment was rendered against the plaintiff; this judgment was affirmed by the Circuit Court of Appeals for the Second Circuit; the opinion of the court is in 233 Fed. 398, 147 C. C. A. 334. A judgment for costs against Napier for a sum somewhat less than \$3,000 was entered. Subsequent to the judgment, legal title to the Napier stock became vested in George Fowler, trustee. The charge of the plaintiff in the New York proceeding was substantially that, although the business was being conducted in corporate form, the business should be administered as if it was conducted by a partnership. The New York court found that the partnership agreement had not continued after the formation of the corporation. This finding necessarily resulted in a dismissal of the bill. On March 2, 1918, George Fowler, individually and as trustee, and Thomas S. Napier, commenced suit in this court against Westerhoff Bros. Company, a body corporate (the name of the corporation having been changed), Peter D. Westerhoff, Henry Westerhoff, Jacob Westerhoff, and Harris J. Westerhoff. The bill prays for an investigation of the conduct of the business of the corporation, alleges mismanagement upon the part of its directors and officers, prays an accounting from them, alleges an improper withholding of dividends, and asks for a decree directing the directors to declare dividends. It also asks for the appointment of a receiver. Subsequently proceedings were commenced upon the judgment of the federal court in New York. The complainants move for an injunction restraining defendants from proceeding upon their New York judgment until a decree can be obtained in this court, so that wherever sums may be found due complainants from defendants may be offset against the judgment obtained in New York; a counter motion is made by defendants

to stay the pending suit until the judgment in New York is settled by the complainant Napier.

[1] First. The motion of the defendants will be denied. The argument is that the cases are so similar as that the judgment in New York is res adjudicata in the pending suit, and that the pending suit is to all intents and purposes a renewal of the litigation in New York. To what extent the judgment in New York is conclusive upon the issues in the pending suit it is not necessary for me to determine. It is quite apparent that it is not conclusive upon some of the issues presented. No authority has been brought to my attention which would warrant the court in staying the pending suit as prayed for by the defendants.

[2] Second. The defendants have a valid subsisting judgment of the federal court, in equity, of the Southern district of New York, against complainant Napier, and the attempt of complainants is to enjoin proceedings to enforce that judgment until a decree here, which complainants hope will result in their acquiring sufficient moneys to pay the New York judgment. The jurisdiction of this court is not questioned by defendants. That it is not free from doubt will be demonstrated by a consideration of the following cases: *McKim v. Voorhies*, 7 Cranch, 279, 3 L. Ed. 343; *U. S. ex rel. Riggs v. Board of Supervisors of Johnson County*, 6 Wall. 166, 18 L. Ed. 768, at page 776; *Davenport v. Lord*, 9 Wall. 409, 19 L. Ed. 704, at page 707; *Central National Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807, at page 818; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; *Wonderly v. Lafayette*, 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. Rep. 474.

Complainants rely upon the analogy of the present application to applications to courts of law to offset judgments and to stay proceedings upon executions until suits between the same parties in the same or other jurisdictions may ripen into judgments, so that they may be offset, and they cite *Hendrickson v. Brown*, 39 N. J. Law, 239, *Blackburn v. Reilly*, 48 N. J. Law, 82, 2 Atl. 817, and *Phillips v. Mackay*, 54 N. J. Law, 319, 23 Atl. 941. But Justice Garrison, in *Phillips v. Mackay*, said:

"The practice requires that the application be made in the court whose judgment is against the party applying for the set-off; but it has never been required that the court in which the remedy is sought should have control over the judgment used as a set-off."

And in *Brookfield v. Hughson*, 44 N. J. Law, 285, Justice Reed, speaking for the Supreme Court, held that the motion should be made in the court where the judgment against the moving party is obtained.

Irrespective of the power of the court, the application is one that is always addressed to the sound discretion of the court. It seems

to me that this court ought not at the present time attempt to interfere with the proceedings in New York. The complainants may, I think, obtain complete relief, if entitled to any, by application to the New York court. I will permit the injunctive feature of the order to show cause to remain in force until they may have an opportunity to do so. I need hardly say that I express no opinion upon what the action of this court would be if the application were to enjoin the defendants, pending this suit, from assigning or otherwise disposing of the judgment obtained by them in New York, or if the action sought to be enjoined was designed to destroy the basis of this suit by obtaining, through the use of the New York judgment, title to the Napier stock, and it were made to appear that equitable considerations required that, pending the determination of this suit, the title should not be disturbed. These questions are not before me.

Settle order on notice.

(39 N. J. Eq. 361)

ROSS v. ROSS. (No. 41/28.)

(Court of Chancery of New Jersey. July 10, 1918.)

DIVORCE \S 129(16) — EVIDENCE — SUFFICIENCY.

Evidence held to warrant decree of divorce on ground of wife's adultery.

Petition by William R. Ross against Eleanor Ross. Decree for petitioner.

Queen & Stout, of Jersey City, for petitioner. J. Emil Walscheid, of Union, for defendant.

LEWIS, V. C. The petitioner in this case has presented evidence that convinces me that he is entitled to a decree for divorce against his wife. The parties were married on February 27, 1907. He was a motorman, and she was employed as a domestic. Their residence was in Brooklyn until the summer of 1907, when the petitioner came to live in this state. One child, born July 29, 1908, was the fruit of the union, and at the time of this hearing is being cared for by Mrs. Margaret Ross, an aunt of the petitioner; all expenses in connection with the same being paid by the petitioner. Shortly after the birth of the child, troubles arose in the household, owing to the use by the defendant of intoxicating liquors. She was arrested at times, and the petitioner procured her release, but finally, she was sent to the House of Good Shepherd in Brooklyn. From this institution she was also discharged through the intercession of the petitioner, but she was again arrested. Upon her release on this occasion, she brought suit in Brooklyn against her husband for separate maintenance. It was then that the petitioner took up his residence in New Jersey, and they lived apart

from August, 1909, to September, 1915. The petitioner then wrote to his wife, asking her to come to New Jersey, and they met and made arrangements, the result of which was the taking of an apartment at No. 299 Monmouth street, Jersey City. At this address they lived together from September, 1915, until December, 1915. The defendant for a short time abstained from the use of intoxicants, and then resumed her habits, which she continued until December 10th, and on this date the testimony discloses that she set fire to her apartment and was arrested on a charge of drunkenness. After a hearing, she was convicted in the Second criminal court of Jersey City and sentenced to the county jail for 90 days.

A consideration of the conduct, habits, and disposition of the defendant leads one unhesitatingly to the conclusion that her morals were such that she might commit the offense charged against her under the circumstances as related by the correspondent, William Skow. Her solicitor contended that the views expressed and the rules laid down in the case of *Letts v. Letts*, 79 N. J. Eq. 630, 82 Atl. 845, Ann. Cas. 1913A, 1236, should be applied; but, as I indicated at the time, I think the evidence in this case reveals an entirely different situation. The vulgarity of the story told herein does not necessarily lead a reasonable person to regard it as entirely improbable. The correspondent stands unimpeached. There is nothing before me to indicate that his testimony was not given in the interests of justice. His story must be received with great caution and scanned carefully. This was done, and a searching cross-examination failed to shake it. It has corroboration from other lips, and one observing the correspondent and these witnesses must have been impressed with the fact that they were ingenuous and relating a truthful account of the defendant's relations with Skow. He says that he had intercourse with her on two occasions. These offenses were committed on November 28, 1915, and the second on December 5, 1915. They took place in a woodshed in a cellar of No. 299 Monmouth street, Jersey City. Skow's evidence as to the first occasion is as follows:

"Q. Will you describe to the court just when it was, and where it was, and under what circumstances it took place? A. Well, I was down chopping wood one Sunday morning, and Mrs. Ross came down while I was chopping wood, and she asked me for 10 cents, and I pushed her away and told her not to bother me, and then I goes up and goes over to the other woodshed, and she comes in after me, and she threw her arms around me, and she asked me again for 10 cents, and I said, 'No,' and she kept on pleading, and wanted me to be sure that I will come down this afternoon, and she lifted up her clothing, and I gave her a quarter that afternoon. She came down, and she laid on the burlap in the woodshed, and I had connections with her."

His evidence relative to the second occasion is as follows:

"Q. Was there any other occasion when you did that? A. Then the Sunday following I was down there again chopping, and she came down, and she asked me for money, and I gave her a half dollar, and she came down in the afternoon, the same as the first."

Mrs. Christina Skow, the mother of the correspondent, who lived during the events described by her son at the same address as the Ross family, testified that she heard the voices of her son and Mrs. Ross in the cellar. She knew they were down there. Skow says that one of the expressions used by the defendant when in the basement was "Come on." His mother says that on one occasion she heard Mrs. Ross, who was down in the basement, use these words. The effort made to prove that it was impossible to hear a voice in the basement from the Skow apartment failed.

After the arrest and conviction of the defendant in the Second criminal court of Jersey City, Ross asked Mrs. Skow if she knew anything about his wife, and Mrs. Skow told him to ask her son William. Mrs. Skow had previously informed Ross, whose apartments were opposite hers, that his wife was continually in the cellar, and that she was with men. Ross talked to Skow, the correspondent, and the latter told him that he had had intercourse with Mrs. Ross. Upon examination, he gave as his reason for disclosing to the petitioner his relations with the defendant that he felt it his duty to see Ross right, as his wife was carrying on and had set fire to the house. It was quite apparent that Skow and Ross were unsophisticated. After hearing the correspondent's story, the petitioner went with Skow, the correspondent, and Magnus Peterson, to the county jail and confronted his wife there. Peterson, according to the testimony, appears to have accompanied Ross as a friend. A confession as to the commission of the offenses is related by the three. Ross' account is as follows:

"Q. Tell the court what you said, and what she said, and what the others said. A. I asked her how much money she got off William Skow, and she at first said, 'No,' and I said, 'Yes, you did,' and she said, 'No,' and I said, 'Yes, you did,' and she said, 'How do you know?' and I said, 'I was told so,' and she said, 'I got 50 cents for one time and a quarter another time,' and I said, 'What did you give him for his money?' and she said, 'Nothing,' and I said, 'Yes, you did,' and she said, 'No, I did not,' so I called in William Skow. Q. Where was he? A. He was sitting out in the little hall, and I called him in, and he stayed back of me, and I asked him if he was lying to me, or who was lying to me, and he said, 'Ross, I am not lying to you,' so finally she said, 'I let Skow have the best of me twice.' Q. Who was there at that time? A. Mr. Peterson."

Peterson and Skow both corroborate petitioner as to the admission of the defendant when confronted by Skow.

Mrs. Ross denies her intimacy with Skow. She admitted having borrowed money from him, but entered a denial of the story of the offenses in the cellar of the Monmouth street

home. Of course, this confession could not alone be relied upon to support a decree for divorce; but it gives corroboration to the story related by the correspondent and the other witnesses of the petitioner. Skow, as above stated, appears to be unshaken in his testimony, and, aside from his improper conduct with defendant, there is nothing affecting his character shown; so the situation is not as in *Clare v. Clare*, 19 N. J. Eq. 37. The story as told by Skow accords with the defendant's proved habits and character. *Adams v. Adams*, 17 N. J. Eq. 325. I think the requirements for divorce so comprehensively set forth in the case of *Berckmans v. Berckmans*, 17 N. J. Eq. 453, are met by the testimony offered in this case.

I shall, in accordance with the views above expressed, advise a decree nisi for the petitioner.

(89 N. J. Eq. 159)

IN RE McADAMS.

(Prerogative Court of New Jersey. Feb. 15, 1918.)

1. INSANE PERSONS — GUARDIANS — WHO MAY BE APPOINTED.

That the clerk in chancery, who consulted with counsel conducting proceedings under a commission in the nature of a writ of *de lunatico inquirendo* issued out of the Court of Chancery, and gave him information which aided in the proper development of the petitioner's case, did not disqualify the clerk from afterwards being appointed guardian of the lunatic by the orphans' court, on the ground that the clerk was practicing law before the commission.

2. INSANE PERSONS — APPOINTMENTS OF GUARDIAN — WHO MAY BE GUARDIAN.

Under 2 Comp. St. 1910, p. 2781, § 1, the orphans' court may appoint any fit and discreet person guardian of a lunatic; a mother or next of kin not having a preference.

Appeal from Orphans' Court, Union County.

In the matter of the appeal from an order of the orphans' court of the county of Union, appointing Robert H. McAdams guardian of Catherine Morrissey, a lunatic. Order affirmed.

Herbert C. Gilson, of Jersey City, for appellants. William D. WolfsKell, of Elizabeth, for respondents.

WALKER, Ordinary. This is an appeal from an order of the Union county orphans' court appointing Robert H. McAdams, Esq., guardian of Catherine Morrissey, a lunatic.

Catherine Morrissey having been adjudged a lunatic under a commission in the nature of a writ of *de lunatico inquirendo* issued out of the Court of Chancery, a transcript of the proceedings in that court was duly filed in the Union county orphans' court, which court, by order, duly appointed Robert H. McAdams, Esq., who is the present clerk in chancery, guardian of the lunatic. There was a contest over the guardianship in the orphans' court between relatives of the luna-

tic. Certain of them filed a petition praying for the appointment of a guardian other than Mr. McAdams, upon grounds set forth in the petition, the salient ones being that Mr. McAdams had been attorney for the lunatic for a number of years, and had been active in keeping the petitioners away from her, and keeping them ignorant as to her mental condition, and also because, on the hearing under the commission, Mr. McAdams appeared with Mr. WolfsKell and consulted and conferred with him during the progress of the proceedings; and they invoke rule 35 of the Court of Chancery, which provides that the clerk of the court shall not practice either as a solicitor or as a counselor in the court, as a reason why Mr. McAdams' appointment should be reversed.

[1] Whether practicing in the Court of Chancery as solicitor or counsel by the clerk in chancery in a lunacy proceeding would disqualify the clerk afterwards from being appointed guardian of the lunatic by the orphans' court it is not necessary to decide, because what was done by Mr. McAdams in this case was not practicing in the court. Mr. McAdams had been counsel for the subject of the inquisition. He did not file the petition for the commission, nor address the commissioners, nor examine witnesses upon the taking of the inquisition. This was admitted by counsel for appellants. What he did he had a right to do, and properly did, namely, to consult with counsel who was conducting the proceedings, and give him information which he possessed, and which presumably aided in the proper development of the petitioner's case.

Counsel for the relatives who objected to the appointment of Mr. McAdams asked leave to take depositions in this court to show that Mr. McAdams was active at the counsel table at the hearing before the commissioners and jury. This I denied, not only because the matter of taking testimony in this court on appeal is discretionary with the ordinary, but also because counsel admitted, as above stated, that Mr. McAdams had not addressed the commission or the jury, or examined any witnesses, and, of course, the record discloses that he was not the solicitor of the petitioners. As I remarked before, the only thing he did was what any one possessed of facts bearing upon the case was privileged to do, namely, assist counsel in developing the case.

[2] The appellants placed reliance on the case of *Read v. Drake*, 2 N. J. Eq. 78. It was there decided that under the act of 1820 (Rev. Laws, p. 784) the mother or next of kin were given a preference, and were entitled, if they desired it, to the appointment of guardian of minors under 14 years of age, and could not be passed by, except upon some satisfactory objection made and sustained before the court. That case has no application to the one at bar. That involved the appoint-

ment of a statutory guardian for an infant. This case involves the appointment of a statutory guardian for an insane person. The provision which here governs is to be found in the act concerning idiots and lunatics (Comp. Stat. p. 2781, § 1), which provides that in case of lunacy found the Chancellor shall cause to be transmitted to the orphans' court of the county of the lunatic's residence a certified copy of the proceedings, and the orphans' court is directed and required, on application for that purpose, to appoint some fit and discreet person guardian of such lunatic. It will be observed at a glance that the only qualification here required is the appointment of a fit and discreet person. That Mr. McAdams is fit to be appointed guardian of a lunatic is perfectly clear, and that he is a discreet person I think is equally apparent. That he possessed the qualifications of fitness and discretion was decided by the orphans' court, and there is nothing in the record which suggests any reason why the discretion exercised by the orphans' court in making the appointment should be overturned.

I am of opinion that the order appealed from should be affirmed, and that will be the order.

(92 N. J. Law, 183)

KAUFMAN v. WILLIAMS et al. (No. 51.)
(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

LANDLORD AND TENANT §184(2)—PLEDGE TO SECURE PERFORMANCE OF LEASE—RIGHTS AS AGAINST SUBSEQUENT GRANTEES.

A lessee deposited cash with the lessor as security for the performance of all the covenants and conditions of the lease. The lessor conveyed the land, and with the consent of the lessee paid over the deposit to the grantee, who made an express agreement with the lessee to hold the deposit in accordance with the terms and conditions of the lease. The grantee subsequently conveyed, subject to the lease. Whether, in the settlement between the parties to this conveyance, the deposit reached the hands of the new grantee, or remained in the hands of the first grantee, was a disputed question. The lessee upon the termination of his lease sued for the deposit. *Held*, that the deposit was a pledge, and that the first grantee was liable to the lessee therefor under the express agreement, and that the second grantee was liable only in case the deposit had reached her hands.

Appeal from Circuit Court, Essex County.

Action by Benjamin H. Kaufman against Elma Mennen Williams and others. From a judgment on a directed verdict in favor of defendant Meyer, and against defendants Williams and Mennen as individuals, defendants Williams and Mennen appeal. Affirmed as to defendant Meyer, and reversed as to defendants Williams and Mennen.

Charles J. Basch, as landlord, and Benjamin H. Kaufman, as tenant, entered into a lease of property owned by Basch, which recited that the tenant had deposited with the

landlord, upon delivery of the lease, \$5,000 as security for the performance of all its covenants and conditions. It was thereby agreed that, if the tenant paid the rent and performed the conditions and covenants, the landlord would return the deposit to the tenant upon the termination of the lease, and that interest thereon should be paid semiannually to the tenant. One provision of the lease was that the term "landlord" should be construed as meaning Basch, "his executors, administrators, or assigns," and that the term "tenant" should be construed as meaning Kaufman, "his executors, administrators, or assigns." Another provision was that the covenants contained in the lease were binding on the parties thereto and their successors in interest. Basch conveyed the property in fee to Meyer, subject to "all stipulations, agreements, and covenants which * * * now are obligatory upon the owner or now owners of said premises," and subject, further, to the Kaufman lease. Meyer within a month thereafter entered into an agreement under seal with Kaufman, by which he assumed the lease and all the terms thereof, acknowledged the receipt of \$5,000 from Basch, pursuant to the terms of the lease, and agreed to hold that sum as a deposit in accordance with the terms and conditions of the lease. Thereafter Meyer conveyed to Elma C. Mennen in fee, subject to all existing leases and tenancies, specifying the Kaufman lease. This deed contained the same provision as to stipulations, agreements, and covenants, which "now are obligatory upon the owner or now owners of said premises." Meyer continued, notwithstanding his deed to Mennen, to pay Kaufman the semiannual interest on the \$5,000 for four years thereafter, including each semiannual installment that came due during Mrs. Mennen's life. She died October 25, 1916. Elma Mennen Williams and William Gerhard Mennen are her executors, and also her residuary devisees. The property in question was devised to them. Kaufman paid the rent until three months before the expiration of his term. The rent for the last three months he has not paid. This suit is brought by him against Meyer, Mrs. Williams and Mr. Mennen as executors of Elma C. Mennen, and as individuals. He claims judgment in the alternative against Williams and Mennen, as executors or as individuals, in the sum of \$2,500 (the \$5,000 deposit less the unpaid rent), or against Meyer in the sum of \$5,000. The trial judge directed a verdict in favor of Meyer, and against Williams and Mennen as individuals, for \$2,500 and accrued interest.

Scott German, of Newark, for appellants. Jacob Fischel and Wilbur A. Heisley, both of Newark, for respondent Meyer. Samuel F. Leber, of Newark, for respondent Kaufman.

SWAYZE, J. (after stating the facts as above). The trial judge held that Williams and Mennen were liable as individuals by reason of the provisions of the lease. This could only be if the covenant to return the deposit was a covenant running with the reversion. On no other theory could Williams and Mennen be held liable on Basch's covenant. We think there was a misconception of the legal situation. The true state of the case is that \$5,000 was pledged with the landlord as security for the rent. The covenant to repay the deposit did not change its character. It remained a deposit by way of pledge. Later Meyer, the then landlord, and Kaufman the tenant entered into a new agreement, either assenting to or authorizing the transfer of the pledge by Basch to Meyer, and this transfer was made. Thereby the pledgor substituted Meyer for Basch as pledgee, and Basch, having parted with the pledge with the assent of all parties in interest, was discharged from further liability. Meyer became liable to Kaufman on his agreement to hold the deposit in accordance with the terms and conditions of the lease, and no contract or conveyance by Meyer without Kaufman's consent could deprive the latter of his rights. When Meyer subsequently conveyed to Mrs. Mennen, he remained a pledgee, and liable to her as such, by reason of her becoming entitled to the debt secured, unless he transferred the pledge to her. The only question is, in case Meyer still holds the pledge, whether under the terms of the lease there is a present liability of Meyer to return the deposit. By those terms it was to be returned at the termination of the lease if the rent had been paid. The lease has terminated, but the rent has not been fully paid. The suit is therefore prematurely brought against Meyer. The judgment in his favor must be affirmed on that ground, and on that ground alone.

We cannot agree with the learned trial judge that Mrs. Williams and Mennen can be held individually as owners of the land by reason of the covenants in the lease. The suit is to recover a deposit held in pledge as security for the performance of the covenants in the lease. The pledgee is liable as such, not as lessor. So far as concerns the legal situation, the deposit might as well be made with a trust company. The liability to return the deposit to Kaufman runs not with the reversion but with the pledge, if we may use that form of expression. Whether Mrs. Mennen or her estate or devisees can be held by reason of the acceptance of a deed from Meyer, subject to all stipulations, agreements, or covenants obligatory upon him, is a question not now presented. Even if, upon a proper construction of the deed, it should be held that the language amounted to an assumption of the liability of Meyer or an agreement to indemnify him, Kaufman was

not a party to the deed, and cannot enforce Meyer's right in a court of law against the Mennens. *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650. The deed contains no covenant in favor of Kaufman. If the Mennen estate can be held at all by Kaufman, it can only be because, in the passing of the title, the \$5,000 deposit was allowed to her as a deduction from the purchase price. If this was done, then she in effect received \$5,000 of Kaufman's money held in pledge, and upon his fulfilling the condition of the pledge she must return it. Whether or not she was allowed this deduction is a question of fact, which must be submitted to a jury. If they find that she received it, judgment should go against her executors. If they find that she did not receive it, judgment should go in favor of her executors. Mrs. Williams and Mennen as individuals are in any event entitled to a judgment in their favor. The present judgment against them must be reversed.

We reiterate by way of caution that the judgment in favor of Meyer is affirmed only because, as to him, the suit is prematurely brought. His ultimate liability may be determined hereafter. Technically, perhaps, the suit is prematurely brought against Williams and Mennen, even if they have had the \$5,000, since confessedly the rent was not fully paid when the suit was begun; but a credit of the amount of rent against the deposit is in effect payment, and there can be no difficulty in making this credit, if Mrs. Mennen has had the money.

(32 N. J. Law, 190)

MAUSERT v. MUTUAL DISTRIBUTING CO. (No. 30.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES §=260—SALE—DEMAND.

A demand on the mortgagor to perform the condition of his mortgage is a condition precedent to a valid seizure and sale of the mortgaged chattels, where there can be no default until demand.

2. CHATTEL MORTGAGES §=260 — DEMAND FOR PAYMENT—SUFFICIENCY.

Where a chattel mortgage is payable on demand, there can be no default until demand; but in such case a lawful notice of intention to sell the chattels for the purpose of making the debt is equivalent to demand of payment, when the mortgagor has rendered an actual demand impossible by his flight and concealment.

3. CHATTEL MORTGAGES §=292(1)—CONVERSION OF MORTGAGED CHATTELS—DEFENSES.

It is a defense to an action by the mortgagor against the mortgagee, for conversion of the chattels covered, that the mortgagor has consented to, or ratified, the acts of the mortgagee; and such ratification may be inferred from evidence that for two years after seizure and sale for the purpose of making the mortgage debt the mortgagor expressed no dissatisfaction, but, on the contrary, before bringing suit, purchased

of the mortgagee a part of the chattels, which the latter had bought at the sale to protect itself, and had also, with full knowledge of the facts, accepted from the mortgagee a voluntary payment of the difference between the amount of the debt and what the mortgagee had realized from the chattels purchased at the sale.

Appeal from Circuit Court, Essex County.

Action by Frederick William Mausert against the Mutual Distributing Company, a corporation, for conversion of chattels. From a judgment for plaintiff, defendant appeals. Reversed, and venire de novo awarded.

Reed & Reynolds, of Newark, for appellant. Palmer Bradner and Frank E. Bradner, both of Newark, for appellee.

TRENCHARD, J. This suit was brought to recover damages for the conversion by the defendant of certain chattels of the plaintiff. The defendant, in its answer and at the trial, claimed to be a purchaser of such chattels at a sale thereof under a chattel mortgage given by the plaintiff to the defendant, and so sought to justify its possession. The learned trial judge directed a verdict for the plaintiff, leaving to the jury only the amount of the damages.

We are of the opinion that the direction of a verdict cannot be sustained. It appeared that the mortgage in question was upon the condition that if the mortgagor should pay to the mortgagee "on demand, at the office of said Mutual Distributing Company [mortgagee] in Newark, N. J., the sum of \$682.88, then these presents shall be void," and further provided that in case of default in payment it should be lawful for the mortgagee to take and sell the chattels covered, and out of the proceeds to retain and pay the mortgage debt, and render the overplus to the mortgagor. Of course, under such a mortgage, upon default the mortgagee may, upon due notice to the mortgagor, sell the chattels covered by the mortgage for the satisfaction of the mortgage debt, without resort to any court for a decree of foreclosure. *Freeman v. Freeman*, 17 N. J. Eq. 44. And that was what the defendant (the mortgagee) undertook to do.

[1] But it appeared that the mortgagee had not made an actual demand of payment on the mortgagor, and the trial judge considered that in the absence of such a demand there was no default, and that therefore the sale was a nullity. It was upon that ground that he directed a verdict for the plaintiff. No doubt a demand on the mortgagor to perform the condition of his mortgage is a condition precedent to a valid seizure and sale of the mortgaged chattels, where there can be no default until demand. *Goodrich v.*

Willard, 2 Gray (Mass.) 208. And where, as in the present case, a chattel mortgage is payable on demand, there can be no default until demand. *Goodrich v. Willard*, 2 Gray (Mass.) 208; *Ely v. Carnley*, 19 N. Y. 496; *Slingo v. Steele-Wedeles Co.*, 82 Ill. App. 139. The case of *Security Trust & Safe Deposit Co. v. N. J. Paper Board, etc., Co.*, 57 N. J. Eq. 603, 42 Atl. 746, is not to the contrary. The well-recognized rule that an action at law may be brought on a promissory note, or a bond payable on demand, immediately after its delivery and before any actual demand has been made, has no application here. A chattel mortgage has characteristics which a note or bond has not. It is a security for a debt, and the mortgagor has a right to redeem the chattels by payment of the debt.

[2] But even in the case of a chattel mortgage payable on demand a lawful notice of intention to sell the chattels for the purpose of making the debt is equivalent to demand of payment, when, as here, the mortgagor has rendered an actual demand impossible by his flight and concealment. *Goodrich v. Willard*, 2 Gray (Mass.) 208. In the present case the evidence tended to show that immediately after the mortgage was executed the mortgagor abandoned his place of business and residence in this state, and secreted himself outside the state in such a manner that plaintiff could not ascertain his whereabouts. The evidence also tended to show that lawful notice of the intention to sell was given by the mortgagee.

[3] There is another reason why the mere absence of actual demand of payment did not justify a direction of a verdict in favor of the plaintiff. It is a defense to an action by the mortgagor against the mortgagee, for conversion of chattels covered, that the mortgagor has consented to, or ratified, the acts of the mortgagee. *Merritt v. Ward*, 113 Ill. App. 208. In the present case the evidence tended to show that, for more than two years after the mortgagee had taken and sold the chattels, the mortgagor expressed no dissatisfaction with the mortgagee's conduct, but, on the contrary, before bringing this suit, purchased of the mortgagee a part of the chattels, which the latter had bought at the sale to protect itself, and had also, with full knowledge of the facts, accepted from the mortgagee a voluntary payment of the difference between the amount of the debt and what the mortgagee had realized from the chattels purchased at the sale. This evidence permitted of the inference that the mortgagor had ratified the acts of the mortgagee.

The judgment below will be reversed, and a venire de novo awarded.

WHITE v. GRAVES et al. (No. 43/338.)
(Court of Chancery of New Jersey. July
10, 1918.)

1. WILLS §=439 — CONSTRUCTION — INTENTION OF TESTATOR.

The cardinal principle in construing wills is to ascertain the real intention of testator.

2. WILLS §=440 — CONSTRUCTION — TESTATOR'S INTENTION FROM WILL.

The intention of testator is usually gathered from the will itself.

3. WILLS §=441 — CONSTRUCTION — TESTATOR'S INTENTION—CIRCUMSTANCES.

Where the language of the will is of doubtful meaning, attendant circumstances may be taken into consideration in ascertaining testator's intention.

4. WILLS §=439 — CONSTRUCTION — TECHNICAL RULES OF CONSTRUCTION.

Technical rules of construction are designed to assist the court in and not prevent the court from ascertaining testator's intention.

5. WILLS §=692 — CONSTRUCTION OF TESTAMENTARY POWER.

Where testator directed that, upon wife's death, property held in trust should be sold and proceeds paid "to my children or to benevolent objects, in such proportions, as my wife may appoint," he gave his wife power to apportion his estate among his children and benevolent objects, and each of the members of the classes; the words "in such proportions" applying to "children" as well as "benevolent objects."

6. WILLS §=692—POWER OF APPOINTMENT—INVALID APPOINTMENT.

Where testator empowered wife to apportion the proceeds of the sale of trust property "to my children," an appointment to the widow of a deceased son is void.

7. WILLS §=692—VOID PROVISION IN WILL PURSUANT TO POWER OF APPOINTMENT.

Where wife is empowered to apportion proceeds of the sale of trust property, a provision in her will attempting to charge upon the residue moneys alleged to have been loaned by two beneficiaries to the estate is void.

8. WILLS §=692—POWER OF APPOINTMENT—UNAUTHORIZED PROVISION OF WILL.

Where husband's will empowered wife to apportion the proceeds of sale of property held in trust to his children, a provision in wife's will that the children, to whom she had apportioned shares in such fund pursuant to the appointment, should invest money and use income, and that remainder should go to issue of such children, held void.

9. WILLS §=692—POWER OF APPOINTMENT—VOID APPOINTMENT.

Where wife, pursuant to power of appointment given her by husband's will, apportions proceeds of sale of trust property among the children specified in husband's will, the fact that she made a void appointment, and made invalid provisions concerning the enjoyment of the estate by the beneficiaries, does not vitiate the valid appointments.

10. WILLS §=589—EXERCISE OF POWER IN RESIDUARY CLAUSE.

Power of appointment may be exercised in a residuary clause.

11. WILLS §=589 — CONSTRUCTION — EXERCISE OF POWER OF APPOINTMENT.

Where testator, in residuary clause, referred, not only to residue of her estate, but to residue of trust fund over which she had power of appointment, and one-fourth of trust fund had not been disposed of, the residuary clause was an appointment of the undisposed one-fourth to the residuary legatee.

12. WILLS §=692 — APPOINTMENT — EXERCISE.

Where wife is empowered to apportion trust fund among testator's children, and gives one-fourth each to testator's two sons by first marriage, and also one-half to her daughter, the wife will not be held to have committed a fraud upon the power, although the sons are in more need of assistance than the daughter.

Bill by Mary R. White, trustee under the will of Edwin Graves, deceased, against Edwin Augustus Graves and others. Decree advised in accordance with opinion.

Minton & Day and O. Franklin Wilson, all of Morristown, for complainant. Francis H. McGee, of Trenton, and Gilbert Collins, of Jersey City, for answering counterclaimants. Raymond C. Matthews, of Morristown, for certain answering defendants.

LANE, V. C. The case requires the construction of the twelfth (called in the will the eleventh) paragraph of the will of Edwin Graves, deceased, and that of Mary J. Graves, deceased. The paragraph of the Edwin Graves will reads as follows:

"Eleventh. The residue of my estate which I have hereinbefore given to my executors in trust for my family, I desire and direct them and the survivor of them to so hold in trust as long as my wife lives, and at her decease I direct them to sell my real estate, or such real estate as they may have purchased according to the provisions hereinbefore contained and convert the same into money and to pay the same with the proceeds of the personal property held by them in trust, to my children or to benevolent objects, in such proportions, as my wife may by her will or other writing in the nature thereof appoint, having entire confidence in her judgment in that respect, and having no desire to give to my children any more of my estate than I have herein given to them, unless some unforeseen contingency may render such increase necessary or advisable, of which I wish my wife to be the judge."

The question is whether, under this provision, the children take under the will, unless the wife has appointed to benevolent objects, or whether the children take only such shares as the wife has seen fit to appoint to them.

By the eighth paragraph of his will the testator had provided:

"Eighth. All the rest and residue of my estate, both real and personal, wheresoever the same may be situated, I give, devise, and bequeath unto my executors hereinafter named and to the survivor of them, in trust to and for the following uses, purposes and trusts: To permit my wife and family to occupy my present residence as heretofore, to rent out any other real estate I may own and to invest the personal estate according to their discretion and receive the rents, and income and pay the same to my wife Mary, semiannually, to be by her appropriated for the support and maintenance of my family and the education of my children, and the surplus to appropriate to benevolent objects according to her discretion and according to my practice heretofore."

The wife, Mary J. Graves, upon her death, left a will, the third paragraph of which reads as follows:

"Third. In pursuance of the power of disposition and appointment given to me in the

last Will and Testament of my deceased husband, Edwin Graves, and after carefully considering all existing circumstances and probable future conditions, I do appoint and dispose of the property and estate which comes within the power hereinbefore stated as follows:

"During the many years intervening since the death of my said husband I have annually devoted to charity considerable portions of the income by me derived from my said husband's trust estate, which gifts and benefactions I feel would completely fulfill the desires of my husband concerning benevolent objects, therefore, and in further consideration of the present circumstances of my family, I make no further gifts to benevolent objects.

"A. In the exercise of the power of disposition aforesaid, I give to my daughter, Mary R. White, the pictures, household furniture, and articles of household use, which were my husband's at the time of his decease; and the books which were my husband's, I direct shall be equally divided between my sons, Edwin A. Graves and George M. Graves.

"B. My daughter, Mary R. White, and my son, Walter Graves, having jointly loaned to the said trust fund of my said husband's estate the sum of thirty-two hundred and seventy dollars, I do order and direct that of said sum, sixteen hundred and thirty-five dollars be paid to my daughter, Mary R. White, and sixteen hundred and thirty-five dollars thereof be paid to Julia R. Graves, the widow of my said son, Walter Graves.

"C. The residue of said trust fund, thereafter remaining, I do order and direct to be divided in four equal parts, one-fourth of which I give and bequeath to my son, George M. Graves; one-fourth part thereof, I give and bequeath to my son, Edwin A. Graves; one-fourth thereof, I give and bequeath to my daughter, Mary R. White. It is my desire, however, that my children securely invest the legacies in this paragraph given to them, and use the income for their personal benefit during their respective lives, with remainder on the decease of such legatee to his or her children. If any of my children in this paragraph named be deceased at the time of my death leaving child or children, then such child or children of my deceased child shall take the part which his, her or their parent if living at the time of my decease would have taken. It is my desire that my homestead premises after my decease be retained for the use of my family or be rented until such time as a fair and adequate price can be obtained for it.

"D. Another one-fourth part thereof I give and bequeath unto Julia R. Graves, widow of my said deceased son, Walter, but I charge this gift with the payment of twenty-two hundred dollars, which by my said son, Walter, was owing to me at the time of his decease. If, at the time of my death, the said Julia R. Graves be deceased, then I give and bequeath that which she would have taken if living under this legacy unto my said daughter, Mary R. White."

[1-4] The widow, Mary J. Graves, was the third wife of Edwin Graves. He left him surviving two sons by his first wife, one son by his second wife, and a daughter by his third wife. At the time of the death of Mary J. Graves, the two sons by the first wife and the daughter by the third wife were surviving. The son by the second wife died, leaving a widow, Julia R. Graves. As has been so often said, the cardinal principle in the construction of wills is to get at the real intention of the testator. This is usually to be gathered from the will itself, although attendant circumstances may, of course, be taken into consideration, if the language us-

ed be of doubtful meaning. Technical rules of construction are designed to assist the court in, and not prevent the court from, ascertaining the intention of the testator. *Deats v. Ziegner*, 82 N. J. Eq. 605, 89 Atl. 31. If I could see my way clear, I would put upon the will the construction insisted upon by the respondents, to wit, that the children take under the will, and that the power of appointment to the wife was limited to designate such benevolent objects as she saw fit, and that the words "in such proportions" apply either to proportions between children and benevolent objects as classes, or proportions among benevolent objects. If so construed, the testator would not have made it possible that, in the absence of an exercise of the power of the appointment by the widow, he would have died intestate as to the entire residue of his estate; there would be secured to the children, in the absence of an appointment by the wife to benevolent objects, an equal division of the estate; and the widow would not have had it placed within her power to discriminate among the children, only one of whom was hers.

[5] My first impression, upon reading the will, without a knowledge of the attendant circumstances, was that under it the widow might apportion among the children and benevolent objects and each of the members of the classes. It was not until the result of such a holding was brought forcibly to my mind that I thought I could see that another construction might be placed upon the language used. I have examined the will since in the light of the arguments and briefs of counsel, and have endeavored to ascertain whether there was any such doubt upon the face of the will as that, considering the surrounding circumstances, the court might be permitted to put upon the will such a construction as would result in a fair and reasonable distribution of the estate. I have failed to find such a doubt. The language used is not technical. The draftsman undoubtedly, in reducing to writing his ideas, used the language which first came into his mind to express them. It seems to me that, under these circumstances, the impression which is made by a first reading is more likely to convey to the reader the real intention of the draftsman than the impression which is only arrived at by a careful, technical scrutiny of the language used and the application of technical rules of construction. I have tried both methods, and have been unable to shake my first impression. I think that the phrase "in such proportions" applies both to children and benevolent objects; that the testator intended to give his wife complete power to apportion his estate among his children and benevolent objects in such manner as she should deem proper under the circumstances existing at the time of the making of her will. The respondents would read the clauses in the will as follows:

"To my children, or to benevolent objects, in such proportions as," etc.

I cannot so read them, and I think that the latter clauses are in opposition to any such reading.

[6-9] The appointment made by Mary J. Graves to Julia R. Graves, the widow of the deceased son, is admittedly void. So, also, is the attempt to charge upon the residue moneys alleged to have been loaned by Mary R. White and Walter Graves to the estate, as is also the attempt of the testator to interfere with the enjoyment of the estate by the beneficiaries. That the testator has, however, included within her will these void provisions, does not vitiate the valid appointments. I think she validly appointed to the two sons by the first marriage and the daughter, Mary R. White, each one-fourth of the estate.

[10, 11] This leaves one-fourth undisposed of, and of which the testator, Edwin Graves, is now intestate, unless the residuary clause of the will of Mary J. Graves may be considered an appointment of this quarter to her daughter, Mary R. White. A power of appointment may be exercised in a residuary clause. It is not necessary that technical words be used; if it clearly appears from the document that the power of appointment was intended to be exercised, it will be considered as having been exercised. That the testator had in mind that, although she had previously disposed of the whole of the residue of her husband's estate, yet some contingency might arise, as has arisen, by which there would be a residue undisposed of, is clear. In the residuary clause of her will she distinctly refers, not only to the residue of her estate, but to the residue of the trust fund. Her intention was that if, for any reason or other there should be anything left over not legally disposed of, that residue should go to the daughter, Mary R. White. I think, therefore, that there was an appointment by the will of Mary J. Graves of the illegally appointed quarter to Mary R. White.

[12] It is lastly insisted by respondents that, because it appears that the two sons by the first wife are much more in need of assistance than the daughter by the third wife, the testator, Mary R. Graves, committed a fraud upon the power. The testator, Edwin Graves, expresses entire confidence in the judgment of his wife, and makes his wife judge of the happening of the unforeseen contingency referred to in his will. It would have to be a very clear case indeed before this court would interfere, and substitute its judgment for the judgment of the person designated by the testator. While it is true that the daughter, Mary R. White, is financially in a much better position than the two sons by the first marriage, it is likewise true that she is a woman and they are men, and that they are much older than she, and there-

fore, in the nature of things, will not require assistance so long as she may. I do not think that there has been such discrimination in this case as would permit the court to find that there was fraud.

It is suggested in the briefs of counsel that the poverty of the two sons by the first wife is the only unforeseen contingency which would warrant the widow in appointing to children rather than to benevolent objects; but this does not follow. The will of Edwin Graves was made in 1860. While the provision made by him in his will at that time may have been ample for the children, at the time of the making of the will of Mrs. Graves in 1912 such provision may have been totally inadequate. Conditions have changed. The value of money has fluctuated to a great extent. The testator does not require that the unforeseen contingency should be such as would make it necessary that there should be an increase; he says, "necessary or advisable," and he makes his wife the judge.

I will advise a decree in accordance with these views, which decree will provide for the immediate liquidation and distribution of the estate. Decree may be submitted on two days' notice.

(91 N. J. Law, 544)

BROWNE v. HAGEN.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

1. MUNICIPAL CORPORATIONS §183 — OFFICERS—CIVIL SERVICE.

The Civil Service Act applies only to those offices the terms of which are not fixed by law.

2. MUNICIPAL CORPORATIONS §191—HEALTH OFFICERS—CIVIL SERVICE—"TERM FIXED BY LAW."

Under 2 Comp. St. 1910, p. 2660, § 31, authorizing local boards of health to appoint subordinate officers and fix their terms, and an ordinance appointing health inspector for three years, with right to hold over until appointment of a successor, one so appointed held office for a "term fixed by law," and he did not come within the protection of the Civil Service Act, nor hold office during good behavior.

Appeal from Supreme Court.

Quo warranto by the State, on the relation of J. Alexander Browne, against Orville R. Hagen. From a judgment (100 Atl. 857) for relator, respondent appeals. Reversed.

William I. Lewis, of Paterson, for appellant. Peter J. McGinnis, of Paterson, for appellee.

GUMMERE, C. J. This is a quo warranto proceeding, brought for the purpose of determining the title to the office of health inspector of the city of Paterson. The relator by his information challenges the right of the respondent, Hagen, who is the incumbent, to continue in the occupation of the office, and asserts his own right to hold it. The respondent demurred to the information, and upon the hearing before the Supreme Court

judgment was directed for the relator. From that judgment the respondent appeals.

The information discloses the following facts: In November, 1903, the board of health of the city of Paterson appointed Browne, the relator, health officer of that city. On the 13th of November, 1906, the board reappointed him for a term of three years. On the 13th of November, 1909, he was again reappointed for a term of three years, and until his successor should be appointed. At the general election held in the city of Paterson in November, 1912, that municipality adopted the Civil Service Act (Acts 1908, c. 156). Subsequent to its adoption the board of health of Paterson made several attempts to appoint a health officer to succeed Browne, but these attempts were, each of them, ineffectual, because of the inability of the members of the board to agree upon an appointee, until January 12, 1915. On this latter date one Thomas A. Clay was appointed to the office. In the meantime, and until the appointment of Dr. Clay, the relator continued in the occupation of the office and in the enjoyment of its emoluments. Dr. Clay entered into the possession of the office shortly after his appointment, and continued to hold it for nearly two years, and then resigned. The board of health accepted his resignation, and on the 14th of November, 1916, appointed Hagen as his successor. Some little time after this latter appointment the relator filed the present information, and seeks to support it upon the ground that, being legally in office at the time of the adoption of the Civil Service Act, he was by virtue of its provisions entitled to hold the office during good behavior.

[1, 2] The civil service law applies only to those offices the terms of which are not fixed by law. The question which the present case presents, therefore, is this: Was the office of health inspector of the city of Paterson, which was held by Dr. Browne at the time of the adoption of the civil service law by that city, one the term of which was fixed by law, or one which had an indefinite term? The power of the board of health of Paterson to appoint a health inspector at the time of the appointment and reappointments of Dr. Browne to that position was conferred by the thirty-first section of the General Health Act of 1887 (Comp. Stat. p. 2669), which provides that:

"Local boards of health shall have power and authority to appoint such subordinate officers and agents * * * as they may deem necessary, to fix the term of such appointments and the compensation of such appointees."

This section not only authorizes the creation of the office of health inspector, but in express words empowers the board to fix the term thereof. As has already been pointed out, the appointment of Browne in 1909 was for a definite term of three years, with authority to remain in the occupation of that office after the expiration of the term until

his successor should be appointed. We are therefore to consider whether the holder of an office, who has been appointed by a resolution declaring the term during which he shall hold it, coupled with a further declaration entitling him to continue in the office after the expiration of that term until his successor is appointed, occupies an office the term of which is fixed by law. On the authority of earlier decisions, we think it must be declared that he does.

In this case of *Peal v. Newark*, 66 N. J. Law, 265, 271, 49 Atl. 468, the common council of Newark passed a resolution appointing Peal as superintendent of buildings for the period of two years, at a salary of \$1,500 per year, and this court held that, assuming the resolution to have been passed by legal authority, it fixed the term of the appointee. In the later case of *McGrath v. Bayonne*, 85 N. J. Law, 188, 89 Atl. 48, this court had before it the legal effect of a resolution adopted by the board of councilmen of the city of Bayonne, appointing one Noolan to the office of assistant building inspector, and fixing the term of the position at one year. It was held by this court that the appointment was for a term fixed by law; the declaration of this court being that a resolution of a municipal body which declares the term of its appointee, such action being in the exercise of a power conferred upon it by the Legislature, is as much the fixing of a term by law as if the Legislature itself had acted in the premises.

These two cases would be dispositive of the question involved in the present proceeding, except that in the resolutions then under consideration there was no provision that the appointee should hold over after the expiration of his term until the appointment of his successor, and the contention on the part of the relator is that this provision changes what would have been a definite into an indefinite term. A similar question was presented to the Supreme Court in the case of *Rightmire v. Camden*, 50 N. J. Law, 43, 18 Atl. 30. The city charter of Camden provided for the election of a receiver of taxes, fixing the term of his office at three years, and until his successor should be chosen and qualified. The court held that the term of this officer expired at the end of three years from his election, following the decision of this court in *Haight v. Love*, 39 N. J. Law, 479, 23 Am. Rep. 224, and then proceeded as follows:

"Nor is the principle above cited"—that is, the principle upon which *Haight v. Love* was rested—"impaired or modified by the fact that the statute which created the office provided that the incumbent should hold until his successor qualified. Such a provision was not designed to extend the tenure of office of the incumbent beyond the specified time for his benefit. Its purpose was to conserve the public interests, that there might be no vacancy in office through the delay of the successor to qualify."

We concur in the view thus expressed, and consider the declaration equally applicable, whether the incumbent holds over through the delay of his successor to qualify, or through the neglect of the appointing body to perform the public duty which the law has cast upon it of appointing a successor at the expiration of the term, of the incumbent. The relator, having been appointed for a term which was fixed by law, does not come within the protection of the Civil Service Act, and his challenge of the right of the defendant to hold the office of health inspector is therefore without merit.

The judgment under review must be reversed.

(92 N. J. Law, 193)

HOLZAPFEL et al. v. HOBOKEN MANUFACTURERS' R. CO. (No. 47.)

(Court of Errors and Appeals of New Jersey. June 17, 1918.)

(Syllabus by the Court.)

1. ACTION \S 65—AMOUNTS NOT DUE.

Section 21 of the Practice Act of 1912 does not support a suit and entry of judgment therein for moneys not due at the time of beginning the action, though there be installments to accrue, and though there is already a right of action for installments in arrear.

2. MASTER AND SERVANT \S 394—AWARD UNDER WORKMEN'S COMPENSATION ACT—ENFORCEMENT.

A contract to pay weekly sums in settlement of liability of an employer for the death of an employe, equal to the maximum provided in the Workmen's Compensation Act of 1911 (P. L. p. 184), and supplements thereto, may be enforced, by the persons claiming the payments, in the Supreme Court by a common-law action.

3. APPEAL AND ERROR \S 1172(2)—REVERSAL IN PART.

Where the judgment was properly rendered for moneys already due, but was erroneous in providing for moneys not due, it may stand as to the moneys due, and need not be reversed in toto. Rules 131 and 147 are applicable.

Walker, Ch., and Black, J., dissenting.

Appeal from Supreme Court.

Action by Margaret C. Holzapfel and others against the Hoboken Manufacturers' Railroad Company. From a judgment for plaintiffs, defendant appeals. Judgment modified.

Isidor Kalisch, of Newark, for appellant. James D. Carpenter, Jr., of Jersey City, for appellees.

PARKER, J. The appeal is from a judgment entered in the Supreme Court pursuant to an order signed by Judge William H. Speer, of the circuit court, acting as Supreme Court Commissioner by virtue of rules 92 et seq. of this court, which are substantially the same as rules 61 et seq., appended to the Practice Act of 1912 (P. L. p. 395), which order adjudged the defendant's answer sham and frivolous, and directed that judgment be entered against the defendant (appellant) in favor of Margaret C. Holzapfel, and William,

Anna, John, Mary, James, and Margaret Holzapfel, suing by Margaret C. Holzapfel, their next friend, "for the sum of \$260 (being for 26 weekly payments of \$10 each), and for \$10 on the Tuesday of each and every week from and after the date hereof for 262 weeks, with plaintiff's costs to be taxed by the clerk."

The theory upon which judgment was rendered in this form seems to have been that it conformed to the provisions of a contract between defendant and said Margaret C. Holzapfel, acting for herself and for the benefit of the other plaintiffs above named, who are her infant children, and that such judgment was warranted by section 21 of the Practice Act of 1912, which provides that:

"Judgment may be entered in such form as may be required by the nature of the case and by the recovery or relief awarded." P. L. p. 381.

The contract, as will presently more fully appear, provided for payments of \$10 per week until the total of \$3,000 should be paid. At the date of the order 12 weekly payments had been paid, 26 were in arrear, and the other 262 were still to accrue. The commissioner apparently considered that the statute authorized an adjudication which would cover the whole contract once and for all.

[1] We are quite clear that he overstepped the powers conferred by the section quoted. It creates no cause of action where none existed previously, nor does it enable a party to sue in anticipation of a cause of action which has not yet arisen. The general object is, of course, to avoid multiplicity of suits and of judgments, in cases where the rights of all parties may be settled and ascertained with convenience. In effect it is an assimilation to the existing procedure in equity. But even equity ordinarily avoids making an award of money as between debtor and creditor until it is due. *Allen v. Taylor*, 3 N. J. Eq. 435, 437, 29 Am. Dec. 721; *Jordan v. Clark*, 16 N. J. Eq. 243, 247. If it accrue after bill is filed and before decree, a supplemental bill is the proper practice. *Id.*; 16 Cyc. 357; *Story, Eq. Pl.* § 336. It is, of course, elementary at common law that an action cannot be brought to recover money not due. In attachment cases the statute permits it (*Devlan v. Wells*, 65 N. J. Law, 213, 47 Atl. 467); but this is a departure from the common law, and when the action is commenced by summons, no claim that matured after the suit was brought can properly be included in the judgment, even in case of an installment contract (*Felt v. Steigler*, 69 N. J. Law, 92, 54 Atl. 243; *Titus v. Gunn*, 69 N. J. Law, 410, 55 Atl. 735; 1 O. J. 1148). The rule is a meritorious one, certainly as to causes of action to accrue after the judgment, because non constat that payments will not be promptly made as they accrue. It is going far afield to say that this elemental and sen-

sible rule of the substantive common law was intended to be abrogated by a statute relating to practice—to methods of procedure rather than to rights of action. The judgment in this aspect was clearly erroneous.

The other phase of the case requires a somewhat fuller recital of the facts exhibited in the record. William Holzapfel, husband of the adult plaintiff and father of the infants, was in the service of the defendant as a locomotive engineer when he sustained a fatal accident in the course of his employment, and died the same day, leaving the plaintiffs, his widow and infant children. The widow and the defendant, conceiving the case to be one covered by the Workmen's Compensation Act, entered into an agreement in writing which, among other things, mentioned the names and ages of the children, classifying them and the widow as "dependents," and stipulating for a "maximum" payment of \$10 per week and a total compensation of \$3,000. From these and other features of the agreement it may safely be inferred that it was made in view of the provisions of the act, which in case of death calls for a maximum of \$10 per week for 300 weeks. P. L. 1913, p. 306. The agreement was submitted to, and approved by, the Workmen's Compensation Aid Bureau established by P. L. 1916, p. 98. But the act is nowhere mentioned or referred to in the agreement.

[2] It is argued, on the assumption that the agreement in question was made pursuant to the act, that only the court of common pleas, as the forum provided in the statute, had jurisdiction to enforce the agreement, and hence the Supreme Court had none. To this view we do not accede. The original act (P. L. 1911, p. 134) does not particularly contemplate any formal agreement, except as to the amount of compensation in the case of injuries not covered by the schedule. See foot of page 138. There is no allusion to agreements for compensation in death cases. Page 139. In fact, the agreement to compensate would seem to be that implied in the contract of hiring, or conclusively presumed to have been made because of the statute. P. L. 1911, p. 136, par. 9; *American Radiator Co. v. Rogge*, 86 N. J. Law, 436, 92 Atl. 85, 94 Atl. 85; *Id.*, 87 N. J. Law, 314, 93 Atl. 1063. The amendment of 1913 does not recognize the practice of making an agreement after the injury and protects the claimants against an agreement to accept less than they are entitled to by permitting the statutory action in the pleas in spite of it, leaving it open to that court to decide whether a sufficient compensation was stipulated. P. L. 1913, p. 309.

In 1916 the Legislature went a step further and provided that no such agreement should be conclusive unless approved by the Workmen's Compensation Aid Bureau, and that, unless such an agreement approved by

that bureau was filed within 31 days after the injury, the bureau should take the matter up itself by way of settlement, or, in default of settlement, by suit. P. L. p. 97. But nowhere in all this legislation is there any intimation that the agreement, when made and when calling for the full statutory compensation in a case where it is definitely fixed by the statute, and especially when approved by the bureau, as in this case, so that it is conclusive, shall be enforceable only in the court of common pleas. The Supreme Court case of *Parro v. N. Y., S. & W. R. R.*, 85 N. J. Law, 156, 88 Atl. 825, is cited to the contrary, and from the report of that case it appears that there was a "release" whose consideration was the payment of compensation as provided by the terms of the Compensation Act of 1911. If that was all of it (and nothing more appears) the jurisdiction of the common pleas may well have been exclusive, as the amount of compensation must needs be fixed by that court. But in a case like that at bar, where the rate and amount are fixed in exact accord with the maximum laid down in the act, and in words and figures, and not by reference, and the agreement, if made under the act is conclusive we see no reason for denying to our principal court of common-law jurisdiction the power to entertain a suit for arrears of liquidated installments due thereunder. The cited case of *Dupont v. Spocidio*, 90 N. J. Law, 438, 101 Atl. 407, is in no wise to the contrary. All that was there decided, relevant to the present inquiry, is that an agreement for compensation, when made, relieves the claimant of the obligation to bring his suit within one year after the injury.

The next point made is that the agreement was signed by the mother alone, and hence created no rights in favor of the children, because the act of 1916, *ubi supra*, contemplates signature by the dependents. But this argument contains its own refutation, for the agreement in that event becomes, as to the children, an agreement of compromise and settlement at common law, made for their benefit and ratified by them, through a suit thereon to which they are parties plaintiff by their next friend, and by a judgment in which they will be concluded. *Sites v. Eldredge*, 45 N. J. Eq. 632, 18 Atl. 214, 14 Am. St. Rep. 769; 22 Cyc. 698. If they were seeking to repudiate the agreement, the case might be different; but they are standing on it, and defend the judgment.

The last point made is that the judgment does not provide against contingencies mentioned in the Compensation Act, such as remarriage or death of the widow, death of one or more of the children, or their arrival at 18 years of age. It is a sufficient answer to say that our disposition of the case, so far as relates to the payments to accrue in futuro, makes it unnecessary to pass upon this point.

[3] The judgment, as respects the provision for payment of weekly amounts to accrue after its rendition, must be reversed. Whether it properly included any payments accruing after the commencement of the suit is not argued, so we do not pass on this, though we are not to be understood as so intimating. The question then is: Must the judgment be reversed in toto? In our view rules 131 and 147 of the Supreme Court are applicable, and enable us to separate the error as to future payments from the judgment correctly rendered as to past-due payments. The situation is somewhat similar to that in *Camden v. McAndrews & Forbes Co.*, 85 N. J. Law, 260, 88 Atl. 1034. The amount of arrears is not disputed, and for all that appears was properly adjudicated.

The judgment will be modified, by striking out the provisions as to payments not accrued (which must be sued for in another action or other actions). No costs will be allowed in this court.

WALKER, Ch., and BLACK, J., dissent.

(89 N. J. Eq. 311)

RUNKLE et al. v. SMITH et al. (No. 42/743.)
(Court of Chancery of New Jersey. June 17, 1918.)

1. USURY \S 127—EFFECT AS TO ONE COLLATERALLY LIABLE.

Where an obligation could not be enforced against the principal debtor to the extent of the amount by which it was usurious, it could not be enforced to the same extent against persons but collaterally liable.

2. USURY \S 127—EFFECT AS TO SURETY.

In suit by the creditor, the sureties of the principal debtor may set up the defense of usury.

3. GUARANTY \S 79—RES ADJUDICATA—PARTIAL VALIDITY OF USURIOUS CLAIM.

In the determination of the chancery court that part of the debt was usurious, there was included a determination that there was justly due on the claim the sum for which it was valid, which determination, all parties being before the court, was res adjudicata of any right the creditor may have against principal debtor's guarantor.

Suit by Harry G. Runkle and others against William E. R. Smith, executor, etc., and others, wherein the Logan Trust Company cross-petitions for payment to it out of income accruing on certain shares in a certain trust fund of an amount the court refused to order paid out of the residuary estate, the Casualty Company of America filing claim on an assignment. Application of the Casualty Company for payment to it denied.

McCarter & English, of Newark (Arthur F. Egner, of Newark), for William A. Marburg. Lindabury, Depue & Faulks, of Newark (J. Edward Ashmead, of Newark), for Union & New Haven Trust Co. Frank S. Moore, of New York City, for complainants and Daniel Runkle. Colby & Whiting, of Newark, for Casualty Co. of America.

LANE, V. C. [1-3] The Logan Trust Company holds an assignment of the interests of Harry G. Runkle in the residuary estate of William Runkle. There was also assigned by Daniel Runkle and Mary Runkle Heiberg their interests in the income of the trust fund of which the Fidelity Trust Company of Newark is trustee. The Casualty Company of America gave to the Logan Trust Company a bond securing the payment by Harry G. Runkle of the debt as stated of \$73,000, due from him to the Logan Trust Company. As security, the casualty company took from Harry G. Runkle an assignment of his interest in the residuary estate of William Runkle. The papers were contemporaneously executed and delivered, and refer to one transaction. The Logan Trust Company filed a claim upon its assignment executed by Harry G. Runkle of his interest in the residuary estate of William Runkle, and I have already held (103 Atl. 382) that the loan was usurious to the extent of \$7,300, and have disallowed the claim of the Logan Trust Company so far as the residuary estate of William Runkle is concerned to that extent. It has now filed a cross-petition, asking this court to direct payment out of the income accruing upon the shares of Harry Runkle and Mary Runkle Heiberg in the trust fund of the amount that this court has refused to direct paid out of the residuary estate. To this cross-petition Daniel Runkle and Mary Runkle Heiberg have filed answers setting up the usurious nature of the transaction. The casualty company filed its claim upon its assignment, and it has been adjudicated by a prior decree of this court that there is due to it upon its assignment of the interest of Harry G. Runkle in the residuary estate the sum of approximately \$1,100. That decree directed the distribution of the residuary estate upon the basis that there was, and could be, due to the casualty company upon its assignment only the sum of \$1,100. This sum has been paid. It would appear that the claim of the casualty company upon its assignment has been fully satisfied. It is now suggested, however, orally, that the court ought not to make distribution of the \$7,300, the amount of the usury already found to be in the loan of the Logan Trust Company to the assignee next in order of priority, no order having yet been signed upon the prior opinion of the court, unless the casualty company be in some way protected against liability to suit by the Logan Trust Company upon the bond of guaranty, and it is suggested that either the court ought to order the \$7,300, with its accumulations, to be paid to the casualty company upon its assignment, or that the fund should be retained until the liability of the Casualty Company of America, upon its bond, shall have been determined. It is now stat-

ed by counsel for the casualty company that a determination of this contention will be academic, because since it was made the casualty company has been declared insolvent by a New York court, and placed in charge of a liquidating agent, and that under the law in New York claims of such a nature as that which the Logan Trust Company would have cannot be enforced. See the cases considered in *Allen v. Distillers Co. of America*, 87 N. J. Eq. 531, 100 Atl. 620. Exhaustive briefs have been filed on behalf of all parties. I will not consider, unless there be an appeal taken, of which I desire to be notified at once, the cases cited, but will merely express generally the reasons which have induced me to come to the conclusion I have. So far as the Logan Trust Company's claim against the income accruing to Daniel Runkle and Mary Runkle Helberg is concerned, the case is now in such a position that the Logan Trust Company is asking affirmative relief against Daniel Runkle and Mary Runkle Helberg. Their liability is collateral to that of the principal debtor, Harry G. Runkle. Having already found that the obligation cannot be enforced as against Harry G. Runkle to the extent of \$7,300, it follows that it cannot be enforced to the same extent against Daniel Runkle and Mary Runkle Helberg. It is not denied that the law is such that sureties may set up the defense of usury. The claim of the Logan Trust Company against the interests of Daniel Runkle and Mary Runkle Helberg will therefore be denied. The casualty company is a guarantor of Harry G. Runkle, the principal debtor. Its assignment is of the same fund of which the Logan Trust Company holds an assignment. To direct the fund to be paid to the casualty company would be, in fact, to turn it over to the Logan Trust Company, which this court has already refused to do. To segregate the fund and hold up its distribution until it may be determined whether the Logan Trust Company has a claim against the casualty company is, in the nature of things, impossible. Substantially the court is administering the affairs of an insolvent estate, although not so in form. If suit should be brought by the Logan Trust Company against the casualty company, the defense of usury is available to the casualty company, but aside from this it appears to me that the Logan Trust Company has submitted to the jurisdiction of this court, and there was necessarily included in my finding that it could not recover the \$7,300 usury, a determination that there was justly and equitably due upon its claim the sum for which I held it to be a valid claim, and that, all parties being before the court, that determination is *res adjudicata* upon any right that the trust company may have against the casualty company.

I will therefore deny the application of the casualty company for the payment to it, or to withhold distribution until its rights may be determined in some other forum.

If an appeal is to be taken, I desire to be notified at once, so that more formal conclusions may be filed.

In re HOLMAN.

(Supreme Court of New Jersey. July 29, 1918.)

INTOXICATING LIQUORS ~~§~~ 34—VALIDITY OF PROHIBITION ELECTION — NONRESIDENT ELECTORS.

A special election on the question of prohibition, under Act Jan. 29, 1918 (P. L. p. 14), will be set aside, where Act Feb. 28, 1918 (P. L. p. 437) §§ 4-6, 9, passed in conformity to the constitutional mandate allowing electors engaged in the military service outside of the election district to vote, was not complied with, and the number of such disfranchised electors was sufficient to have changed the result; the right to vote being an inherent one.

Petition by George W. Holman, Jr., to contest the validity of a special election in Dover township, Ocean county, under Act Jan. 29, 1918 (P. L. p. 14). Election set aside.

Argued before KALISCH, J., sitting alone pursuant to the statute.

Berry & Riggins, of Toms River, for petitioner. William Howard Jeffrey, of Toms River, opposed.

KALISCH, J. A special election was held on Tuesday, May 28, 1918, in the township of Dover, in the county of Ocean, in this state, under chapter 2 of the Laws of 1918, on the question whether the sale of intoxicating liquor as a beverage shall or shall not be prohibited. The result of the election, as announced, was 291 votes for and 275 votes against prohibiting such sale, thus making a majority of 16 votes in favor of prohibition.

The admitted facts, presented by a stipulation, in writing, entered into by counsel of the respective parties in the case, are, that on the date of the special election, and more than 20 days prior thereto there were 43 qualified electors of the township in active service in the military forces of the United States, and who were absent from their respective election districts; that out of these 43 qualified electors, as appears from a list attached to the stipulation, there were 34 within the United States, with their military addresses obtainable upon due inquiry; that, out of these 34, 18 were distributed among the camps and coast guard stations within the state of New Jersey; that no sample ballots were mailed to any of the absent qualified electors; that no registry lists were posted in the respective election districts of the township prior to said special election; that the township clerk did not mail to the

qualified electors of the township, in the military service of the United States any statement of the proposition to be voted upon at such special election or any notice of, or information concerning said election; that none of the qualified electors of the township in the active military service of the United States, who were absent from their respective election districts on the day of said election voted thereat. From the testimony taken, under an order made by me in the cause, it appears, and I do find, that the secretary of state did not, at least 20 days prior to the said special election or at any other time, forward to the clerk of Dover township, in Ocean county, the names and addresses of the qualified electors in the military forces of the United States, residing within the limits of the township, as required by section 5 of the act of 1918 (Act Feb. 28, 1918 [P. L. p. 439]).

It further appears from the testimony, and I do find, that no attempt was made by the secretary of state to obtain the names and post office addresses of the qualified electors of the state, in the military service of the United States, residing in the township of Dover, from the Adjutant General of the United States or other proper authority of the United States. It further appears from the testimony, and I do find, that there is no record, either in the office of the secretary of state or in the office of the adjutant general of New Jersey, of any application made by the secretary of state to the adjutant general for the names and post office addresses of the qualified electors in the military service of the United States, residing within the township of Dover.

There is, however, testimony to the effect that the office of the secretary of state was advised by the department of the adjutant general of this state that it was impossible for the latter to furnish any list of names and military addresses of the soldiers and sailors of the state of New Jersey. But I think it is wholly unimportant whether or not the failure of the secretary of state or of the adjutant general to comply with the provisions of the statute was due to their willfulness or neglect, or of either of them, or because of the impracticability of carrying the statutory behests into execution, so long as it appears that the qualified electors were deprived of their right to vote at the election and were sufficient in number to have changed the result, if they had been afforded an opportunity to cast their votes and had voted against prohibition. I find further as a fact that the secretary of state made no attempt to comply with section 6 of the act, which requires him to send to each of such qualified voters either a printed copy of this act or printed directions for voting and sending therewith a ballot, etc.

In view of the fact that section 9 of the act permits a qualified voter, in the military

forces of this state or of the United States, to vote by an unofficial ballot, I am not prepared to say that, if this had been a general election, a failure of compliance with sections 4, 5, and 6 would be sufficient to justify setting aside the result accomplished at such election, even though it appeared that the qualified absent electors, if they had voted, would have changed the result. The reason for this view is founded upon a marked difference which exists between a general and special election. The day for holding a general election is fixed and certain. It is a legal holiday, and it is fair to presume that every person of intelligence has knowledge of it. It is the duty of every good citizen to vote, but he is not compellable to do so. It is a right which he is free to exercise or not. The absent soldier is afforded an opportunity to acquire the necessary information, by applying to the proper sources, as to who the candidates are, or the questions to be voted on, or how he may properly register his vote, at the election, before the day of election arrives. As has been said, section 9 permits the absent soldier to cast an unofficial ballot. Thus it is to be observed that he is at least afforded an opportunity to cast his vote. But this cannot be properly said in the case of a special election, for he has no means of knowing when such election is to take place, unless he receives actual notice. It is plain that, if he receives no such notice, he is practically deprived of the opportunity and right to vote.

It is argued that the right to vote is not an inherent right. As a general proposition, I think it is manifestly unsound, for it is clear that the citizens of a democracy have an inherent right to a voice in their government and to participate in the selection and election of those to be intrusted with the administration of their governmental affairs, and to make laws to govern themselves. This inherent right can only be exercised through the ballot, or by like means, in order to express the popular will. The right to vote inheres in citizenship. The common law did not create the right to vote. The right pre-existed the common law. It is only necessary to point to both sacred and profane history for confirmation of this statement. The common law of England fostered class distinctions, and only recognized the right of local self-government in a certain class of citizens; e. g., such as is accorded to the citizens of London to participate in the governmental affairs of their municipality, granted by charter, and as an ancient and sanctioned prerogative. The common law of England is impotent to serve as a safe guide in the matter of the suffrage of citizens, in a government of and by the people. But, whatever may be the state or condition of peoples living under different forms of government from ours, the question of the

inherent right of a citizen to vote in a democracy cannot be an open one here. Now, it is to be observed that the federal Constitution does not create or confer the right to vote, but guarantees that right, and recognizes such right to exist in every male citizen of the United States who has arrived at the age of 21 years. Our state Constitution likewise does not create or confer the right to vote, but, like the federal Constitution, guarantees it and limits the right to vote to male citizens of the United States who have attained the age of 21 years, and who have resided in this state for 1 year, and in the county in which he claims his vote for 5 months, next before the election. Our Constitution further declares:

"That in time of war, no elector in the actual military service of the state or the United States, in the army or navy thereof, shall be deprived of his [right to] vote by reason of his absence from such election district; and the Legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the return and canvass of their votes, in the election districts in which they respectively reside." Const. art. 2, par. 1.

The Legislature, in conformity to the constitutional mandate, passed such laws. The evidence before me shows that they were not complied with. I am not prepared to hold that the provisions of the statute are mandatory, in that a failure to observe them would have the effect of vitiating the election, irrespective of the fact whether or not the disfranchised vote, if voted, would have changed the result.

I find as a fact that a sufficient number of qualified electors were absent from the township of Dover, in the county of Ocean, who were in the military forces of this state and of the United States, and that in violation of the Constitution of this state, and the provisions of the statute, they were deprived of their votes, at the special election held in the township, which votes, if cast against prohibition, would have changed the result of the election, and therefore the election must be set aside.

(39 N. J. Eq. 205)

STEITZ v. OLD DOMINION COPPER MINING & SMELTING CO. et al.
(No. 44/164.)

(Court of Chancery of New Jersey. July 28, 1918.)

1. CORPORATIONS ⇐189(9)—SUIT BY STOCKHOLDER—INDISPENSABLE PARTIES—DISMISSAL.

Bill for rescission or accounting for profits by stockholder, alleging fraudulent confession of judgment by corporation and transfer of its property in satisfaction, and subsequent transfers, though not making ultimate transferee party, will not be dismissed, especially in view of chancery rule 13 (100 Atl. viii) as to determining controversy between parties before court or directing others to be brought in.

2. CORPORATIONS ⇐189(11)—SUIT BY STOCKHOLDER—BILL—SHOWING RELATION.

Bill by stockholder sufficiently shows the relation by allegation that at a certain time he became holder of a certain per cent. of its stock; objection that he is not such a stockholder as should be permitted to maintain such a bill being matter of defense.

3. CORPORATIONS ⇐865(3)—FOREIGN CORPORATIONS—INTERNAL AFFAIRS—INVESTIGATION BY COURT.

Bill based on allegation of fraud committed by officers and directors of corporation against its stockholders, and so not involving its internal affairs, is not open to objection that court should not investigate affairs and relations of foreign corporations at suit of nonresident as to property without the state.

4. CORPORATIONS ⇐189(11)—SUIT BY STOCKHOLDER—BILL—SHOWING REASON.

Bill by stockholder of corporation, the organization of which has been abandoned, for rescission or accounting for profits of transfer of its property in satisfaction of judgment fraudulently confessed by it, held to show sufficient reason for suit by stockholder, instead of by corporation.

5. CORPORATIONS ⇐189(6)—SUIT BY STOCKHOLDER—LACHES—BILL.

Allegation of bill by stockholder for rescission or accounting for profits of transfer by corporation of its property to satisfy judgment fraudulently confessed by it held sufficient to eliminate charge of laches, notwithstanding long delay.

6. DISCOVERY ⇐6—IN EQUITY—DISMISSAL OF BILL—GROUNDS.

That a defendant, obviously having knowledge of some of the facts, may not have knowledge of all the facts of which the bill seeks discovery, is not ground for dismissing bill.

7. EQUITY ⇐362—DISMISSAL OF BILL—GROUNDS.

It is no ground for dismissal of bill that the court would not appoint a receiver as prayed, that being only a portion of the relief prayed for.

Suit by Henry L. Steitz against the Old Dominion Copper Mining & Smelting Company and others. Heard on motion of the named defendant to dismiss the bill of complaint. Motion denied.

Carlyle Garrison, of Jersey City, for complainant. Collins & Corbin, of Jersey City, and Dunbar, Nutter & McClennen, of Boston, Mass., for defendant Old Dominion Copper Mining & Smelting Co.

LEWIS, V. C. The complainant, in his bill, states that in 1913 he became the holder of the Old Dominion Copper Mining Company of New York, to the extent of about 2 per cent. This corporation apparently never did any business in New Jersey, and never owned any property therein, and its organization was abandoned in 1889. He alleges that this corporation was organized in 1880, and owned property in Arizona, and that in 1884 the company confessed judgment in favor of the copartnership of Cope, Cole & Co., of the state of Maryland, and that the claim on which the judgment was confessed had previously been paid in part and was without consideration, and that members of this part-

nership were directors of said New York company and concealed from the other directors this confession of judgment. He alleges that later in 1884, pursuant to the alleged consent of more than two-thirds in number and amount of the stockholders in the New York company, a mortgage was given and filed of record covering all the property of the New York company. He alleges that in 1886 all the property was sold to William Keyser, a partner in Cope, Cole & Co. to satisfy said confessed judgment. He alleges that in 1888 Keyser conveyed this property to the Old Dominion Copper Company of Baltimore, a Maryland corporation. He alleges that in 1895 the property was purchased by Leonard Lewisohn, of New York, and Albert S. Bigelow, of Boston, Mass., on behalf of the defendant Old Dominion Copper Mining & Smelting Company, a corporation organized under the laws of New Jersey, but owning no property in this state. He charges that the Maryland corporation and the New Jersey corporation took with knowledge of the earlier transaction. He alleges that the directors of the New Jersey corporation have passed a resolution by which they have authorized and directed that all of the property of the corporation be sold and transferred to the Old Dominion Company, a corporation organized in Maine, and that a meeting of the stockholders of the New Jersey corporation has been called to be held in Jersey City March 15, 1917, to act on this resolution of the directors.

The amended bill of complaint was filed in June, 1917, and does not negative the inference that the stockholders of the New Jersey corporation did vote to ratify the conveyance authorized by the directors, and the allegations of the bill do not negative the fact that the conveyance by the New Jersey company to the Maine company was made and executed, and the consideration for it paid and distributed, to stockholders of the New Jersey company before the original bill of complaint was filed. The bill of complaint does not allege that the complainant acquired his stock by operation of law, or that he paid any consideration therefor, but at the suggestion of the court, made on the oral argument, counsel for complainant has annexed to his brief, for the purpose of amending the bill, that the complainant entered the employ of one John Leighton, of New York City, who was interested in various enterprises at the time, in the early part of the year 1901; that he subsequently became actively associated in the business affairs of said Leighton, acting as his secretary and in a general confidential capacity up to the time of the death of said Leighton; that said Leighton, in the later years of his life, lost most of his money so that he could not pay complainant herein for services rendered, and in the year 1913 Leighton transferred to complainant the stock which the complain-

ant now holds, as consideration in part for services heretofore rendered. Twenty-four years had therefore elapsed after the organization of the New York corporation was abandoned; and 29 years after the confession of judgment in 1884, which is claimed to be fraudulent, and the basis of the sale made in 1886, 27 years before the complainant became a stockholder.

The bill purports to make defendant the New York corporation, the Maryland corporation, the New Jersey corporation, and certain individuals, all nonresidents of New Jersey, claimed to be participants in the original transaction. It does not purport to make the Maine corporation a defendant. The bill prays a discovery from all the respondents as to the original transaction, and as to the property which was the subject of that transaction in which, on the allegations of the bill, many of the respondents took no part. The bill seeks a rescission of that transaction, or an accounting of the resultant profits.

Counsel for the defendant Old Dominion Copper Mining & Smelting Company, ask that the bill be dismissed for the following reasons: First. There is a fatal absence of indispensable parties defendant. Second. The complainant does not show himself to be such a stockholder as should be permitted to maintain such a bill of complaint. Third. This court should not undertake an investigation of this kind into the affairs and relations of foreign corporations at the suit of a nonresident as to property not within the state. Fourth. There has been no sufficient effort to have the New York corporation sue for the wrong, if any, done to it, and no sufficient excuse for not making that effort. Fifth. The delay of over 25 years by the New York corporation, and by its officers, directors, and stockholders, has not been sufficiently excused or accounted for. Sixth. The discovery sought from the New Jersey corporation is of matters occurring before it was organized, and in which it took no part. Seventh. No sufficient ground is alleged on which to base an appointment of a receiver of the New York corporation by a New Jersey court.

[1] The matter is to be determined, of course, upon the allegations in the bill. As to the first objection: Upon the circumstances alleged in the bill I do not find a fatal absence of indispensable parties, especially in view of chancery rule 13 (100 Atl. viii). See also, *Wilson v. Palace Car Co.*, 64 N. J. Eq. 534, 54 Atl. 415, 65 N. J. Eq. 730, 55 Atl. 997, and 67 N. J. Eq. 262, 58 Atl. 195.

[2] As to the second objection: It sufficiently appears on the face of the bill that complainant is a stockholder. The defendant's objection are matters of defense.

[3] As to the third objection: I can see no merit in it. The matters involved in the bill are not internal affairs of a corporation, but are matters based on allegations of fraud

committed by officers and directors of a corporation against the stockholders thereof.

[4] As to the fourth objection: The allegations of the bill, if true (and on this motion they must be assumed to be true), show sufficient reason for suit by a stockholder, instead of the corporation itself.

[5] As to the fifth objection: The allegations of the bill are sufficient on the face thereof to eliminate the charge of laches, which might, perhaps, otherwise be inferred from the long delay.

[6] As to the sixth objection: Obviously the defendant must have within its knowledge, possession, or control, some of the facts of which discovery is sought, as specified in the complainant's bill. The fact that it may not have knowledge or possession of all the information of which discovery is sought by complainant in his bill is, of course, no ground for dismissal of the bill.

[7] As to the seventh objection: The appointment of a receiver is only one portion of the relief prayed for by complainant. Even assuming that this court would not appoint the receiver, as prayed for, that in itself is no ground for dismissal of the bill. The only application before me is for the dismissal of the bill, and, in my opinion, the allegations set forth in the bill are sufficient to maintain it upon this motion.

I will therefore advise an order denying the motion, and directing, under chancery rule 67 (100 Atl. xii), that it stand over until the hearing.

(89 N. J. Eq. 177)

U. S. INDUSTRIAL ALCOHOL CO. v. DISTILLING CO. OF AMERICA et al.

(Court of Errors and Appeals of New Jersey. June 17, 1918.)

1. EVIDENCE ¶73 — PRESUMPTIONS — CORPORATE ACTS.

Where power had been conferred upon a corporation to guarantee payment of dividends on stock of other corporations for the purposes of its own business, and such corporation guaranteed payment of dividends on certain stock, it will be presumed that it did so for purposes of its own business.

2. CORPORATIONS ¶388(2) — ULTRA VIRES CONTRACT—ESTOPPEL.

Where a corporation received a good and valuable consideration for contract into which it entered, it will not be permitted to set up lack of power to make the contract, and thus defraud the other contracting party.

3. CORPORATIONS ¶387(3) — ULTRA VIRES ACTS—WHO MAY CHALLENGE.

If ratification of a contract of a corporation by the stockholders was necessary, the stockholders are the only parties who can raise the question, and the corporation cannot.

4. EQUITY ¶141(1) — BILL — SUFFICIENCY — CONTRACTS—CONSIDERATION.

Where a contract sued on was set out in a bill, and stated a valuable consideration, it cannot be maintained that the bill did not show that the contract was supported by a valuable consideration.

5. CORPORATIONS ¶610(1)—VOLUNTARY DISSOLUTION—EFFECT OF EXISTING GUARANTY.

A corporate contract, guaranteeing payment of dividends on stock of another corporation and providing that no voluntary dissolution should affect the guaranty, did not strip the corporation of power to voluntarily dissolve, but only required it to make reasonable provision for the protection of the guaranty.

6. CORPORATIONS ¶620—VOLUNTARY DISSOLUTION—INJUNCTION.

Where a corporation guaranteed payment of dividends by another corporation, equity will grant an injunction against a voluntary dissolution until a provision is made to protect the guaranty.

Appeal from Court of Chancery.

Bill by the U. S. Industrial Alcohol Company against the Distilling Company of America and others. From a decree denying the application of the defendants for an order dismissing the bill of complaint, and granting a preliminary injunction (87 N. J. Eq. 531, 100 Atl. 620), defendants appeal. Affirmed.

Richard V. Landabury, of Newark, and Levy Mayer, of Chicago, Ill., for appellants. John R. Hardin, of Newark, and Adrian H. Larkin, of New York City, for appellee.

GUMMERE, C. J. This is an appeal from a decree advised by Vice Chancellor Lane, denying the application of the defendants for an order dismissing the bill of complaint for want of equity, and granting a preliminary injunction restraining the defendants from completing statutory proceedings taken by them for the dissolution of the defendant, the Distilling Company of America, until the further order of the court. It appears by the bill that the complainant is the owner of 350 shares of the preferred capital stock of the Cuba Distilling Company; that in the year 1907 the Distilling Company of America entered into an agreement with the Cuba Company and a corporation known as the Matanzas Railway & Warehouse Company, which, after reciting that the Cuba Company had an authorized preferred capital stock of 25,000 shares of the par value of \$100 each, of which 10,000 shares had been actually issued, and 15,000 shares were about to be issued, agreed that it, the Distilling Company of America, would guarantee to the then present and all future holders of all or any part of said 25,000 shares of Cuba preferred, so long as the same should be issued and outstanding, not exceeding the period of 50 years, quarterly dividends on said Cuba stock at the rate of 7 per cent. per annum; that the said guaranty should be irrevocable, and that no voluntary or involuntary dissolution, or merger or consolidation of the Cuba Company, or of the Distilling Company of America, should, except by and with the written consent of the holders of record of all of said preferred stock outstanding at the time,

release, discharge, modify, or affect the guaranty in any way; and that said guaranty should be printed or engraved on all certificates of such Cuba preferred stock on the issuance thereof. The bill further alleges that in November, 1916, the Distilling Company of America instituted statutory proceedings looking to its dissolution, without making any provision for the protection of the rights of the holders of the Cuba preferred stock.

[1, 2] The order appealed from is attacked upon several grounds. First, it is contended that the bill should have been dismissed for want of equity, because there appears to be no authority vested in the defendant company to guarantee the payment of dividends on Cuba preferred stock. It appears in the defendant's certificate of incorporation that there had been conferred upon it the right to guarantee and secure the payment or satisfaction of dividends on shares of stock of other corporations, providing it does so for the purposes of its own business, or any part thereof. The argument upon this point submitted on behalf of the appellants is that the bill fails to disclose that the guaranty in the present case was for the purposes of the business of the Distilling Company, or any part thereof. This argument seems to us to be unsound. Where a power is conferred upon a corporation to be exercised under certain conditions, and it exercises that power, the presumption is that it exercises it legally, and not in violation of law; for to hold the act illegal, in the absence of any affirmative allegation, would be to declare that the corporation had perpetrated a fraud upon the statute, as well as upon the other contracting party. Moreover, the contract of guaranty expressly declares that it is made "for good and valuable consideration, the receipt of which is hereby acknowledged," and, even if it be conceded that this guaranty was ultra vires, the Distilling Company cannot now take advantage of its wrongful act. It has obtained the benefit of its contract, it has received a good and valuable consideration for it, and in such a situation it will not be permitted to set up lack of power to make the contract, and thus defraud the other contracting party. *Camden & Atlantic R. Co. v. May's Landing, etc., R. R. Co.*, 48 N. J. Law, 530, 7 Atl. 523.

[3] It is further argued that the bill should have been dismissed because it does not appear that the stockholders of the Distilling Company approved the contract of guaranty. The bill itself shows, we think, by necessary inference, that this contract received the approval of at least 80 per cent. of the stockholders at the annual meeting held next after the making of the contract. But whether it did receive such approval or not seems immaterial. The contract was a valid one, so far as the bill shows, made for a good and valuable consideration, and within the power of the directors to make. It conse-

quently required no ratification by the stockholders. Moreover, if such ratification was necessary, the only parties who can now raise the question are the stockholders who did not approve the contract, and they are none of them here challenging its legality.

[4] Next, it is said that it does not appear on the face of the bill that this contract of guarantee was for a valuable consideration. This assertion, however, is contrary to the fact. The contract itself is set out at length in the bill; it expressly recites that the Distilling Company received a good and valuable consideration for the guaranty, and that admission on its part justified the Court of Chancery in so declaring.

[5, 6] The principal ground of attack, however, made upon the complainant's bill, is that by the provision in the contract that no voluntary or involuntary dissolution or merger or consolidation of the Distilling Company should release, discharge, modify, or affect the guaranty in any way, the Distilling Company stripped itself of a power conferred upon it by the statute (that is, the power to voluntarily dissolve), and that the public policy of the state makes such an agreement void. It may be conceded that a corporation organized under our laws cannot bargain away any of the franchises or powers conferred upon it by the Legislature for its own selfish purposes, and in derogation of the sovereign right. But we do not think this is the legal effect of the provision of the contract now under consideration. The power of the Distilling Company to voluntarily dissolve is left intact; but when it exercises this power it is under a valid obligation to make reasonable provision for the protection of the holders of its guaranty, so that such guaranty shall not be injuriously affected by the act of dissolution. This the bill shows the appellant failed to do, and such failure is an irreparable injury which equity will protect against. What method the Distilling Company should adopt is a matter with which the court is not now concerned, provided that the method, when adopted, will afford full protection to the holders of the guaranty. It may be that the latter will assent to a scheme suggested by the Distilling Company, and, if so, such assent will be accepted, normally, by the court as a valid performance of the Distilling Company's contract. If a particular method is suggested which does not meet the approval of the holders of the guaranteed stock, it will then become a judicial question whether such method will be a complete performance of the contract of guaranty. But until some method is formulated, which receives the approval either of the holders of the guaranty or of the court, the Distilling Company may properly be restrained from completing its act of dissolution.

We conclude, therefore, that the motion to dismiss the bill was properly denied, and

that the restraining order appealed from (it being in force only until the court shall otherwise order) should be affirmed.

(92 N. J. Law, 168)

**ATLANTIC COAST ELECTRIC RY. CO.
v. BOARD OF PUBLIC UTILITY
COM'RS et al. (No. 68.)**

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

**1. CONSTITUTIONAL LAW §26 — GRANT OR
LIMITATION OF POWER.**

The Senate and General Assembly, in whom by our Constitution the legislative power is vested, must necessarily, as the representative of all the people of the state, be held to retain all the sovereign powers, except as far as they have by unmistakable language intrusted them to others.

**2. MUNICIPAL CORPORATIONS §680, 681(1)
— CONTRACTS—STREET RAILWAY COMPANIES.**

The traction acts of 1893 and 1896 (4 Comp. St. 1910, pp. 5021, 5040) do not expressly authorize municipalities to contract with street railway companies. The power is implied from the power to grant or refuse consent to a location of tracks, and to impose lawful restrictions. The implication of power ought not to be extended beyond the necessities of the case.

**3. CARRIERS §12(9) — RATES — REGULA-
TION—STREET RAILWAY COMPANIES.**

Full effect can be given to the language of the traction acts of 1893 and 1896 by holding that the force and effect of a contract under section 32 of the act of 1893 is the force and effect of a contract by which the municipality and the railway company—the only parties thereto—are bound, but that no restriction is thereby implied on the sovereign power of the state to fix just and reasonable rates, as subsequent conditions may make desirable.

**4. MUNICIPAL CORPORATIONS §682(4) —
STREET RAILWAYS—RESTRICTIONS.**

The power of a municipality to impose lawful restrictions upon granting consent to the location of tracks of a street railway is subject to the condition that they be reasonable.

**5. MUNICIPAL CORPORATIONS §682(4) —
STREET RAILWAYS—RESTRICTIONS.**

The lawful restrictions that may be imposed upon granting consent to the location of tracks of a street railway must be lawful not only at the time, but from time to time; that is, at all times.

**6. REGULATION OF RATES—POWER OF UTIL-
ITIES COMMISSION.**

The order of the Board of Public Utility Commissioners in the present case is justified by the Public Utilities Act of 1911 (Act April 21, 1911 [P. L. p. 374]).

Walker, Ch., and White, J., dissenting.

Appeal from Supreme Court.

Certiorari on the application of the Atlantic Coast Electric Railway Company to review an order of the Board of Public Utility Commissioners as to rates in the borough of Bradley Beach. The order was set aside (89 N. J. Law, 407, 99 Atl. 395), and defendants appeal. Reversed.

L. Edward Herrmann, of Jersey City, for appellant Public Utility Com'rs. Robert H. McCarter, of Newark (Durand, Ivins & Car-

ton, of Asbury Park, on the brief), for appellee.

SWAYZE J. [1] The question is whether the ordinance of Bradley Beach and its acceptance by the street railway company made a contract which the state of New Jersey could not thereafter control, for, unless the state was deprived of its control by the act of the municipality, the Board of Public Utility Commissioners is free to act under authority of the act of 1911 by which it was created. The grant of power is strictly construed in favor of the state just as all grants of corporate power are strictly construed. *Meday v. Rutherford*, 65 N. J. Law, 645, 48 Atl. 529. The Senate and General Assembly, in whom by our Constitution the legislative power is vested, must necessarily, as the representative of all the people of the state, be held to retain all sovereign powers, except as far as they have by unmistakable language intrusted them to others. Our Constitution does not, like the Constitutions of some states, confer upon municipalities the right to grant street franchises. We have been careful to keep the sovereignty of the state unimpaired, and have not parceled out the sovereign powers among minor political subdivisions. Municipalities with us act solely by virtue of legislative authority and as legislative agents. The Legislature may intrust to municipal corporations, or even, as in the case of eminent domain, to private corporations, certain powers, and may even authorize them to make irrevocable contracts; but the courts ought to be, as they have been, astute to see that such powers are not unnecessarily extended by implication.

[2] The powers of municipalities in the granting of franchises to street railways are to be found in the traction act of 1893 (C. S. 5021) and the act of 1896 (C. S. 5040). They are limited to giving consent to the construction, operation, and maintenance of the street railway, the location of tracks, and imposing lawful restrictions.

The peculiar language of the acts is noteworthy. They nowhere expressly authorize the municipality to contract; they nowhere declare that the consent and acceptance constitute a contract. Section 32 merely declares that the consent and acceptance shall have the "force and effect" of a contract. This language would be unnecessary, if the consent and acceptance were in fact a contract, in the full sense of the word, for a contract necessarily has such force and effect. It must be because the consent and acceptance are in the nature of municipal legislation, rather than of private agreement, that the Legislature thought it necessary to add that they should have the force and effect of a contract. We must, indeed, attribute to the words all the meaning that the

Legislature meant to attach thereto; but the question is what force and effect was meant, since they are clearly subject to some limitation. The consent and acceptance are surely subject to the taxing power and the police power of the state. No one would suggest that the power to consent and impose lawful restrictions upon the street railway company could be so exercised as to deprive the state government of its general control over the highways in which the rails are laid, including the power to vacate, to regulate speed of vehicles, to enact a law of the road, to give fire apparatus the right of way, to transfer control to county boards or to the state, instead of the municipality, and to determine as to other matters of police. *Northern Pacific Railway v. Duluth*, 206 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, and cases there cited. So, also, it is quite inconceivable that the municipality could, by its ordinance granting consent, make provisions that would limit the taxing power of the state, whether by granting exemption from local taxes or by special contract as to amount or method of assessment. To that extent, surely, the ordinance could not have the force and effect of a contract. To what extent does the ordinance limit the other sovereign power of controlling rates of public utility companies?

It is well settled that a power to fix rates may be delegated to the municipality, and that rates so fixed may amount to an irrevocable contract, binding future Legislatures. The leading cases are cited by the Supreme Court. But, as was said in *Home Telephone Co. v. Los Angeles*, 211 U. S. 285, 273, 29 Sup. Ct. 50, 52 (53 L. Ed. 176):

"For the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

In that case the city charter gave power to regulate telephone services and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connection. This as the court said, is "ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement." And the court made a distinction between an ordinance "to fix and determine the charges" and an ordinance to "agree" upon the charges. In that case, the franchise had been sold by the municipality under statutory authority for a valuable consideration, and an ordinance had been passed granting the franchise and providing that the charges for service should not exceed specific amounts. Afterward the city passed an or-

dinance establishing lower rates. The later ordinance was held valid. Here the subsequent action was by municipal ordinance. In a later case, the subsequent action was by a state board. *Milwaukee Electric Railway v. Wisconsin R. R. Comm.*, 238 U. S. 174, 35 Sup. Ct. 320, 59 L. Ed. 1254. In that case the power of the municipality under the act of the Legislature was to "grant" the rights to street railways to use the streets upon such terms as the proper authorities should determine. The ordinance authorized the street railway company to charge a fare not to exceed 5 cents and required the sale of 25 5-cent tickets for a dollar. Later an order of the Wisconsin Railroad Commission required the sale of 13 tickets for 50 cents. The order was held valid. The opinions in these cases review the earlier precedents upon which our Supreme Court relied in the present case, and show that those precedents arose under an express power to contract, or under statutes which ratified the municipal action and in effect made it the action of the Legislature itself. There is no such statute in New Jersey. Since the ultimate decision in cases where a claim is made to an irrevocable contract must rest with the United States Supreme Court, we must follow their decisions.

[3, 4] There is, as we have already said, no express grant of power to the municipality to fix rates or to contract as to rates. The power is implied from the power to grant or refuse consent to a location of tracks and to impose lawful restrictions. *Jersey City & Hoboken Horse R. Co. v. Jersey City & Bergen R. Co.*, 21 N. J. Eq. 550; *Jersey City v. Jersey City & Bergen Railway Co.*, 70 N. J. Law, 360, 57 Atl. 445. Neither in section 1 nor section 7 of the act of 1893, nor in the act of 1896, is there any mention of a contract; nor does the title of the ordinance granting consent indicate an intention to contract as to rates of fare, or even to impose lawful restrictions. It purports only to grant consent to the construction, operation and maintenance of a new line of street railway, a location of the route, and a location of the tracks and rails. Since the power to contract as to fares is only an implied power, the implication ought not to be extended so as to restrict the sovereign power of the state, unless we are compelled to that result by the necessity of giving meaning to the words "force and effect of a contract." Such a result is not necessary. Full effect can be given to the language by holding that the force and effect of a contract given by section 32 is the force and effect of a contract by which the municipality and the railway company—the only parties thereto—are bound, but that no restriction is thereby implied on the sovereign powers of the state, whether to fix just and reasonable rates as subsequent conditions may make desirable, or to exercise the taxing power or the police power. As between

the parties, the consent and acceptance have force and effect as a contract, as was held in *Reed v. Inhabitants of Trenton*, 80 N. J. Eq. 506, 85 Atl. 270, and in *Asbury Park Street Railroad Co. v. Township of Neptune*, 75 N. J. Eq. 562, 74 Atl. 998; but it is a contract subject to the state's sovereign power over rates, and when, as in this case, the state, through its Board of Public Utility Commissioners, exercises its sovereign power over rates, the contract rights of the parties must yield. This gives the municipal action the force and effect of a contract, but not the force and effect of an irrevocable contract.

Even the implied power of the municipality to contract is under the statute limited. It is implied from the power to impose restrictions, but the statute requires that the restrictions be lawful, and they must, like all provisions of municipal ordinances, be reasonable. *Rutherford v. Hudson River Traction Co.*, 73 N. J. Law, 227, 63 Atl. 84. It would not be reasonable for a municipality, without express power for the purpose, to tie the hands of the state forever.

Not only must the restrictions be reasonable; they must be lawful. The word "lawful" may mean lawful at the time of the consent and acceptance, or lawful from time to time, and at the time the controversy arises. If we adopt the former meaning, the word at the date of the ordinance in 1897, as applied to rates, meant just and reasonable rates as at common law, and that meant just and reasonable rates from time to time, as cost of service and other circumstances vary; the power to fix unchangeable or unreasonable rates could not be implied from the words "lawful restrictions." But it is the latter meaning that had become the settled one in the United States Supreme Court before 1897, the date of the ordinance now before us. In *Ruggles v. Illinois* (1883) 108 U. S. 526, 2 Sup. Ct. 832, 27 L. Ed. 812, the railroad company was authorized to pass by-laws regulating the affairs, business, and interest of the company, provided they were not repugnant to the Constitution and laws of the United States or the state of Illinois. Rates of fare had been fixed pursuant to the by-laws. The question arose in a case involving the legality of a passenger fare. The court said:

"Clearly under this authority no by-law can be established by the directors that does not conform to the laws of the state, and this, whether the laws were in force when the amended charter was granted or came into operation afterwards. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the state. The corporate power was a continuing one and intended for the ordering of the affairs of the company as circumstances might from time to time require. The reserved control by the state was also continuing in its nature, and manifestly intended for the protection of the public whenever in the judgment of the legislative department of the government the necessity should arise."

[5] This rule has been applied in the Railroad Commission Cases (1886) 116 U. S. 307, 6 Sup. Ct. 834, 388, 1191, 29 L. Ed. 636, and recently, in *Owenboro v. Owenboro Waterworks Co.* (1908) 191 U. S. 358, 370, 24 Sup. Ct. 82, 48 L. Ed. 217. In *Freeport Water Co. v. Freeport City* (1901) 180 U. S. 587, 600, 21 Sup. Ct. 493, 45 L. Ed. 679, it was held that a statute authorizing a contract between a city and a water company for water at such rates "as may be fixed by ordinance" meant "as may be fixed by ordinance from time to time," and not as may be fixed by ordinance at the date of the contract. In the most recent case it was held that a proviso that rules for the management and operation of lines of a street railway company "shall not conflict with the laws of the state," by fair construction, means the laws as they shall from time to time exist. *Puget Sound Traction Co. v. Reynolds* (1917) 244 U. S. 574, 37 Sup. Ct. 705, 61 L. Ed. 1325. Following this rule of construction, the lawful restrictions authorized by the traction act of 1898 must be lawful from time to time, that is, at all times, and hence at the present time; from which it follows that they must not be in conflict with the Public Utilities Act of 1911.

We can test our result in another way. What was lawful in 1897 was just and reasonable rates and practices. It would be absurd to contend that the municipality and the railroad company, under the power to impose lawful restrictions, could have fixed by their agreement unjust and unreasonable rates and practices; we must assume that the rates and practices then fixed were at the time just and reasonable. But it can hardly be that with changing circumstances those rates and practices would forever remain just and reasonable. We are admonished by present-day conditions that the higher level of prices and wages may have made old rates unreasonably low, and the constant progress in invention and in business management may have made old practices unjust to the public. And if the rates become unreasonable and the practices unjust, they would cease to be lawful. Unchangeable rates and practices are almost certain to become unlawful. The Legislature did not in this respect change the law by the Public Utilities Act of 1911. That act only authorizes just and reasonable rates and practices. It puts into statutory form what was in 1897 and always has been lawful, and intrusts the execution of the act to the new board. It follows that there is no impairment of the contract for lawful restrictions, which is all the traction act authorizes.

To avoid possible misunderstanding, we add, what is probably plain enough, that our view does not affect contracts made by the Legislature itself, or by any individual or corporation which has power to make them. We are in this case dealing only with the extent of the power given to the municipality,

and we hold that the power is not broad enough to justify the municipality in restricting the sovereign power of the state over rates to be charged by public utilities.

[8] It remains only to consider whether the Public Utilities Act of 1911 warrants the order made by the board. The scope of that act is very broad. It is evidently meant to give full control of all public utilities to the board thereby created, so far as it could be done by legislation. The board is given general supervision and regulation of and control over public utilities and over their property, property rights, equipment, facilities, and franchises, so far as necessary to carry out the provisions of the act. The commission is given power, among other things, to fix just and reasonable rates, to fix just and reasonable standards, classifications, regulations, practices, measurements, or service, and to require railroads and street railways to establish and maintain just and reasonable connections with other lines. These powers are quite enough to justify the present order, whether it is regarded as a regulation of practices or fares.

The judgment setting it aside must be reversed, with costs.

WHITE, J. (dissenting). I disagree with the view that the terms, under which was granted the public franchise here involved, were at the same time both a contract and not a contract; that such contract, while entered into by the municipality in pursuance of express legislative authority from the state to have "the force and effect of a contract," although a valid and binding contract between the parties to it, viz. between the municipality and the trolley company, is not such a contract as is protected by the federal and state Constitutions. The municipality is a state agency, as is also the Public Utility Commission. If the franchise restrictions were binding, as a contract upon one agent they were as equally binding upon the other, because they were binding upon the principal of both. Without authority from such principal to contract, they were binding upon neither agent; with such authority, they were binding upon the principal, and consequently upon both agents. To concede that they were binding as a contract upon one agent is, it seems to me, to concede that they are binding upon the principal and upon both the agents.

It is suggested that this is not so, because the subject-matter of the contract is subject to the state's sovereign police and taxing power. I think that the doctrine that contractual property rights, which are subject to the state's police power and taxing power, and, I might add, to the power of eminent domain, are, because of this, not protected from confiscation, is both novel and unsound.

It is further said that the fact that the act provided that the restrictions imposed by the

municipality, if accepted by the trolley company, should have the "force and effect of a contract," shows that they were not in fact a contract, because, if they were, it would not have been necessary to give them the force and effect of a contract. I take the contrary view. It seems to me that, in order to invite the investment of capital in public transportation, by giving it something definite to rely upon, and to negative the idea that the terms agreed upon were merely temporary regulations, subject to change from time to time at municipal or state legislative whim, the state authorized the municipality to put them in the shape of an inviolable contract.

Again, if it be true that these terms, proposed by the municipality and accepted by the trolley company, as to the rate of fare to be charged, do not constitute a contract, then they may be changed by the state, or by any other of its duly authorized agencies without the consent of the municipality, which exacted the terms for the protection of its own people traveling upon its own streets. If, on the contrary, they constitute a contract, it seems to me that contract was made by an agency of the state having, and recognized by the state at the time as having, an interest in the subject-matter of the contract, and that therefore, under the well-recognized rule as to other agents, the contract cannot be altered by the state without the consent of the interested municipality.

For the above reasons, and for those expressed in the opinion of Mr. Justice Trenchard, speaking for himself and for the Chief Justice and Mr. Justice Black, in the Supreme Court, with which reasons I agree, I vote to affirm the judgment of that court.

I am requested by Chancellor WALKER to say that he concurs in the foregoing views.

(30 N. J. Eq. 173)

In re HEDENBERG'S ESTATE.

(Prerogative Court of New Jersey. June 21, 1913.)

(Syllabus by the Court.)

TAXATION \S 886 $\frac{1}{4}$ —TRANSFER INHERITANCE TAXES—ASSESSMENTS.

Testator bequeathed part of his estate to his sister, who predeceased him, leaving a son and daughter who survived the testator. *Held*, that the transfer inheritance tax is imposed upon the direct succession of the nephew and niece at the rate of 5 per centum, and not upon the bequest to the deceased sister, subject to exemption and a reduced rate.

In the matter of the assessment of an inheritance tax on the estate of Jesse Charles Hedenberg, deceased. On appeal from the assessment. Affirmed.

James Gillin, of New York City, for appellant. Herbert W. Boggs, Asst. Atty. Gen., for the State.

BACKES, Vice Ordinary. The decedent by his will gave the residue of his estate

to his four brothers and sisters in equal shares. One of the sisters predeceased him, leaving a son and daughter, who survived the testator and took one-quarter of the estate, appraised by the comptroller at \$9,084.13. Upon the several successions of the nephew and niece of \$4,542.07, an inheritance tax was levied at 5 per cent., \$227.10. From these assessments, the executor appeals, contending that the legacy should have been treated as a bequest to the testator's sister, and that the tax should have been levied upon the successions as though the sister had survived the testator, viz. by first allowing a sister's exemption of \$5,000, and taxing the balance of \$4,084.13 at the rate of 2 per cent., \$81.68.

The beneficiaries acquired the estate by virtue of the testator's will, supplemented by section 22 of the "Act Concerning Wills" (Comp. St. p. 5866), which provides, amongst other things, that a devise or bequest to a brother or sister dying in the lifetime of the testator, leaving children surviving the testator, shall not lapse, but the estate so devised or bequeathed shall vest in such children "in the same manner as if such legatee or devisee had survived the testator or testatrix, and had died intestate."

The transfer inheritance tax (Comp. Stat. p. 5301), as amended in 1914 (P. L. p. 287), imposes a tax of 5 per cent. upon the clear market value of property transferred by the will of a resident decedent. In case the transfer is to a sister, an exemption of \$5,000 is allowed, and the rate is cut to 2 per cent. on the excess.

The argument in support of the proposition that the legacy should be treated as a bequest to the testator's sister is rested mainly upon the construction placed upon the statute in *Denise v. Denise*, 37 N. J. Eq. 163, where the question presented was "whether the person whom our statute, in such an event as that which has happened in this case, puts in the place of the legatee named in the will takes subject to the debts of the primary legatee to the testator's estate." In holding that the funds of the estate should not be impaired, and that the legacy was to be treated as though the legatee named in the will had not died, Vice Chancellor Van Fleet says:

"The statute-made legatee is a mere substitute; he is thrust, by force of the statute, in the place made vacant by the death of the legatee named in the will, and is given what, but for his death, would have gone to the primary legatee. He takes the primary legatee's place, as a beneficiary under the will, and should, according to the ordinary rule prevailing in like cases, bear his burdens, and be subject to the equities which would have existed against him. * * * Statutes must always be construed so as to give effect to the intent and object of the Legislature, and this one, I think, must be so read as to cure the mischief it was intended to remedy; that is, it should be held to put the substituted legatee in the place of his parent, and to give him just what his par-

ent would have been entitled to, subject to the same equities that his parent would have been subject to, and bound by the same rules of justice that his parent would have been bound by. He must take in the same manner that his parent would have taken."

In the later case of *Suydam v. Voorhees*, 58 N. J. Eq. 157, 43 Atl. 4, which involves the question whether the substituted legatee took the bequest charged with the debts of the testamentary legatee, Vice Chancellor Reed pointed out that the rule in the *Denise* Case applies only as between the estate and the statutory legatee, and, commenting upon the language above quoted, says:

"The last sentence contains the pith of the rule as between the testator and the statutory legatee. The latter takes what the testamentary legatee would have taken. It does not mean that the deceased legatee takes an interest in the legacy which passes through him to his child, and which, in passing, is liable to be seized upon by the creditors or the personal representatives of the father. Such a meaning would be contrary to the words of the act. Under the statute there is no vesting in the father for an instant. The legacy, which would have vested in the father had he lived, is by the statute vested in the first instance in the son. In respect to it there is nothing for the personal representatives of the father to administer nor for his creditors to reach."

The rules laid down in these cases are not antagonistic nor conflicting in principle, and to adopt either or both leads to the same result in the present controversy. The inheritance tax is imposed upon the transfer of the estate of decedents, and it is immaterial by what particular means afforded by law the property passes from the dead to the living, or what the character or quality of the legal vehicle is by which the transmission is accomplished; provided, of course, the method employed is one upon which the taxing power operates. As between kindred, the relationship that the deceased bore to the beneficiary fixes the exemption and measures the rate of taxation. Nephews and nieces are not within the exempt class, and under the statute they rate as do strangers.

The assessment will be affirmed.

(38 N. J. Eq. 146)

SULLIVAN v. NEWARK LUNCH ROOM CO. (No. 44/758.)

(Court of Chancery of New Jersey. June 17, 1918.)

1. RECEIVERS ~~§ 146~~—DISCHARGE—REINVESTMENT WITH CORPORATE PRIVILEGES—"PROVIDING FOR DEBTS."

Mere extension of time for payment by insolvent corporation may not be "providing for debts" within 2 Comp. St. 1910, p. 1645, § 69, permitting court to discharge receiver and reinvest company with privileges if debts have been paid or provided for.

2. RECEIVERS ~~§ 146~~—DISCHARGE OF RECEIVER—REINVESTMENT WITH CORPORATE FRANCHISES—PROCEEDING.

Procedure contemplated by 2 Comp. St. 1910, p. 1645, § 69, permitting court to discharge receiver and reinvest an insolvent corporation with its franchises if debts have been

paid or provided for, is in nature of equitable proceeding wherein public, as well as stockholders and creditors, must be considered.

3. RECEIVERS — 146 — DISCHARGE — RETURN OF ASSETS.

Chancery Court, under 2 Comp. St. 1910, p. 1645, § 69, will not order discharge of receiver of insolvent company on proposition of creditors' committee, in control of nearly all stock, that assets be transferred to company, in control of committee, and time notes be given creditors for face of claims.

Suit by Francis J. Sullivan against the Newark Lunch Room Company, resulting in appointment of receiver for the company on decree of insolvency. On application of a creditors' committee for an order discharging the receiver and reinvesting the corporation with its privileges and franchises. Application denied, and receiver directed to apply for and obtain an order of sale.

J. F. Hoover, of Newark, for the motion. Chester W. Fairlie, of Newark, receiver pro se.

LANE, V. C. [1, 2] The Newark Lunch Room Company has been decreed insolvent by this court. A receiver has been appointed. He has operated the business under the orders of this court up until this time. A creditors' committee has obtained control of practically all the capital stock. The liabilities amount to upwards of \$12,000. Tangible assets are appraised at upwards of \$6,000, exclusive of good will. The creditors' committee, representing a substantial amount over a majority of the creditors and over one-half of the total indebtedness, now propose that the receiver be discharged, the assets transferred to the corporation now in control of the committee, and that time notes be given to the creditors for the face amount of their claims. On the return of an order to show cause why such a course should not be pursued, no one appeared objecting. Ought the court, notwithstanding the request of a great majority of the creditors, both in number and amount, and the acquiescence, in view of the failure to object, of all the creditors, refuse to permit the consummation of such a plan? The title of the act under which the receiver was appointed was originally "An act to prevent fraud by incorporated companies." Revision approved April 15, 1846; Revision of 1847, p. 129. The section of the act permitting the court to discharge the receiver and reinvest the corporation with the privileges and franchises requires that before this is done the debts must have been paid or provided for, and that it appears to the court that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business. Section 69 of "An act concerning corporations" 2 Comp. Stat. p. 1645. A mere extension of time for payment may not be providing for debts. Bull v. International Power Co., 87 N. J. Eq. 1, 99 Atl. 111. The procedure contemplated by

the statute is in the nature of an equitable quo warranto. Gallagher v. Asphalt Co., 65 N. J. Eq. 258, 55 Atl. 259. Not only are the stockholders and creditors to be considered, but the public generally. If every stockholder and every creditor consented to a plan of reorganization, unless this court can see that the business can be resumed with safety to the public, it ought not to approve the plan. If the plan proposed in the present case be approved, the result will be that the corporation will be started afresh, with liabilities exceeding its assets; new debts will be created; the old debts, the corporation through stock ownership being in control of old creditors, may be paid, and new creditors left to bear the burden. New creditors must be assumed to consider that they are dealing with a solvent concern, since this court has permitted the concern to continue, yet, in fact, they are not, and thus money may be taken and appropriated by the old creditors.

There are two analogous cases now fresh in my mind. In one, the company was adjudicated bankrupt; a creditors' committee was formed; the assets were bought in at sale by the creditors' committee; a new corporation was formed; the assets were turned over to it, at a valuation in excess of the amount paid by the creditors' committee at the sale in bankruptcy, but at a valuation claimed to be fair; notes were delivered for the purchase price; the corporation again became insolvent; a large part of the old debts had been liquidated; the money of the new creditors had been used in liquidating them. It is now claimed that the new debts share *pari passu* with the balance due on the old. At least two years in two courts has now been spent in the winding up of the new corporation, and it has not yet been determined what the relative rights of the parties are. In *Horne v. Harrington* there was a taking over by a corporation of the business of an individual insolvent. The creditors got together; formed a corporation; took over the assets of the insolvent individual at a valuation based not on actual value, but on the amount due from the individual to creditors; stock was issued to the creditors; the company became insolvent. In the latter case I have just been obliged to order an assessment on the stock to raise sufficient money to pay new debts. These two cases illustrate the care with which the court should scrutinize any plan such as now before it, before permitting it to become operative, and the court should, on its own motion, refuse to approve such a plan unless it appears that as a matter of fact the business can be resumed with safety to the public. If the creditors desire to reduce the stock of the company to an amount which will represent the fair value of the assets and will distribute that stock among themselves in proportion to their debts and take the stock in

payment of their debts, another situation will have been presented.

[3] I am convinced that the present plan does not come within the sixty-ninth section, and will decline to direct an order discharging the receiver and reinvesting the corporation with its privileges and franchises.

A receiver has been appointed and has been continuing the business for a considerable time. It ought to be sold as a going concern. It should be sold at once. The receiver is directed to apply for and obtain an order directing him to sell within two weeks and to bring on a motion to confirm the sale immediately thereafter.

Settle order within one day.

(89 N. J. Eq. 283)

G. P. FARMER COAL & SUPPLY CO. et al.
v. ALBRIGHT et al. (No. 44/759.)

(Court of Chancery of New Jersey. June 24, 1918.)

1. INTERPLEADER \S 16—EQUITY.

In suit in equity to settle rival claims to proceeds of insurance policy, it is unnecessary for the insurance company to file bill of interpleader, where the company was already a party to the suit, although one of rival claimants had not filed answer, the company having right to protect itself from suit by such claimant by petitioning court to restrain such action.

2. COSTS \S 79—INSURANCE COMPANY—ACTION TO SETTLE RIVAL CLAIMS TO POLICY PROCEEDS.

Where an insurance company was made a party to a suit to settle rival claims to proceeds of an insurance policy, it is entitled to costs, having been made a party, and required to appear and answer through no default on its part.

Action by the G. P. Farmer Coal & Supply Company and others against Mayme H. Albright and others, in which defendant New York Life Insurance Company interpleads by cross-bill or counterclaim. Motion made to strike out cross-bill or counterclaim. Cross-bill permitted to stand.

The bill disclosed this state of facts: The complainant G. P. Farmer Coal & Supply Company issued an attachment out of the Monmouth circuit against A. Fred Albright, and levied upon a policy, on his life, payable to his wife, Mayme H. Albright, issued by the defendant New York Life Insurance Company. The complainant Leon R. Taylor was appointed auditor, and upon his report judgment was entered in the action. The assured is now deceased, and his widow lays claim to the insurance. The contract of insurance was made in the state of New York, and its laws subject life insurance to the claims of creditors. The insurance company has refused to make payment because of the uncertainty of the rights of the rival claimants. The prayer is that the money be ordered paid

into court upon delivering up of the policy, and that the proceeds be applied to the payment of the complainant's judgment. Mayme H. Albright, the beneficiary, is made a party defendant, and has answered, contesting the complainants' right and joining in the prayer that the moneys be paid into court. The New York Life Insurance Company, in its answer, assumes a neutral position towards the parties, and by cross-bill or counterclaim interpleads, and has paid the insurance money into court. Motion is made to strike out the cross-bill or counterclaim.

Kellogg & Chance, of Jersey City, for complainants. Durand, Ivins & Carton, of Asbury Park, for defendant Albright. Dickinson & Bodine, of Trenton, for defendant New York Life Ins. Co.

BACKES, V. O. (after stating the facts as above). [1] This bill is in aid of proceedings at law, and in effect is in the nature of a bill of interpleader to settle rival claims to a fund. All parties in interest are joined in the suit, and in the circumstances a cross-bill of interpleader was unnecessary for the protection of the stakeholder. It is not necessary to file a bill of interpleader where the holder of a fund is already a party to a suit in equity, brought by one claimant against the other, to settle the right to the fund in his hands. Barbour's Chancery Practice (2d Ed.) vol. 2, p. 120; Daniel's Chancery Practice (8th Ed.) p. 1587; 23 Cyc. p. 5; Lane v. New York Life Insurance Co., 56 Hun, 92, 9 N. Y. Supp. 52. A point is made of the fact that at the time the cross-bill was filed the defendant Mayme H. Albright had not filed her answer submitting her claim to the jurisdiction of the court, and that, as the cause then stood, it afforded no protection to the insurance company as against her possible suit at law upon the policy. This is inadmissible, for the reason that the court would have restrained her from such proceedings, upon the filing of a petition in the cause. *Badeau v. Rogers*, 2 Paige (N. Y.) 209.

[2] The cross-bill will be permitted to stand as an answer and as a petition for permission to pay the money into court, and to be discharged. Such is the practice that should have been followed. A decree may be entered, as moved, that the policy be surrendered, and the company be absolved from further liability thereon, and that it be dismissed from the suit. As the defendant was brought into court and required to answer, not because of any default on its part, it is entitled to its costs. A counsel fee of \$50 will be allowed out of the fund, to be taxed as part of the costs, and to be eventually restored by the unsuccessful party.

(88 N. J. Eq. 253)

PENNSYLVANIA CO. FOR INSURANCE
ON LIVES & GRANTING ANNUITIES
v. RILEY et al. (No. 42/22.)(Court of Chancery of New Jersey. July 8,
1918.)

1. WILLS ⇐755—DEMONSTRATIVE LEGACY.

A bequest of \$1,000 out of the sale of a house of testator in trust for education of legatee is a demonstrative legacy.

2. WILLS ⇐754—SPECIFIC LEGACY.

Will directing that money coming to estate from purchase-money mortgage be held in trust, and income divided among children named, creates a specific legacy.

3. WILLS ⇐767—DEMONSTRATIVE LEGACY—ADEMPTION.

A demonstrative legacy, to be paid out of the proceeds of sale of house, does not necessarily fail by disposition of house in testator's lifetime, but assumes the status of a general legacy, payable out of other personal property, or, if properly charged, out of real estate.

4. WILLS ⇐771—DEMONSTRATIVE LEGACY—ADEMPTION—EFFECT.

Where the property to pay a demonstrative legacy had been sold, and the only other property had been specifically disposed of by the will, the demonstrative legacy, though considered as a general legacy, must fail.

5. WILLS ⇐684(7)—TRUST FUND—BEQUEST TO CLASS—TIME OF DISTRIBUTION.

Where will bequeaths income of trust fund to be divided equally among two life beneficiaries, principal to be divided after "their death" among reversionary legatees, on death of one life beneficiary after death of testatrix, one-half of the fund is distributable.

6. WILLS ⇐523—GIFT TO CLASS—PRESUMPTION.

Where a gift is to several persons by name, a presumption arises that the persons are to take in their individual and not in their collective capacity, though persons named constitute a class.

7. WILLS ⇐634(14)—VESTED ESTATE—REMAINDER.

Under will giving income of fund to two life beneficiaries, principal to be divided after their death to named class of persons "or the survivors or heirs of them," and after death of testatrix one life beneficiary and one reversionary legatee dies, the quoted words cannot be given a force sufficient to prevent the bequest from being vested at death of testatrix, so that share of deceased reversionary legatee would be payable to his estate.

Bill in equity by the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee under the will of Fietta Alselt, deceased, against Mary Riley and others, for construction of a will. Will construed.

Martin V. Bergen, of Camden, for complainant. O. L. Cole, of Atlantic City, for defendants Mary Riley and others. Edwin F. Crane, of Camden, for defendant Theresa Riley.

LEAMING, V. O. By this suit complainants seek judicial construction of the will of Fietta Alselt, deceased.

The provisions of the will, construction of which is herein sought, are as follows:

"6. I direct that out of the proceeds of the sale of my house, or other property, one thou-

sand dollars shall be set apart and held in trust by my executor, for the education of Robert Lewis Read, child of my granddaughter, Mrs. Florence S. Read, née Riley, and in case of his death, the said sum shall be divided equally between my grandchildren, Frank A. Riley, Mary Riley, Joseph H. Riley, Robert Riley, Fietta J. Alselt, Knight Alselt, Robert Alselt and Rachel Alselt."

"7. I direct that the twenty-six thousand dollars coming to my estate from the sale of the Norwood shall be held in trust by my executor, and the income therefrom shall be divided equally between my children, Mrs. Mary Riley and Mr. William H. Alselt, during their lifetime; and after their death, the principal shall be divided equally between my grandchildren Frank S. Riley, Robert Riley, Joseph H. Riley, Mary Riley, Fietta J. Alselt, Knight Alselt, Robert Alselt and Rachel Alselt and Robert Lewis Read, son of Florence S. Read, née Riley, or the survivors or heirs of them."

At the death of testatrix she had disposed of the house referred to in the sixth item of the will, above quoted, and had no other property which could be sold for or applied to the purpose named, except \$28,000; that money was the proceeds of a purchase-money mortgage of \$26,000 on the Norwood, which mortgage represented the \$26,000 referred to in the seventh item of the will above quoted; the mortgage had recently been paid, and the money was intact at the time of the death of testatrix. All other property of testatrix and also \$2,000 of the proceeds of the \$28,000 mortgage has since been used by the executors to pay debts of testatrix.

[1-4] The first inquiry relates to the status of the bequest in the sixth item of the will.

This bequest is a demonstrative legacy. The circumstance that testatrix at her death did not own the property out of which she directed the bequest to be paid is not alone operative to wholly defeat the bequest. A demonstrative legacy, so circumstanced, assumes the status of a general legacy, and should be paid from other personal assets of a testator, and, if properly charged, from testator's real estate. But, as already stated, no other assets of testatrix existed, except the proceeds of the Norwood mortgage, and that mortgage was specifically disposed of by the seventh item of the will. The trust bequest of the Norwood mortgage is a specific legacy; this is fully disclosed by the authorities collected in *Mecum v. Stoughton*, 81 N. J. Eq. 319, 86 Atl. 52, and *Kearns v. Kearns*, 77 N. J. Eq. 453, 76 Atl. 1042, 140 Am. St. Rep. 575; and the \$28,000 representing its proceeds has been identified in a manner that clearly subjects the proceeds to the operation of the bequest. As general legacies must abate before specific legacies, it necessarily follows that the demonstrative legacy of the sixth item of the will fails. *Johnson v. Conover*, 54 N. J. Eq. 333, 35 Atl. 291; *Tichenor v. Tichenor*, 41 N. J. Eq. 39, 2 Atl. 778.

[5] Doubts touching the seventh item of

the will have arisen by reason of the following circumstances:

At the death of testatrix all the persons named in the seventh item of the will were alive. Robert Riley, one of the reversionary legatees, died October 4, 1912, intestate and without issue. William H. Alselt, one of the life beneficiaries, died August 1, 1915. Mary Riley, the remaining life beneficiary, and all the reversionary legatees, except Robert Riley, are still alive. Instructions are now sought as to whether any part of the corpus of the trust fund became distributable at the death of William H. Alselt, and, if so, what disposition is to be made of it.

At the death of William H. Alselt one-half of the corpus of the trust fund became distributable. It has been uniformly so held in this state in construing similar language in all cases in which no other part of the will manifests a contrary intent. *Woolston v. Beck*, 34 N. J. Eq. 74; *Stoutenburgh v. Moore*, 37 N. J. Eq. 63, affirmed 38 N. J. Eq. 281; *Collins v. Wardell*, 65 N. J. Eq. 366, 54 Atl. 417; *Merriam v. Dunham*, 62 N. J. Eq. 567, 50 Atl. 235. In *Kellog v. Burnett*, 74 N. J. Eq. 304, 69 Atl. 196, the words "after the decease of my said two children" were held to mean after the decease of both; but that construction was there made necessary because of a reversion to a class which could not be ascertained until the death of both life tenants. It was, however, there recognized consistently with the cases above cited, that the direction for equal division of income between the life tenants is inconsistent with a right in the income in the nature of a joint tenancy. The language "during their lifetime," as used in the seventh item of the will here in question, must accordingly be understood to mean during their lifetime respectively. It follows that at the death of William H. Alselt one-half of the corpus of the trust fund became distributable.

But for the concluding words of the seventh item of the will, namely, "or the survivors or heirs of them," little, if any, doubt could be entertained touching the manner of distribution at this time of one-half of the corpus of the trust fund.

[6] The direction contained in the will is to "divide equally between" the persons specifically named. All the persons named are grandchildren of testatrix, except one, who is a great-grandchild; the enumeration of persons includes all of the grandchildren of testatrix and her only great-grandchild; the several grandchildren named are the children of the respective life tenants; the great-grandchild is a child of a deceased granddaughter of testatrix. Where a gift is to several persons by name, a presumption arises, in the absence of a contrary intent apparent on the face of the will, that the persons named are to take in their individual, and not in their collective, capacity, even though the persons named constitute a class or

classes. *Dildine v. Dildine*, 32 N. J. Eq. 78. It follows that the manner of distribution of the corpus of the trust fund as contemplated by the will is per capita, as distinguished from per stirpes.

[7] It also seems clear that, in the absence of the concluding words of the bequest already referred to, the reversionary rights of the several grandchildren and the great-grandchild named in the bequest necessarily would be regarded as vested interests at the death of testatrix, as pointed out in *Security Trust Co. v. Lovett*, 78 N. J. Eq. 445, 79 Atl. 616, since there is to be found in the several reversionary legatees at the death of the testatrix a present right of future enjoyment, and that right of future enjoyment limited only on an event—the death of a life tenant—which was certain to happen, and the several reversionary legatees capable of taking in possession at any time either of the life estates should be spent; it is the uncertainty of the right of enjoyment, and not the uncertainty of actual enjoyment, which prevents a right from vesting, and renders it contingent. And even though the concluding words of the bequest should be understood as creative of a right by survivorship in those surviving in the event of the decease of a reversionary legatee before the period for distribution, the interest of such legatee would be regarded as a vested interest, subject to being divested by death before the period of distribution.

Accordingly it remains to consider whether the words "or the survivor or heirs of them," as used at the conclusion of the bequest, are found to be restrictive of the gift in such manner as to confer upon the survivors or upon certain heirs a right to the share of a legatee dying before the period for distribution. As hereinabove stated, Robert Riley, one of the reversionary legatees, died intestate and without issue, after the death of testatrix and before the death of William H. Alselt, one of the life tenants whose death made a distribution of one-half of the corpus necessary.

It will be conceded that the force to be attributed to the language in question here is difficult of ascertainment. Had the word "survivors" been used, without the word "heirs," the language would have clearly related to the survivors at the death of the life tenant, and Robert thus would have been excluded. *Stout v. Cook*, 79 N. J. Eq. 573, 576, 81 Atl. 821. But the words "survivors" and "heirs," as here used, appear to be wholly irreconcilable, unless some artificial or restricted meaning shall be attributed to the words, without satisfactory indication of the intention of testatrix in that respect. Testatrix may have intended by the word "heirs" to refer to issue or descendants, and in that manner may have sought to provide that, in the event of the death of a residuary legatee, without issue, before the period for distribution, his or her share should be

paid to the then survivors; but that construction of the language used by testatrix would attribute an artificial meaning to the word "heirs," and would be essentially conjectural, and without the support of substantial evidence of such actual intent. A construction giving more adherence to accepted rules of construction would be to regard the disjunctive word "or," before the words "survivors" and "heirs," respectively, as strictly substitutionary, as distinguished from the copulative word "and," which latter word, when so used, ordinarily denotes quality or duration of the estate to be taken, and thus impute to testatrix an intent to substitute as objects of her bounty survivors or heirs for one dying before the period for distribution; but that construction presents the incongruity of two substituted and antagonistic classes of takers, without indication of their precedence, except such as might be inferred by the order in which they are named. In *Re Stannard*, 52 L. J. Ch. 355, 48 L. T. Rep. N. S. 660, with somewhat similar language before the court for construction the view was adopted that force should be given to both the word "survivors" and "heirs," and that this could not be done by relating the gift to the period of death of the life tenant, since in such case the substitutionary word "heirs" would be in conflict with the word "survivors." Accordingly the gift was held to relate to the death of the testator, and thus be to those who survived the testator, and to the heirs of any who did not survive testator. But in the will now under consideration the direction is for distribution to specific persons at the death of the life tenant "or the survivors or heirs of them." Perhaps other more or less reasonable conjectures could be indulged as to the possible intent of testatrix in the use of this peculiar and almost meaningless language selected by her; but no suggestion has been made that appears to have the support of a forceful manifestation of a defined intent upon her part. In such circumstances the conclusion appears to be impelled that the language here under consideration cannot be properly given any defined force which shall be operative to so restrict the several reversionary gifts that they may not be regarded as vested in right at the death of the testatrix. Accordingly the share of Robert Riley will be paid to his administrator for the benefit of Robert's estate.

(117 Me. 281)

REED v. REED.

(Supreme Judicial Court of Maine. June 26, 1918.)

1. DEEDS §208(1)—DELIVERY—EVIDENCE.
Evidence held to show unconditional delivery of deed.

2. DEEDS §208(1) — DELIVERY — TAKING BACK MORTGAGE.

That grantor took back a mortgage of the premises to secure performance of conditions of grantee's bond is practically conclusive upon the question of delivery of the original deed by grantor with the intention to convey immediately and unconditionally.

3. DEEDS §179 — REDELIVERY OF DEED TO GRANTOR.

That grantee returned his unrecorded deed to grantor, and grantor mortgaged the land in his own name, to secure a loan from a third person without knowledge of the deed, did not affect the title, as between the original grantor and grantee.

4. EVIDENCE §420(1) — DEEDS — PAROL EVIDENCE—CONDITIONS.

Parol evidence is not admissible to show that a deed actually delivered to the grantee and absolute on its face shall have effect only upon the performance of some condition or the happening of some contingency.

On Motion and Exceptions from Supreme Judicial Court, Lincoln County, at Law.

Action by Melville H. Reed against J. Burton Reed. Verdict for defendant, and the case comes up on plaintiff's motion and exceptions. Motion sustained, and verdict set aside.

See, also, 115 Me. 441, 99 Atl. 181.

Argued before CORNISH, C. J., and SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

McGillcuddy & Morey, of Lewiston, and Carl M. P. Larrabee, of Wiscasset, for plaintiff. A. S. Littlefield, of Rockland, for defendant.

CORNISH, C. J. This is an action of forcible entry and detainer to recover possession of certain real estate in Boothbay Harbor. The plaintiff claims to derive title by virtue of a warranty deed, dated and acknowledged September 4, 1907, from his father, Chapman N. Reed, to Bessie L. Reed, wife of the plaintiff, and by deed from Bessie L. Reed, of the same date, to himself. The defendant denies the passing of the title from Chapman N. Reed during his lifetime, and pleads title in his three brothers, one of whom is the plaintiff, and himself as tenants in common, heirs at law of their father. The issue is the efficacy of the deed from the father to Bessie L. Reed, and that depends upon whether or not it was legally delivered by the grantor to the grantee. If it was legally delivered and title passed, then the plaintiff should recover; if it was not delivered, then the plaintiff fails.

The jury having rendered a verdict in favor of the defendant, the case is before the law court on plaintiff's motion and exceptions. It is only necessary to consider the motion.

[1] It appears that Chapman N. Reed, with his wife, Sarah A. Reed, at the time the deed was made, was living in this homestead, which they had occupied for many years. He

was then a man 72 or 73 years of age. In order to provide an annual income for himself and his wife, he arranged to convey this property to his son, the plaintiff, then living in Cambridge, Mass., who, in consideration of the conveyance, agreed to pay his father the sum of \$300 a year during the father's life, and the same amount to his mother, should she survive her husband. In furtherance of this agreement a local attorney was secured, who drafted the warranty deed in question from Chapman N. Reed to Bessie L. Reed, the plaintiff's wife, a bond from Bessie and the plaintiff to Chapman N. Reed, conditioned to make the annual payments, a mortgage to Chapman N. Reed, signed by Bessie and the plaintiff, to secure the performance of the bond, and a warranty deed from Bessie to the plaintiff, subject to the mortgage. These were all a part of one and the same transaction. All these instruments, when prepared, were taken by the attorney to the Reed homestead, where all the parties were, and were duly executed and acknowledged in his presence. He cannot positively testify that they were delivered by the respective grantors to the respective grantees, nor could he be expected to do so as a matter of distinct recollection after a lapse of 10 years; but he left them at the house with the parties interested. This has been held to be some evidence of delivery. *Lowd v. Bridgman*, 154 Mass. 113, 28 N. E. 1004. To assume that they were not delivered is to conclude that all the labor and expense connected with the transaction were designedly futile. However, the plaintiff and his wife, who are the only other living witnesses to the transaction, testify that all the instruments were unconditionally delivered at the time of their execution; the deed by Chapman to Bessie, and the bond and mortgage by Bessie and the plaintiff to Chapman. The deed from the father to Bessie, as well as the deed from Bessie to the plaintiff, were carried by the plaintiff to his home in Massachusetts. None of the documents was recorded until after the father's death, which was in deference to the wishes of the parents. The plaintiff made various payments under the bond; the exact amount being somewhat in controversy. Sarah A. Reed died in February, 1908, and Chapman N. Reed in February, 1913.

[2] If further proof of the completed delivery of the deed is needed, in addition to the uncontradicted testimony of the plaintiff and his wife, and the inherent reasonableness of the transaction, it is to be found in the concurrent acts of the parties which recognized a transfer of the title. The father's intention to convey immediately and unconditionally is shown by the fact that he took back a mortgage of the same premises to secure the performance of the conditions of the bond. This is practically conclusive upon the question of delivery of the original

deed, and is so held by the courts. *Creeden v. Mahoney*, 103 Mass. 402, 79 N. E. 776; *Blackwell v. Blackwell*, 193 Mass. 186, 81 N. E. 910, 12 Ann. Cas. 1070. If no title had passed to the grantee under the deed, the grantee had nothing which she could convey to the grantor in mortgage, and the grantor knew it. The validity of the mortgage was based on the validity of the deed.

Moreover, we have the written and unanswerable admission of Chapman N. Reed himself, made 3 months after the conveyance. In December, 1907, the plaintiff applied to his father for assistance in raising \$1,000. Under date of December 27, 1907, the father replied:

"I got your letter last night. I am sorry to hear that you have had such hard luck. I will help you out if I can. But as it stands I can't do a thing. You have a deed (or Bessie has) of this place, and in one sense the place is yours; while you carry out the agreement (that is, the bond), I can't do a thing with it. If I should go to put a mortgage on it, the question would be asked: Is it clear of all incumbrances. You see that it would not be while you have a deed of it. Now, you send me the deed. None of the papers have been put on record. Then everything will stand the same as if nothing had been done. Then I can answer any questions that may be asked with a clear conscience. Then I will see what I can do. * * *

Acting upon this suggestion, the deed was returned by the plaintiff to his father, who thereupon placed a mortgage for \$1,000 upon the premises with the Boothbay Savings Bank, in the father's name, the bank supposing that he was still the legal owner, and the money was turned over to the plaintiff by his father. Subsequently the plaintiff met some of the interest payments on this mortgage, and also paid a portion of the principal, ceasing payment on advice of counsel after the question of title had been raised. The father had received nothing from the bank, and paid nothing to the bank, and as between father and son it was as if the bank mortgage had been placed upon the son's property, while as between the father, son, and the bank the mortgage had been placed upon the father's property. It was a matter of pride with the old folks, and naturally so.

[3] This transaction, however, had no legal effect as between Chapman N. Reed and Bessie L. Reed, or the plaintiff, upon the delivery of the deed of September 4, 1907, or the passing of the title thereunder. That deed not having been placed on record, and the holder of the \$1,000 mortgage having neither actual nor constructive notice of its existence, the bank's title under the mortgage would be good as against both Bessie and the plaintiff; but as between the father and them his deed had been delivered beyond recall, and the son held the title, subject to the mortgage for support.

It is needless to discuss the evidence further. The fact of unconditional delivery is completely established. No other inference can reasonably be drawn from the testimony and circumstances. Such was the conclu-

sion reached by this court when the case was first here. *Reed v. Reed*, 113 Me. 522, 95 Atl. 211. At nisi prius the presiding justice had directed a verdict for the plaintiff, and the case was taken to the law court upon exceptions to that ruling, and also upon a motion for new trial on the ground of newly discovered evidence. Regarding the direction of the verdict the court said:

"We shall not discuss the evidence. We need only to say that a careful study of it leads us to the conclusion that a verdict based on nondelivery of the deed could not be sustained. The exceptions must therefore be overruled."

The motion for new trial on the ground of newly discovered evidence was granted. At the second trial, which included the introduction of the newly discovered evidence, a verdict was rendered by the jury in favor of the plaintiff; but this verdict was set aside on exceptions, because under the pleadings the defendant was not given the right to open and close. *Reed v. Reed*, 115 Me. 441, 99 Atl. 181. The merits of the controversy on the delivery of the deed were not considered. At this third trial it is the opinion of the court that the plaintiff's claim is completely established, as was found by the law court after the first trial, and as was found by the jury at the second trial. True, the defendant seeks to have us infer from certain statements of the plaintiff in testimony given in Massachusetts, and in cross-examination at the trials in this state, that some condition was attached to the delivery and that title did not vest. Such an inference is not fairly deducible from the evidence. The plaintiff evidently had in mind the conditions named in the bond, and knew that the title was not indefeasible while those conditions remained unperformed. It was precisely the same idea that the father entertained, when in his letter already quoted he said:

"You have a deed (or Bessie has) of this place, and in one sense the place is yours; while you carry out the agreement (that is, the bond), I can't do a thing with it."

Both father and son were correct in their views. The rights of the father in the place rested upon the bond secured by the mortgage, and not upon an undelivered deed, or a deed conditionally delivered, and that was what was intended by the son's testimony. Carefully analyzed, the testimony is not contradictory, and therefore the newly discovered evidence detracts in no wise from the strength of the plaintiff's claim. This deed having been completely and unqualifiedly delivered by the grantor to the grantee, title vested *ipso facto* in the grantee.

Some confusion seems to have arisen over the use of the term "conditional delivery," and the distinction between a condition affecting the delivery of a deed and an attempted oral condition modifying the efficacy of a deed once delivered by the grantor to the grantee was overlooked. The former is recognized in law; the latter is not and

should not be recognized. This distinction follows from the indispensable element existing in every completed delivery, namely, the absolute relinquishment on the part of the grantor of all dominion and control over the instrument. There cannot be a joint control of the deed by the grantor and the grantee. Their adverse interests forbid it. It must be within the dominion of the one or the other, and title passes or does not pass, according as the deed has or has not been actually delivered. Once delivered, the only conditions affecting the vesting of the grantee's title must be expressed in the instrument itself.

Of course many cases have arisen where a deed has come into the possession of the grantee by mistake, or for a special purpose apart from delivery, and the grantee has assumed dominion over it, either without authority or in violation of authority. In such cases there has been no delivery whatever, conditional or otherwise, because there has been no intention on the part of the grantor to lose the right of control over it, and it has not come into the possession of the grantee as a conveyance with the consent of the grantor. Illustrations may be found in *Chadwick v. Webber*, 3 Greenl. (Me.) 141, 14 Am. Dec. 222; *Woodman v. Ooolbroth*, 7 Greenl. (Me.) 181; *Rhodes v. School District*, 30 Me. 110; *Brown v. Brown*, 66 Me. 316; *Joslin v. Goddard*, 187 Mass. 165, 72 N. E. 948—the last two cases being cited by the defendant. These authorities have no application here, because here the grantor had surrendered all right of dominion, and the grantee had lawfully received the instrument into her possession, in accordance with the intention and act of the grantor.

Under these circumstances this case falls within the well-settled doctrine that, when a deed has been delivered by the grantor to the grantee with the intention that it shall take effect as his deed, it takes effect in exact accordance with the expressed terms of the deed, and it cannot be shown by parol that it was to take effect only upon the performance of some condition or the happening of some event not expressed therein. A condition may precede delivery; but, once delivered, no conditions, except those expressed in the deed, can postpone the vesting of the title. In this we have made no reference to the cases in equity where a deed absolute on its face is held to be a mortgage. They concern the nature of the title granted, not the vesting or nonvesting of any title, and they have no bearing upon the point in issue here.

In *Warren v. Miller*, 38 Me. 108, a real action, the tenant offered to prove by parol evidence that, when the deed introduced by the demandant was made and delivered, the deed was to be void upon the fulfillment by the grantee of a verbal condition subsequent. The evidence was rejected by the presiding justice, and the law court sustained the ruling.

In *Hubbard v. Greeley*, 84 Me. 340, 24 Atl.

799, 17 L. R. A. 511, a case often cited in this state, the court said:

"The authorities all agree that a deed cannot be delivered directly to the grantee himself, or to his agent or attorneys, to be held as an escrow; that, if such a delivery is made, the law will give effect to the deed immediately, and according to its terms, divested of all oral conditions. The reason is obvious. An escrow is a deed delivered to a stranger, to be delivered by him to the grantee, upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. * * * And it is perfectly well settled, by all the authorities, ancient and modern, that an attempt thus to deliver a deed as an escrow cannot be successful; that, in all cases where such deliveries are made, the deeds take effect immediately and according to their terms, divested of all oral conditions."

It should be further said that oral testimony should not be admitted to abrogate the legal effect of a written instrument once intentionally and completely delivered to the grantee. Otherwise the validity of the transaction would depend upon the recollection and truthfulness of human witnesses.

"There is manifest wisdom in the old rule, that the law will regard, in such transactions, not what is said, but what is done." Ordinary of N. J. v. Thatcher, 41 N. J. Law, 403, 32 Am. Rep. 225.

[4] In short, delivery of a deed in its legal sense is one thing; the effect of the deed after delivery is another. A deed does not on its face prove delivery; therefore the evidence of the fact must come from without. But the effect of the deed after delivery is proved on its face, and must come from within. Parol evidence is not admissible to show that a deed actually delivered to the grantee and absolute on its face shall have effect only upon the performance of some condition or the happening of some contingency. This is the settled law. *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17; *Whitney v. Whitney*, 10 Idaho, 683, 80 Pac. 1117, 69 L. R. A. 572; *Haworth v. Norris*, 28 Fla. 763, 10 South. 18; *Berry v. Anderson*, 22 Ind. 86; *Lawton v. Sager*, 11 Barb. (N. Y.) 349; *Wipfler v. Wipfler*, 158 Mich. 18, 116 N. W. 544, 16 L. R. A. (N. S.) 941, with extended note; 8 R. C. L. 1003. This has been and still is the law of this state.

We have discussed the subject with greater fullness than might seem necessary, especially in view of the fact that there is no evidence of conditional delivery of any sort, because in *Reed v. Reed*, 113 Me. 522, 524, 95 Atl. 211, and perhaps in *Coombs v. Fessenden*, 114 Me. 347, 96 Atl. 242, the court used language, somewhat in the nature of dicta, that might be construed as approving the rule contended for by the defendant.

Such is not the law, and we take the first opportunity to correct any misapprehension that may have arisen, or might arise, and to reaffirm the doctrine of *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511, supra, in order that there may be no uncertainty as to so important a legal principle, affecting as it does the stability of titles to real estate.

Motion sustained.

Verdict set aside.

(117 Me. 297)

CITY OF BANGOR v. RIDLEY.

(Supreme Judicial Court of Maine. July 3, 1918.)

1. MUNICIPAL CORPORATIONS — 255 — CONTRACTS WITH OFFICERS—VALIDITY.

Under Rev. St. c. 4, § 43, prohibiting member of city government to be interested in any contract and making contracts in violation thereof void, a city alderman, who furnished teams and received payment for services, was liable to the city for the amount so received; the money having been paid under an implied contract made void by the statute.

2. MUNICIPAL CORPORATIONS — 255—RIGHT TO RECOVER.

Though city received services of teams belonging to a city alderman and the payment therefor to him was equitable, it could nevertheless recover such money in an equitable action for money had and received, since Rev. St. c. 4, § 43, prohibited and made void any contract between the city and the alderman.

3. MUNICIPAL CORPORATIONS — 247—VALIDITY OF CONTRACTS — ILLEGAL CONTRACTS — COMPLETED CONTRACTS.

A party dealing with a municipality can reap no advantage from the fact that his illegal conduct is completed, as it is incumbent upon every one, dealing with a municipality, to discover its authority to act, or to assume the risk upon failure to do so, and deal with it at his peril.

4. MUNICIPAL CORPORATIONS — 255 — CONTRACTS WITH OFFICERS—VALIDITY.

In determining city's right to recover from alderman money paid him under implied contract for services of teams, which was prohibited by Rev. St. c. 4, § 43, the fact that the city received full value for the money paid, and no harm came to the public, was immaterial.

5. MUNICIPAL CORPORATIONS — 231(1)—CONTRACTS—VALIDITY.

Under Rev. St. c. 4, § 43, making void all contracts of the city with a member of the city government, a contract in violation thereof is void on the part of the city as well as the officer.

6. MUNICIPAL CORPORATIONS — 231(1)—"MUNICIPALITY."

In construing Rev. St. c. 4, § 43, prohibiting contracts between city governments and an officer thereof, the term "municipality" should be regarded as limited in its application to cities only.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipality.]

King, J., dissenting.

Report from Supreme Judicial Court, Penobscot County, at Law.

Action by the City of Bangor against Fred C. Ridley. Case reported. Judgment for plaintiff.

Argued before CORNISH, C. J., and SPEAR, KING, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

James M. Gillin, City Sol., of Bangor, for plaintiff. George E. Thompson and Fellows & Fellows, all of Bangor, for defendant.

SPEAR, J. This case comes up on report. The record shows that the defendant, Fred C. Ridley, was an alderman in the city of Bangor for the municipal year of 1915, that during the year he furnished teams and drivers who performed certain services for the city, that he received payment in full in due course of business for the services rendered, and, by the admission of the plaintiff, "that the city received the benefit of the men and teams furnished by him to said city, * * * and that the prices for said teams and men were just and reasonable."

Under this state of facts the plaintiff city has brought an action for money had and received, to recover back from the defendant the amount it had paid him under these contracts, upon the ground that the services were rendered in contravention of the statute, and the payments therefor were illegal.

Revised Statutes, chapter 4, section 43, reads as follows:

"No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof; and contracts made in violation thereof are void."

[1] The defendant has been paid by the city, with the approval of the department of the city government authorized to approve and pay the city bills. The issue is: Has he a legal right to keep the money in defense of the pending suit? We think the test of this question is found in the inquiry: Had he a legal right, in any form of action, to recover from the city for his services? Applying this test, we are unable to discover any form of action upon which the defendant could recover. The language of the statute is as broad as language can make it. "Any contract" in violation of the statute is void. "Any contract" embraces every kind of contract, express or implied. No action can be maintained on a void contract. *Goodrich v. Waterville*, 88 Me. 39, 33 Atl. 659. This was an action to recover for medical attendance upon a pauper. The physician rendering the services was at the time a member of the common council of the city of Waterville. The nature of his contract of employment was precisely like that of the defendant in the present case; each contract resting upon an implied promise to pay what the services were reasonably worth. In this case the identical statute now involved was under consideration, upon which the court say:

"And the statute cited declares that all such contracts shall be void. If the employment of the plaintiffs did not create such a contract, then, of course, their action is not maintainable; for such a contract is the cause of action, and the only cause of action declared on. If it

did create such a contract, it was one in which a member of the city government was directly interested, and for that reason one which the statute cited declares shall be void; * * * of course, no action can be maintained upon it."

Therefore the defendant could not have recovered, for his services, on a quantum meruit, as this form of action is based upon an implied contract, and comes within the inhibition of the statute.

In view of the statute now under consideration, there is another controlling reason why the defendant should be made liable for the money received for his services. The statute in question was enacted for the express purpose of prohibiting a member of the city government from making contracts with the city. But if he can influence the city government, of which he is a member, either as a matter of friendship or corruptly, to give him employment upon a contract, express or implied, and obtain and retain his pay for its execution, then both he and the city government can evade and nullify the effect and purpose of the statute with impunity. He has made his illegal contract. He may have influenced the city government to favor him. He has received his compensation for executing it. If he can keep the money, the statute is dead. He has succeeded by indirection.

This interpretation is fully sustained in the opinion of the court in answer to questions propounded by the Governor, found in 108 Me. on page 552, 82 Atl. 90, upon the construction of a statute identical in meaning with the one under consideration in which the court say:

"The Legislature must be presumed to have had in contemplation all of the contracts which might have been made by the different state officers, and to have enacted the statute for the purpose of removing any temptation on their part to bestow reciprocal benefits upon each other, and of preventing favoritism, extravagance, and fraudulent collusion among them under any circumstances which might be reasonably anticipated as likely to arise under different state governments in the years to follow."

[2] But it may be said the city government has voluntarily paid him for his services, and, as such payment was equitable, they cannot recover it back in the equitable action of money had and received. This reasoning might hold good in cases between individuals, but a municipality is a creature of the statute, and can do just what the statute, and the necessary execution of the statute, permits, and cannot do what the statute inhibits. It will require no citations to show that the officers of a municipal government cannot contract to pay, expend or pay out, city funds for an illegal purpose or upon an illegal contract. It is not within the scope of their powers, and the city in the proper form of action can recover it back. Otherwise municipalities might be mulcted to the verge of ruin by dishonest or incompetent officials. If having illegally

paid the money out, the city cannot recover it back.

[3] A party dealing with a municipality can reap no advantage from the fact that his illegal conduct is completed, as it is incumbent upon every one, dealing with a municipality, to discover its authority to act, or to assume the risk upon failure so to do, and deal with it at his peril. This rule needs no citation in this state, but in *Goodrich v. Waterville*, 88 Me. 39, 33 Atl. 659, dealing with this very statute, the rule is thus tersely expressed:

"All persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers."

[4] Nor is the fact that the city received full value for the money paid out, and that no harm came to the public, the test. *Lesieur v. Rumford*, 113 Me. 317, 93 Atl. 838, is a case in which a member of the board of health was employed by the board to attend a case of smallpox. In this case no statute expressly forbade such employment; but the court held that such employment was prohibited by the spirit of the law, both the common law and statute, and based upon the rule of sound public policy. After quoting the statute under consideration, and the statute relating to the employment of persons holding places of trust in a state office, the court says:

"Assuming, as we do, that these statutory prohibitions do not directly apply to a member of a local board of health, yet the principles on which they are founded are quite as applicable to a contract made by a board of health with one of its own members, as to the contracts expressly inhibited in these statutes."

It is further said (113 Me. 320, 93 Atl. 839):

"The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result.

"Applying this rule to the contract declared on, and testing it by those principles which constitute public policy as recognized by the common law, and as evidenced by the trend of legislation and judicial decisions, we are constrained to hold that the contract does so far contravene public policy that it ought not to be upheld and enforced through the administration of the law."

There is a dictum at the end of this opinion, suggesting that an action of quantum meruit might be sustained; but this case is entirely distinguishable from the case at bar, as there was no express statutory prohibition of employment, by the board of health, of one of their members, and it may be that quantum meruit might lie; but quantum meruit is based upon an implied contract, whereby it is held, when one party knowingly receives the services of another party, and the conditions, circumstances, and relations are such that, in equity and good conscience, he ought to pay for such services, then, although no express contract exists, the law intervenes and implies a contract that

the party receiving the benefit of such services shall be held to pay what they are reasonably worth. But the moment this obligation comes into being by implication it is an implied contract, and falls within the ban of the statute, and is made void thereby.

[5, 6] Finally, it should be noted that this statute was not enacted to prohibit the contractor, alone; with equal force it can be invoked to prohibit the city government from making "any contract" with one of its members. The language of the statute—any contract entered into—makes such a contract as void on the part of the city government as on the part of the contracting member. It makes no distinction. The contract is void on both sides. This language was undoubtedly used advisedly, for, from common knowledge, it is well known that there is a great temptation, and sometimes a positive inclination, on the part of a city government, to favor one of its members. The statute, therefore, wisely holds, if a city government undertakes to transgress its plain duty in this regard, that whatever they do shall be regarded as void. It would therefore appear that the implied contract, upon which the city government paid the defendant for his services, was ultra vires on their part, was illegal on his part, and the money paid was without authority, was in violation of the city's legal rights, and should be recovered back. It should be noted that the statute here invoked and construed applies in its terms solely to cities, and the term "municipality," or "municipal," as here used, should be regarded as limited in its application to cities only.

Judgment for plaintiff for \$495.20, and interest from the date of the writ.

KING, J., does not concur.

(92 Vt. 306)

DEYETTE v. DEYETTE.

(Supreme Court of Vermont. Chittenden.
April 12, 1918.)

1. DIVORCE \S 327 — FOREIGN DIVORCE — JURISDICTION.

In suit for divorce in Vermont, jurisdiction of New York court, which annulled former marriage of defendant, was open to inquiry.

2. DIVORCE \S 329 — FOREIGN DIVORCE — FRAUD.

In suit for divorce in Vermont, jurisdiction of New York court, which annulled former marriage of defendant, can be collaterally impeached only for fraud extrinsic to the matter then tried, and neither party may impeach it for false testimony then given.

3. DIVORCE \S 329 — FOREIGN DIVORCE — FRAUD.

Husband had no such interest in foreign decree annulling wife's former marriage as entitled him to impeach it for fraud of wife and her mother in procuring it by falsely stating the wife's age.

4. APPEAL AND ERROR ¶671(3) — RECORD — EVIDENCE.

The court will pay no attention to exceptions the consideration of which requires examination of evidence not in the record.

5. DIVORCE ¶298(4) — CUSTODY OF CHILD — COMPARATIVE FITNESS.

Though wife was guilty of intolerable severity, such fact is not controlling in disposing of custody of child, where husband sought ruling, in effect, that child was illegitimate, which would have relieved him of liability for her support.

Exceptions from Chittenden County Court; Fred M. Butler, Judge.

Suit by John E. Deyette against Eugenie Deyette, wherein defendant filed a cross-petition. Decree for petitioner, dismissing cross-petition, but awarding custody of child to cross-petitioner, and petitioner excepts. Affirmed and remanded.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

V. A. Bullard and J. J. Enright, both of Burlington, for petitioner. A. L. Sherman, of Burlington, for petitionee.

WATSON, C. J. The petitioner, John E. Deyette, filed his petition for a divorce, and the petitionee, Eugenie Deyette, filed her cross-petition. The two petitions were heard together. A bill of divorce was granted the petitioner for intolerable severity, and the cross-petition was dismissed. The care and custody of the minor child was granted to the petitionee, and the petitioner was ordered to pay \$100 per year to the petitionee toward the care and support of the child until she shall arrive at the age of 16 years. The case is here on the petitioner's exceptions.

It appeared that the petitionee had previously married one Borst in the state of New York, and that a decree of annulment of that marriage had been granted by a New York court, on the ground that she was married to him prior to, and had not lived or cohabited with him as husband and wife since attaining the age of legal consent. A certified copy of the record of those proceedings was introduced in evidence, and is made a part of the exceptions. It seems from that record that, at the time those proceedings were instituted, all the parties thereto were domiciled in the state of New York, and no claim is here made to the contrary. The record shows that the process was personally served upon the defendant Borst within that state. It therefore appears that the New York court had jurisdiction of the parties and of the subject-matter. Borst failed to appear in answer to the case, and was wholly in default. Those proceedings were brought, and the decree therein rendered, under a statute of that state permitting a marriage to be annulled when contracted by a party of less than 18 years of age, provided the parties did not

freely cohabit as husband and wife after such party had attained that age.

In the trial of the present case the petitioner sought to vitiate the New York decree, on the ground of fraud in its procurement; and on this question he was permitted to show, subject to exception, that Eugenie and her mother there testified that the former was born on August 31, 1887, when in fact she was born on August 31, 1886; that in fact she was 18 years of age on August 31, 1904; that she was married to Borst in the preceding October, and continued to live with him as husband and wife until the summer of 1905, and consequently they thus lived together for nearly a year after she attained the age of legal consent. The petitioner contends that the New York decree was therefore based upon fraud respecting an essential fact, by reason of which it is open to collateral attack, and is void.

[1-3] That the question of jurisdiction of the New York court was open to inquiry is beyond doubt. *Domenchini's Adm'r v. Hoosac Tunnel & W. R. R.*, 90 Vt. 451, 98 Atl. 962. But the fraud shown did not go to the jurisdiction. We will assume that such a judgment rendered in that state may be impeached in a collateral action, for fraud, yet it can only be for fraud extrinsic or collateral to the matter tried in that action; it can not be impeached by either of the parties thereto, by reason of false testimony given at the time, even though given by a party. *Camp v. Ward*, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929; *French v. Raymond*, 82 Vt. 156, 72 Atl. 324, 137 Am. St. Rep. 994. It is said, however, that the petitioner in the present action is a stranger to the foreign decree, and therefore he may impeach it collaterally, citing in support of this position *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184. In that case the fraud was as to the domicile of the plaintiff to the action in which the foreign judgment was rendered, and went to the jurisdiction. This court said the defendants, in the case of *Blondin v. Brooks*, were strangers to it, and that strangers can impeach a judgment collaterally "when it is for their interest to impeach it at all." Granting, though not deciding, that a stranger to a judgment may impeach it for intrinsic fraud, if it be for his interest to do so, his "interest" must be such at least, as concerns him in the collateral action wherein the impeachment is sought. Otherwise he is not aggrieved. In *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, the defendant was married in the state of Massachusetts to one Pomeroy. After living together there for some years, Pomeroy went to Chicago to procure a divorce for a cause not recognized by the laws of Massachusetts, and to evade the laws of that state. The defendant went to Chicago, appeared in the action, and the parties, by collusion, procured to be entered and docketed a decree of absolute

divorce. Later the divorced wife married Kinnier, and the action was brought by him to annul the marriage on the ground that the former marriage of the defendant was in force, and her divorce from Pomeroy was void in the state of New York. The case stood on demurrer to the complaint. It was held that the judgment of the Illinois court effectually divorced the parties to it, and their marriage was no longer in force in any legal sense; that the plaintiff in the New York action was not defrauded or injured by the foreign judgment. The court said:

"The plaintiff was entitled to marry a marriageable person, and though she may not have been, in other respects, all he anticipated or all that was desirable, yet she was competent to marry, because her former marriage was not then in force, and, being competent, it is of no legal consequence to the plaintiff how she became so. Conceding fraud as alleged, he cannot avail himself of it."

In *Ruger v. Heckel*, 85 N. Y. 483, it was held that a second husband of a divorced woman could not maintain an action to have the decree divorcing her from her former husband canceled and her second marriage declared void, on the ground that the proof upon which the court acted in granting the divorce was fabricated, and the decree of divorce fraudulently obtained.

We think it clear that the petitioner in the present action has no such interest in the matter of the foreign judgment as entitles him to impeach it on the ground of the fraud shown. The wisdom of this law is forcibly brought to mind by the circumstances of this case, where the petitioner is attempting, by such impeachment, to render his marriage with the petitionee void, and thereby illegitimize their minor daughter of tender years, begotten and born in lawful wedlock, the fruit of the union. The law would be lacking in justice if it permitted such an inhuman undertaking to succeed.

[4] Several exceptions were taken by the petitioner, the consideration of which requires an examination of evidence not before us as a part of the record. To such exceptions we pay no attention. The bill of exceptions had attached to it what is stated to be exceptions taken by the petitioner during the progress of the trial. We assume that this was done by the presiding judge, and that they were intended to be a part of the bill. They are so treated. The evidence offered to be shown by the witness Loosemore, and by the witness Perry, and excluded by the court, does not appear to have been of sufficient consequence to require further notice.

Exception was taken to that part of the decree which gives the care and custody of the minor child to the petitionee, as unreasonable, in that it contemplates that the child will be taken out of the jurisdiction of the court, thus placing it beyond the power of the father to see the child as specified in the de-

creed. Suffice it to say of this exception that there is nothing about the decree indicating the contemplation here stated.

[5] It is said that the court in effect found and decreed that the petitionee had been guilty of such intolerable severity toward her husband as to show her not a fit person to live with him; and, if she has done ill in the marriage relation, she will be likely to do ill in the parental relation. Giving this all the force it is entitled to as an argument, it is far from controlling, in view of the fact, among others that the petitioner's love for the child is so small that it did not even deter him, on the trial of the facts in the court below, nor on exceptions in this court, from strenuously attempting to procure a ruling that could not result otherwise than to render this same child an illegitimate, and relieve him of any liability for her support. The good of the child is the primary consideration, and that can be judged to some extent by the comparative acts of the father and the mother, showing love and affection for it, and a parental interest in its welfare. It is very apparent from the record that the court below committed no error in decreeing the care, custody, and control of the child to the mother.

Judgment affirmed, and cause remanded.

(92 Vt. 390)

FIDELITY & DEPOSIT CO. v. BROWN,
Ins. Com'r.

(Supreme Court of Vermont. Washington.
June 12, 1918.)

1. STATUTES \S 217—CONSTRUCTION—LEGISLATIVE HISTORY.

The legislative history of a statute may be referred to for aid in arriving at the intent and purpose of the Legislature as expressed in the act.

2. CORPORATIONS \S 636 — ADMISSION TO DO BUSINESS IN STATE — TERMS AND CONDITIONS.

In permitting foreign corporations to do business in the state, permission may be granted under such conditions and regulations as the state shall impose, not thereby affecting matters of a federal nature.

3. INSURANCE \S 19 — LICENSE TAXES — COMPANY RULES—"SAME"—"SIMILAR."

A fidelity and deposit company, organized under Code Pub. Gen. Laws Md. 1904, art. 23, § 174, prohibiting imposition of license tax on such corporations, is not subject to license fee in Vermont under P. S. § 4824, authorizing imposition on foreign corporation of similar license fee as that imposed on a "similar" corporation by the other state, notwithstanding Vermont Life Insurance corporation pays a license fee in Maryland under Code Pub. Gen. Laws Md. 1904, art. 23, § 167, as amended by Laws 1912, c. 207, "similar," not having the significance of "same."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Same; Similar.]

Exceptions from Washington County Court; Leighton B. Slack, Judge.

Bill by the Fidelity & Deposit Company

against Joseph G. Brown as Insurance Commissioner. On defendant's exceptions to orders sustaining demurrer in dismissing the appeal. Reversed, demurrer overruled, and cause remanded.

The bill alleges that by the Code of Public General Laws of the State of Maryland of 1904, article 23, section 167, as amended by the General Assembly of that state in 1912 (Laws 1912, c. 207) it is provided:

"No person, firm or corporation shall act as agent or solicitor in this state for any insurance company * * * except for such companies as may be chartered under the laws of this state, in any manner whatever relating to insurance risks, until all the provisions of this article relating thereto have been complied with, and there has been granted by the insurance commissioner a certificate of authority or license, for which said company * * * or their agent, doing a life insurance business, shall pay to the insurance commissioner the sum of three hundred dollars, * * * provided that nothing contained herein shall amend or repeal sections 170 to 174, both inclusive, of article 23 of the Code of Public General Laws of 1904."

That said section 174 reads as follows:

"No license fee shall be hereafter required of or collected from any company, corporation or association chartered, incorporated or organized under the laws of any of the states of the United States other than the state of Maryland. * * * As a condition of granting to such company, corporation or association a license to carry on any of the classes of insurance business known as surety, liability, fidelity, accident, boiler, plate glass, health, burglary, sprinkle leakage, credit indemnity, or casualty insurance. * * *"

It is further alleged that for many years last past the plaintiff has been engaged in carrying on its authorized insurance business in the state of Vermont, and has established a large number of agencies therein for such purpose, doing a large business each year, under a license granted to it according to the law of the state, and on April 1, 1917, a renewal of such license to do business in the state until April 1, 1918, was granted the plaintiff, it paying to the state for such renewal the sum of \$5, as required by law.

Also that under and by virtue of the provisions of said section 167, the state of Maryland imposes upon and requires of the National Life Insurance Company, a Vermont insurance company doing a life insurance business in said state of Maryland, a fee of \$300; that the plaintiff, in its business, either in this state or elsewhere, in no manner whatever engages in life insurance business, but wholly in the classes of insurance business specified in said section 174; that the defendant, as insurance commissioner of Vermont, by reason of the requirement by the state of Maryland of said fee from said National Life Insurance Company as stated above, and claiming authority and right therefor under and by virtue of section 4824 of the Public Statutes (G. L. 5623) has imposed upon, required of, and attempted to enforce against the plaintiff, as a fee for do-

ing its said business in this state, the sum of \$300, and still continues so to do, and therein has demanded of the plaintiff the payment of the additional sum of \$295 as such fee, and has threatened, and still threatens, to revoke and cancel the said license of the plaintiff unless such additional sum is paid; that unless the defendant is restrained from carrying his said threats into effect, the plaintiff's said license will be canceled and revoked without any remedy or redress to the plaintiff in the premises, and thereby the plaintiff will suffer great and irreparable damage, etc.

The prayer is for a perpetual injunction restraining the defendant from revoking or canceling the plaintiff's said license, and from further imposing upon, requiring of, and attempting to enforce against the plaintiff, an additional fee for doing its said business in this state, for the cause aforesaid, and for general relief. A temporary injunction was issued against the defendant, to be in force until further order of court.

The defendant filed his answer, and therein incorporated a demurrer to the bill, assigning as a cause the want of equity. The printed case shows that the parties then stipulated that the cause, in so far as the claims, briefs, and arguments of the parties, are concerned, shall stand for the decision of the court wholly upon the construction of section 4824 of the Public Statutes; that until the final determination of the cause, the defendant, for or by reason of any claim based upon that section of the statute, shall in no way interfere, or attempt to interfere, with the carrying on of business in this state, but, upon the payment by the plaintiff annually of the fee of \$5, shall renew the license of the plaintiff, as of April 1st, so to do business in this state; and that if, upon the final determination of the cause, the Supreme Court shall hold that the fee should be held to have been \$300, then the plaintiff shall pay the same to the state of Vermont without further demur.

The demurrer, being heard solely on the question whether, on the facts alleged, the provisions of section 4824 of the Public Statutes authorizes the insurance commissioner to collect a fee of \$300 from the plaintiff for doing business in this state, was sustained, the bill adjudged insufficient, and dismissed, with costs to the defendant, the temporary injunction to continue in force pending the appeal taken by the plaintiff.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Theriault & Hunt, of Montpelier, for plaintiff. Herbert G. Barber, of Brattleboro, for defendant.

WATSON, C. J. The only question presented is as to the construction of section

4824 of the Public Statutes, now section 5623 of the General Laws, which reads:

"If another state or country imposes upon or requires of a domestic insurance company or its agents doing business therein, fees, fines, penalties, deposits, obligations or prohibitions exceeding those imposed by this state upon or required of foreign insurance companies doing business herein, an insurance company organized under the laws of such other state or country and its agents doing business in this state shall be subject to the fees, fines, penalties, deposits, obligations or prohibitions similar to those so imposed in such other state or country. * * *

The plaintiff claims that if this section of the statute is to stand, it must be construed as applicable in its retaliatory operation, not to insurance companies generally, regardless of the lines of business in which they are engaged, but to insurance companies doing like lines of business; in other words, that the retaliatory operation must be according to classification. While the defendant claims that the true intent and purpose of the General Assembly was to make the maximum fee, etc., imposed upon any Vermont insurance company by another state, the fee, etc., to be imposed upon all insurance companies of the same state, doing business in Vermont.

[1] The law of this section was first enacted as No. 115 of the Acts of 1888. The legislative history of this enactment may be referred to for aid in arriving at the intent and purpose of the lawmakers as expressed in the act. *Town School Dist. of Brattleboro v. School Dist. No. 2*, 72 Vt. 451, 48 Atl. 697; *Lapina v. Williams*, 232 U. S. 78, 34 Sup. Ct. 196, 58 L. Ed. 515. The original bill, as introduced, had reference to life insurance companies only; and the fees, etc., to be imposed upon or required of a foreign life insurance company and its agents while doing business in this state, were "the same" as were imposed upon or required of a domestic life insurance company while doing business in the state or country under whose laws such foreign life insurance company was created, in case they be more in amount or at a greater rate than those required by other provisions of law of this state. By amendments the bill, as it became a law, had reference to "any insurance company," and the fees, etc., to be imposed upon or required of any insurance company coming from another state or country, and its agents, doing business in this state, were fixed as "similar" to those imposed in such other state or country upon any domestic insurance company, while doing business therein, in case, etc.

[2] It is matter of common knowledge that there are several general classes of insurance. The word "similar" is defined (*Webster's Internat. Dict.*) as "nearly corresponding; resembling in many respects; somewhat alike; having a general likeness." It is to be noticed that, as thus defined, it has not the significance of "the same," iden-

tical. The statute under consideration contemplates reciprocal relations founded upon consent, which is implied from comity between the states and the absence of prohibition. In permitting foreign corporations to do business in this state, the permission may be granted under such conditions and regulations as the state shall impose, not thereby affecting matters of a federal nature. *Cook v. Howland*, 74 Vt. 898, 52 Atl. 978, 59 L. R. A. 338, 98 Am. St. Rep. 912. The license, and renewals thereof, granted to the plaintiff prior to the bringing of this bill, were under the provisions of P. S. 4764 (now G. L. 5554), for each of which, extending until the 1st day of April thereafter, the company was required to pay the insurance commissioner \$5. The excess of this sum can be collected of the plaintiff only under the provisions of the retaliatory statute in question. It seems pretty clearly to have been the intention of the Legislature, when this statute is applicable, to return like for like—to treat an insurance company coming from another state or country, to do business here, the same as such a company from this state is treated in such other state or country, while doing business there. So long as the provisions of the original bill related solely to life insurance companies, the amount of the fees, etc., was aptly fixed as "the same." And yet it was fixed by classification, for not two insurance companies, even of the same class, are identical; they have but a general likeness, and are therefore only similar. Were the law in terms to impose the same fees, etc., upon "similar insurance companies," there should seem to be no doubt as to the meaning intended; and yet, as the law was passed, and as it now is, broad enough to bring within its provisions all insurance companies, we think the same idea of classification obviously flows out of the nature of the purpose to be accomplished, and that the word "similar," in the connection of its use, carries with it this basic idea, and that such was the intention.

Therefore, by the law of the section of the statute in question, when applicable, the fees, etc., which shall be imposed upon or required of an insurance company organized under the laws of another state or country and its agents doing business in this state, shall correspond in amount to the fees, etc., imposed by such other state or country upon an insurance company of the same classification, incorporated in this state, or its agents, doing business in such other state or country.

[3] According to the allegations in the bill, the plaintiff is not of the same classification as the National Life Insurance Company of this state, and is nowhere engaged in doing life insurance business. It is engaged exclusively in the classes of insurance business specified in section 174 of the Maryland statute set forth in the statement of the case; and the law of that section is that no license

fee shall be required of or collected from any insurance company, corporation, or association chartered, incorporated, or organized under the laws of any other state of the Union, as a condition of granting to such company, corporation, or association a license to carry on any of the classes of insurance business specified therein. It follows that the insurance commissioner is not authorized by the provisions of section 4824 of the Public Statutes (G. L. 5623) to collect from the plaintiff the additional fee demanded of it for doing business in this state.

Decree reversed, demurrer overruled, bill adjudged sufficient, and cause remanded.

(92 Conn. 702)

ZETTERSTROM v. THOMAS.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. BAILMENT §—1—LOSS OF GOODS—LIABILITY—EVIDENCE.

Where defendant, being called to carry chief of police to scene of automobile and motorcycle collision, was requested by chief to carry motorcycle back, but refused to do so, and later was asked to go and get the motorcycle, and on going to get it found it had been stolen, he was not liable for the loss thereof as a bailee.

2. BAILMENT §—1—WHAT CONSTITUTES.

"Bailment" is delivery of goods in trust on contract, express or implied, that trust shall be truly executed, and goods restored to bailor as soon as purpose of bailment shall be answered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bailment.]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by Harold Zetterstrom against Herbert C. Thomas. Judgment on verdict for plaintiff, which was set aside, and plaintiff appeals. No error.

Walter J. Walsh, of New Haven, for appellant. Charles F. Roberts, of New Haven, for appellee.

RORABACK, J. The complaint alleges that in October, 1916, the plaintiff was riding a motorcycle upon a highway in the town of Orange, when he collided with a motor vehicle and was seriously injured. Certain police officials of the town of Orange took charge of the motorcycle, and one of them authorized and employed the defendant to remove the machine in question, which was slightly damaged because of this collision. The defendant accepted such employment, and undertook to remove the motorcycle from the highway to his garage in the town of Orange, but negligently and carelessly left the same unsecured, without any one to guard it, so that the motorcycle was taken by some person or persons unknown to the plaintiff, and the plaintiff has never been able to recover possession of his machine.

[1] The defendant's motion to set aside the verdict was properly granted, for it appears

from the evidence that about 9:30 o'clock at night on October 10, 1916, the plaintiff and a companion were riding a motorcycle along the highway in the town of Orange, when he collided with an automobile. The force of the collision threw the plaintiff off his machine, which caused a severe injury to him, and he was removed to the hospital. The fact of the collision was communicated to the police headquarters of the town of Orange. The chief of police of this town requested the defendant to send a car to take him to the place of the accident. The defendant took a light touring car, and carried the officer to the place of the collision, which was about four miles distant from the defendant's garage. This was about 11 o'clock at night. The defendant refused to permit the motorcycle to be loaded into his car, because of its size and weight. After an unsuccessful attempt to remove the motorcycle from the highway, the defendant carried the officer back to police headquarters, where a report was made of the collision. After the matter had been reported to police headquarters, the defendant went to his home. Early in the morning of October 11th, the defendant was called up by an officer of the police department and requested by him to go up in the morning and get the plaintiff's machine. This the defendant agreed to do. When the defendant attempted to obtain possession of the plaintiff's machine, it could not be found, as some one had removed it during the latter part of the night.

[2] It is plain from the evidence that the defendant did not stand in the relation of bailee of the plaintiff when his property was surreptitiously taken from the highway. While it is true that there are a number of different kinds of bailments, the different kinds are of the same general character, and for the purposes of this case the word may be defined to be:

"A delivery of goods in trust, on a contract, express or implied, that the trust shall be truly executed, and the goods restored to the bailor as soon as the purpose of the bailment shall be answered."

This is a standard definition of this word, and in the present case there can be no difficulty in understanding its application to the facts presented by the record. The evidence plainly shows that the plaintiff's property was never for a moment in the defendant's possession as bailee, nor does it appear that there was any acceptance of the article by the defendant, as the law of bailment requires. The record clearly indicates that the verdict of the jury was one which could not have been reasonably reached from the evidence, and that it was properly set aside by the court below.

There is no error. The other Judges concurred.

(93 Conn. 38)

Appeal of EVA et al.

In re EVA'S ESTATE.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. APPEAL AND ERROR ¶1071(1)—CURE OF ERRORS.

Parties could not complain of alleged errors in the findings of facts, where they had made a motion for a correction in the court below, and such corrections as were asked were granted.

2. APPEAL AND ERROR ¶265(1) — EXCEPTIONS—CORRECTION OF FINDINGS.

In the absence of exceptions to fact findings, as required by Gen. St. 1902, §§ 795, 796, alleged errors in finding facts will not be reviewed on appeal.

3. APPEAL AND ERROR ¶704(2)—RECORD—REVIEW OF FINDINGS—ABSENCE OF EVIDENCE.

In the absence of the evidence, alleged errors in finding facts cannot be reviewed.

4. EXECUTORS AND ADMINISTRATORS ¶18—APPOINTMENT — QUALIFICATIONS — RESIDENCE.

It was not error to refuse appointment as administrator of a person next of kin, residing in a distant state, whose occupation required his presence in such state, and who was unfamiliar with the matters of the estate, when there appeared to be some antagonism between him and some other heirs.

5. EVIDENCE ¶351—ECCLIASTICAL RECORDS—ADMISSIBILITY.

In determining legitimacy of alleged heir, seeking appointment of administrator, the priest's record of marriage of her parents and of her baptism was admissible, under Gen. St. 1902, § 703, as original entries.

6. MARRIAGE ¶40(1) — LEGALITY — PRESUMPTIONS.

When a marriage has been shown, the law raises a strong presumption in favor of its legality, and the strength of this presumption increases with the lapse of time.

7. MARRIAGE ¶50(1) — EVIDENCE — ADMISSIBILITY.

Circumstantial evidence is always competent proof of marriage in civil cases.

8. BASTARDS ¶6—PROOF OF LEGITIMACY.

Since, under Gen. St. 1902, §§ 897, 898, judicial notice must be taken of the statute laws and judicial decisions of other states, and by the decisions of New York marriage may occur without formalities, legitimacy of a child of a New York marriage was sufficiently shown by the priest's record of having married her parents and of her baptism, so as to warrant appointment of administrator on her petition therefor, as next of kin.

Appeal from Superior Court, Litchfield County; William M. Maltbie, Judge.

Proceeding in the matter of the estate of John Eva, deceased, for the appointment of an administrator. From the decree rendered, Richard Eva and others appeal. No error.

From the finding it appears that John Eva, for many years a resident of Bridge-water, in the probate district of New Milford, died intestate on December 17, 1916. He left an estate of about \$12,000. This consisted of deposits in Connecticut savings banks. He left no lineal descendants surviving him. The deceased had two brothers,

William J. and Richard H. Eva. They died before the intestate. William J. left eight children, of which the appellant is one. These children all resided in the state of Michigan when the testator died. Richard H. Eva was married to Margaret Shannon on February 1, 1866, by Father John Orsenigo, at Croton Falls, N. Y., and one child, Annie Eliza was born of this marriage. On June 26, 1883, Richard H. Eva married Mary R. Brown at Fredericksburg, Va. Three children were born of that union. Annie Eliza went to live with the deceased when she was 4 years of age, and lived with him most of the time until her marriage. For about 12 years, prior to his death, John Eva lived with Annie E. and her husband at Bridgewater, where he died. On December 21, 1916, Annie E. made application to the court of probate for the district of New Milford requesting that John S. Addis, of New Milford, be appointed administrator of the estate of her uncle, John Eva. On June 10, 1917, the children of William J., including the appellant made application to the same court of probate for the appointment of Frank W. Marsh, of New Milford, as administrator of the estate of John Eva. Upon that application the court of probate issued an order of notice for a hearing. The finding does not disclose that this application was ever withdrawn. Subsequently the appellant, Richard Eva, made another application, praying that letters of administration be granted to him. On March 6, 1917, the court of probate heard these applications and found that the heirs failed to agree on the appointment of an administrator among themselves. The trial court also found that from the appearance and attitude toward each other as they appeared before the court on the hearing of the appeal and from the nature of the testimony offered, it was evident that there existed a strong personal feeling among those claiming to share in the estate. All the children of William J. Eva and the children of Mary R. Brown Eva still desire the appointment of Richard Eva as administrator, but object to the appointment of John S. Addis.

Richard Eva, the appellant, is a resident of the state of Michigan. For more than 15 years before the decease of John Eva, Richard Eva had not seen him, and knew nothing of his affairs. During this period he had not been in this state, except on two short visits, up to the time of the trial. He was for several years a fireman, and is now employed as a through freight engineer on the Michigan Central Railroad between Jackson and Detroit, Mich. He is a person of good appearance and intelligence, apparently about 35 years of age. He can procure a leave of absence from his employment at any time, and can obtain free transportation to and from Connecticut. John S.

Addis, the appellee, is a disinterested person, familiar with the settlement of estates, residing in the town of New Milford and is a suitable person to act as administrator. Upon his appointment he duly gave bond, qualified, and entered upon his duties as administrator, and has since then been performing them.

From the reasons of appeal, on which the appellant tried his case in the court below, we ascertain that his contention then was that the deceased, John Eva, left no widow surviving him, and the appellants are all of the next of kin and the only heirs at law of the deceased; that none of the appellants have refused or are incapable to act as administrator of the estate of the deceased; and that Annie E. Gough is not an heir at law or one of the next of kin of the deceased.

Martin J. Cunningham, of Danbury, and Frank W. Marsh, of New Milford, for appellants. Leonard J. Nickerson, of Cornwall, for appellee.

RORABACK, J. (after stating the facts as above). [1-3] Several reasons of appeal are based upon alleged errors in finding facts. These objections are without merit, as the record discloses that a motion was made to obtain a correction of the finding of the superior court, and it appears that the corrections asked for, so far as material, were made. Furthermore, the evidence is not before us, and, besides, there are no exceptions to finding, as required by sections 795 and 796 of the General Statutes. The motion is denied.

The appellant claims the right to administer upon the estate of the deceased by virtue of the provisions of section 318 of the General Statutes, which provides that:

"When any person shall die intestate, the court of probate, in the district in which the deceased last dwelt, shall grant administration of the estate to the husband or wife or next of kin, or to both, or, on their refusal or incapacity, or failure to give bond, or upon the objection of any heir or creditor to such appointment, found reasonable by said court, to any other person whom the court deems proper."

The question here presented is a narrow one. It appears that objection was made to the appointment of Richard Eva by Annie E. Gough, an heir at law and next of kin, which objection the trial court has found reasonable. It also appears that the court below has found it is for the best interest of the estate that a disinterested person should be appointed, and has also confirmed the appointment of Mr. Addis, which was made by the court of probate, so that the only question for us to decide is whether or not the action of the superior court was a reasonable exercise of the discretion resting in it.

[4] The facts disclosed by the record fall far short of showing that it was the duty of the court of probate to appoint the appellant,

Richard Eva, administrator. He and all those whom he represents were entire strangers to the situation that existed in Bridgewater when John Eva died. They knew but little of him, and nothing of his affairs at that time. Richard Eva's only qualification for his appointment was the fact that he is an heir at law and next of kin of John Eva. He is a railroad engineer, and presumably unacquainted with probate procedure under the laws of Connecticut. His calling is such that it is fair to assume that, in this critical period in the history of this country, his undivided time and attention are imperatively required at a place hundreds of miles away from the spot where he would frequently be called upon to act, if appointed administrator of the estate of John Eva. From the nature of this controversy it is apparent, as the trial court has found, that there are antagonisms and differences existing between the opposing parties now before us, which cannot be easily adjusted or reconciled.

In this connection we have not overlooked the fact that the legitimacy of Mrs. Gough has been questioned by an attempt to show that the marriage of her parents was invalid. Upon the other hand, it appears that John S. Addis, the appointee, is a resident of New Milford, a disinterested person familiar with the settlement of estates, and a proper person to act as administrator. The fact that Mrs. Gough has made application for the appointment of Mr. Addis should not militate against his suitability. It appears that Mrs. Gough is an heir at law and next of kin, and has a large interest in the estate of John Eva. It has also been shown that for many years of her life Mrs. Gough has lived with John Eva in Bridgewater. Upon the facts as they are presented by the record, the courts below were fully justified in finding that there was reasonable objection to the appointment of Richard to administer the affairs of this estate. It is almost unnecessary for us to add that we are of the opinion that the superior court acted reasonably and with due regard to the best interest of all concerned in conferring this appointment upon Mr. Addis.

As we have seen, Annie E. Gough claims to be an heir at law and next of kin of John Eva, the deceased. If that be so, her right to object to the appointment of the appellant, Richard Eva, cannot be denied. Whether her claim in this respect is well founded depends upon the validity of a marriage contract claimed to have taken place between her father and mother in 1866 at Croton Falls, in the state of New York. To prove that the father of Mrs. Gough, Richard H. Eva, was lawfully married to her mother, Margaret Shannon, the appellee offered in evidence a record of marriage in connection with other facts and circumstances. The following is a copy of the record:

"February 1st, 1866, Riccard Ida to
Margaret Shannan
James Quinn
Margaret Scully
John Orsenigo."

To the introduction of this evidence the appellant objected, upon the grounds that it does not appear to be a record of marriage, or, if so, a record of what marriages, or in what place; it does not show who married them; nothing appears upon the face of the register showing that anybody married these parties; it does not show that anybody who was competent to perform the marriage ceremony did, in fact, perform a marriage ceremony between these parties; there is no evidence that the register was one required to be kept by law; and that it does not appear that these were the identical parties, Margaret Shannon and Richard H. Eva, that are involved in this suit. The superior court overruled these objections and admitted the evidence, and this is made a reason of appeal.

In connection with the production and admission of this record, the appellee introduced a credible witness, who stated that she knew Richard H. Eva and Margaret Shannon in 1866, and for some time prior thereto; that they resided in the Croton Falls parish in the state of New York; that she knew of their wedding, and that after this event they lived together as man and wife; that about one year after their marriage a child, named Annie, now Annie E. Gough, was born to them; and that she knew of the baptism of this child at Croton Falls. The appellee also called as a witness Rev. Thomas P. Phelan, pastor of the Roman Catholic parish at Brewster, N. Y., and the custodian of the records of marriages and baptisms of the old parish at Croton Falls. He produced this original record of marriages performed in the parish at Croton Falls, kept by John Orsenigo, who, as this witness stated, was an Italian and the parish priest at Croton Falls from 1853 to 1869, and who was generally known and called Father John. The record was kept in all respects according to the rules and customs of the Roman Catholic Church. The first entry in the book was: "Ego conjunctivat in matrimonialis." Then follows the names of the persons married, names of the witnesses, and the name of John Orsenigo. The appellee, against the objection and exception of the appellant, also placed in evidence the original record of baptisms, showing the baptism of Anne Eliza Eva, now Annie E. Gough. The entry in this record is as follows:

"March 1867

March 8th, Riccard Ida & Margaret Shannan
Anne Eliza (b. 18th Feb.)
Margaret McGabe John Orsenigo."

The same person who baptized this child also performed the marriage ceremony just referred to. He spelled the name of the man described therein as "Riccard Ida." He also

spelled it in this way in the record of marriages. Father Phelan, who was the custodian of these records, presented the same in court and stated that he was familiar with Italian, and that "Riccard" is the Italian for Richard.

[5] These records, although not full and complete, were admissible. Section 703 of the General Statutes provides that the records of the proceedings of any ecclesiastical society or religious congregation, or copies thereof, certified by their respective clerks, shall be admissible evidence in all courts of such proceedings. These entries were admissible as original entries. Entries in a family Bible or religious register are admissible. See 1 Greenl. Ev. (15th Ed.) §§ 484, 493; *Northfield v. Plymouth*, 20 Vt. 582. The record of baptisms made by the minister of a parish is evidence of the fact. *Huntly v. Compstock*, 2 Root, 100.

[6-8] The courts of Connecticut take judicial notice of the statute laws and judicial decisions of other states. General Statutes, §§ 697, 698. As the marriage contract, if any, was made in the state of New York, it becomes important to notice the laws of this state. 26 Cyc. 829. In *Hynes et al. v. McDermott et al.*, 82 N. Y. 47, 37 Am. Rep. 538, Chief Justice Folger, in discussing this proposition, adopted the doctrine laid down in *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460. This is stated to be as follows:

"By the law of this state, a man and a woman who are competent to marry each other, without going before a minister or magistrate, without the presence of any person as a witness, with no previous public notice given, with no form or ceremony, civil or religious, and with no record or written evidence of the act kept, and merely by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves, to the state, and to society as such; and if, after that, the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was in the beginning an actual and bona fide marriage."

Under certain well-known principles of administration the difficulty of making proof receives constant recognition by the court. The actor in any case will be required, and within the limits of sound reasoning permitted, to present to the court the best and fullest case that it is within his power to offer. In this respect the element of remoteness is an important one. It follows that, where the fact in question comes to the tribunal from a time beyond memory, roughly placed by a rule of procedure at 30 years, it will readily be assumed that all conditions necessary to its legal validity existed. *Enfield v. Ellington*, 67 Conn. 463, 34 Atl. 818; *N. Y., N. H. & H. R. Co. v. Cella*, 88 Conn. 520, 91 Atl. 972, Ann. Cas. 1917D, 590. When a marriage has been shown, the law raises

a strong presumption in favor of its legality, and the strength of this presumption increases with the lapse of time. In *re Sloan*, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; note 16 L. R. A. (N. S.) 99. Circumstantial evidence is always competent, and in many cases sufficient proof of marriage in civil cases. 18 *Ruling Case Law*, 421, and cases cited in note 18.

Looking at the facts in the present case, we find that the appellee took one important step in proof of his contention that there was a marriage between the parents of Mrs. Gough by the introduction of the record of marriages at Croton Falls in 1866. The act of baptism shown by the records upon this subject speaks in most significant language as to the legitimacy of Mrs. Gough. Much stress is laid on the fact that in these records the husband and father is described as "Riccarda Ida," and not Richard Eva, as he would have been, if he were in fact the party now referred to. It is fair to assume that these misdescriptions were made owing to the fact that an Italian priest performed the ceremonies of marriage and baptism in question. The assumption that these parties were not the identical ones now referred to has but little force, when this fact is considered in connection with the other circumstances presented by the record. In support of the view that a marriage relation existed between these parties, in addition to the facts hereinbefore referred to, it appears that the woman took the name of Eva, that they cohabited together as man and wife, and that they had a daughter who always bore the name of Annie E. Eva until her marriage with Gough.

The facts found fully warranted the superior court in reaching the conclusion that a lawful marriage existed between Richard H. Eva and Margaret Shannon.

There is no error. The other Judges concurred.

(93 Conn. 58)

Appeal of POPE.

POPE v. ROGERS et al.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. WILLS §288(1)—BURDEN OF PROOF.

In a suit to establish a will, the burden of proof of essential facts is on proponent.

2. WILLS §303(6)—PROBATE—SUBSCRIBING WITNESSES.

In a suit to establish a will, the necessary facts need not be established by the testimony of the subscribing witnesses.

3. WILLS §300—SUFFICIENCY OF EVIDENCE.

The essential facts for proof of a will need not be proved beyond a reasonable doubt.

4. WILLS §302(1) — PROBATE — SUFFICIENCY OF EVIDENCE.

To establish a will, all that is necessary is that upon the whole proof it shall reasonably appear more probable than otherwise that the in-

strument was executed in the manner required by the statute.

5. WILLS §302(1) — PROBATE — SUFFICIENCY OF EVIDENCE.

In a suit to establish a will, evidence held sufficient to show that the will was written before the testator and witnesses signed it, that testator's signature was affixed before the signature of the witnesses who saw such signature, and that testator declared the instrument to be his will.

6. WILLS §324(4) — PROBATE — QUESTIONS FOR JURY.

In a suit to establish a will, where it was claimed that the body of the will and testator's signature were added after the signature of the witnesses, the improbability of the testator and the witnesses signing their names to a blank piece of paper without comment was for the jury.

7. WILLS §118—EXECUTION—SIGNATURE OF TESTATOR—DECLARATION.

A declaration by a testator, after the witnesses had signed, in response to the negative answer to his question as to whether they knew what they had signed, that "it is my will," was a sufficient declaration to the witnesses that the signature which they had just seen and witnessed was his own.

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Suit by Homer N. Pope against Hattie P. Rogers and others, executors of Frederick J. Pope, deceased. From a decree establishing the will, plaintiff appeals. No error.

This is an appeal from the judgment of the superior court on the second trial of the contestants' appeal from a decree of probate establishing a certain instrument as the last will of Frederick J. Pope. On the first trial in the superior court a verdict was directed for the proponents, and this court held that the facts did not show due execution of the instrument, and ordered a new trial for the reasons stated in *Pope v. Rogers*, 92 Conn. 248, 102 Atl. 583. On the first trial no evidence of the due execution of the will was offered, other than the testimony of the three attesting witnesses, who were pupils at the testator's school for boys and girls. Their testimony was, in substance, that Mr. Pope, who had been seated at his desk in the schoolroom, left it, carrying a paper in his hand, and approached a table at which the three pupils were seated. He thereupon presented the paper, and asked the three in turn to sign it, and they complied by writing their names successively the one under the other. None of them noticed Mr. Pope's signature on the paper when they signed it, or that he signed it in their presence, or that it then had on any part of the typewriting which now forms the body of the instrument, and none knew from observation, or from any statement made by Mr. Pope, what the paper was or why they were asked to sign it. On the second trial their testimony was to the same effect, but was supplemented by the testimony of two girls, also pupils of Mr. Pope, who testified that they saw Mr. Pope take the paper from his desk, unfold it,

and write something upon it; that he then took it to the three boys and asked them to sign it, and when all had done so asked them whether they knew what they had signed, and on their saying they did not, he said to them, "It is my will." The paper itself shows that the signatures of the testator and of the three witnesses were written over and upon the lines made by the typewriter for that purpose, and the appearance of the folds indicate that the instrument was typewritten before it was folded.

Harrison Hewitt and Charles E. Clark, both of New Haven, for appellant. Charles S. Hamilton, of New Haven, for appellees.

BEACH, J. (after stating the facts as above). Upon its face the paper is a valid will, and the essential facts necessary, under the circumstances of this case, to prove its due execution, were correctly stated by the court in its charge to the jury. They are: First, that the paper, Exhibit A, contained all the typewritten matter now on it when signed by the testator and the witnesses; second, that the signature of the testator was on Exhibit A, as it now appears, when the witnesses signed it; third, that the witnesses saw the signature of the testator on the paper at the time they signed it; fourth, the testator informed the witnesses (who did not see him write it) that the signature was his own.

[1-4] The burden of proof was on the proponents to establish these facts; but they were not bound to establish them by the testimony of the subscribing witnesses, and they were not bound to prove them beyond a reasonable doubt. All that was necessary was that, upon the whole proof, it should reasonably appear more probable than otherwise that the instrument was executed in the manner required by the statute.

[5, 6] The first requirement stated by the court was sufficiently evidenced by the appearance of the paper, which shows conclusively that the typewritten lines prepared for the signatures of the testator and witnesses were on the paper before they signed it; and the appearance of the folds indicates that the rest of the typewritten matter was placed on the paper before it was folded, and before the testator unfolded it for his own signature and for the signatures of the witnesses. The adjustment of the rest of the typewriting to the lines left for signatures, and the extreme improbability of four persons writing their names on a blank piece of paper, without any comment being made at the time, are also proper considerations for the jury.

The second requirement was met by the testimony of the two girls, who saw the testator unfold the paper and write something on it before he presented it for the signatures of the witnesses. As every other

stroke of handwriting on the paper is otherwise accounted for, the only thing the testator could have then written on it is his own signature as it now appears thereon. And since the signature was there when the witnesses signed their names as witnesses in close proximity to it, the jury may well have refused to believe that they did not then see it. Their whole testimony was discredited, so far as the accuracy of their present recollection was concerned, by an affidavit executed when the paper was first offered for probate, in which they stated under oath that they saw the testator sign the paper, that he declared it to be his last will, and that they signed as witnesses in his presence and at his request.

[7] The fourth requirement, that the testator must have informed the witnesses that the signature on the paper was his own, is fairly satisfied by the testator's declaration that the paper was his will. Under the circumstances this statement was a sufficient declaration to the witnesses that the signature which they had just seen and witnessed was his own.

For these reasons the motion to set aside the verdict was properly denied. The assignments of error, based upon alleged errors and omissions in the charge of the court, are overruled. The law, so far as it is applicable to this case, is fully and correctly stated in the four propositions already discussed, and in this and other respects the court charged the jury in accordance with the substance, though not the language, of the contestants' requests to charge.

There is no error. The other Judges concurred.

(93 Conn. 61)

ANDERSON et ux. v. COLWELL

(Supreme Court of Errors of Connecticut. Aug. 9, 1918.)

1. PLEADING \S 236(6) — AMENDMENT — CHARACTERIZATION OF TRANSACTION.

In action for reconveyance of realty alleged to have been deeded to defendant in trust, though deed was absolute in form, disallowance of plaintiff's motion to amend by substitution of "mortgage" for "trust," and "mortgagee" for "trustee," was proper, as character of transaction was determined by allegations, and not by the pleader's characterization.

2. MORTGAGES \S 37(2)—ABSOLUTE DEED—PAROL EVIDENCE.

Parol evidence is admissible to show that an absolute deed was intended to stand only as security, so that the transaction was in fact a mortgage, whether the mortgage was to secure a present debt or future advances.

3. MORTGAGES \S 37(2)—ABSOLUTE DEED—PAROL SHOWING OF CONSIDERATION.

The consideration of an absolute deed intended as a mortgage, serving to prevent a resulting trust in favor of the grantor, may be shown by parol, even in cases which did not involve fraud, accident, or mistake.

4. MORTGAGES \S 32(5)—DEED ABSOLUTE IN FORM.

Where husband and wife transferred incumbered realty to defendant by deed absolute in form, but merely to secure payment of advances promised to be made by defendant, and to secure contracts for work to be given husband by defendant, transaction constituted a mortgage, whether or not defendant made advances.

Prentice, C. J., and Beach, J., dissenting.

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Action by Matthew S. Anderson and wife against Daniel Colwell to secure reconveyance of land absolutely conveyed, as made in trust. From refusal to set aside judgment of nonsuit, plaintiffs appeal. Judgment set aside, and new trial ordered.

George E. Beers and Claude B. Maxfield, both of New Haven, for appellants. Louis M. Rosenbluth and Edwin A. Clark, both of New Haven, for appellee.

WHEELER, J. The complaint sets up these facts:

Mary E. Anderson was on November 1, 1913, the owner of three pieces of land, with the buildings thereon. She was in need of money with which to make repairs and to pay the sums due on incumbrances on this property. Her husband, Matthew S. Anderson, was in need of money for use in his business. Shortly after November 1, 1913, the said Mary E. Anderson transferred, by conveyance absolute in form, this property to the defendant, upon his agreement to make advances to her and her husband, the plaintiffs herein, to engage him to do certain work, to permit them to have possession of these premises, and to occupy one of the houses without paying rent until the final adjustment of the account, and to permit the plaintiffs to hold possession of all of this property until about November, 1915 or 1916. And in consideration of the agreements of the defendant, the plaintiffs agreed to hold this property, keep the charges against it maturing from time to time paid up, keep it in repair, and collect the rents, and to preserve an accurate account of all receipts and disbursements made on account of it, and to pay rent for the house and barn occupied as a home by them at a named rent. The parties to this agreement mutually agreed that in about two or three years from November 1, 1913, they would strike a balance, and the amount due according to this balance was to be paid, and thereupon the defendant was to transfer to the plaintiff Mary E. Anderson this property transferred by her to him.

The plaintiffs are indebted to the defendant for the balance due on rent, \$566; also for cash received from defendant for material and labor, \$1,345.82; also for amounts paid by the defendant upon incumbrances, not to exceed \$1,800—in all, \$3,711.82. The

defendant is indebted to the plaintiffs for work and material furnished by Matthew S. Anderson, \$3,389.17; also for the amount agreed to be paid for the transfer of a mortgage on property on Peck avenue, \$750; also for acquiring title to said property, \$50—in all, \$4,189.17. This leaves a balance due upon this account in favor of the plaintiffs of \$478.35.

The plaintiffs have carried out their part of this agreement, and demanded an accounting and a reconveyance of this property, and offered to pay any balance found due. The defendant has, in violation of his agreements, brought an action of summary process to recover possession of these premises. The plaintiffs pray for a revesting of the title to these premises in them, for an accounting, and for a judgment for the amount due on the accounting. The defendant, in his answer and counterclaim, claims a balance due of \$1,378.70, and prays judgment for \$1,500.

Upon the trial the plaintiffs introduced in evidence the deeds affecting these transfers. These were quitclaim deeds, absolute on their face and expressed to be for a valuable consideration. Thereupon the plaintiffs inquired of the witness Matthew S. Anderson as to what was said at the oral interview, as a result of which these transfers were made. This conversation defendant objected to as an attempt (1) to establish a trust in real estate by parol; (2) to vary by parol the terms of an absolute deed, expressed to be for a valuable consideration; (3) to vary the terms of a written instrument, when there was no allegation in the complaint of fraud, accident, or mistake in its procurement, and this conversation occurred prior to its execution.

The plaintiffs claimed the evidence "to show that the transaction was really a mortgage, and not an absolute transfer." This evidence was excluded. The plaintiffs moved to amend the complaint by substituting the word "mortgage" for "trust," and "mortgagee" for "trustee," in the complaint, wherein it was alleged that the conveyance was in fact upon the trust described in the foregoing agreement. The motion was denied. Thereafter the witness Matthew S. Anderson was inquired of:

"After this conveyance was made to Mr. Colwell, did you do certain work for Mr. Colwell on his property?"

And also:

"At the time that you made the transfers to Mr. Colwell, did you owe Mr. Colwell any money at that time? A. No, sir."

And also:

"After these transfers were made, was any money paid by Mr. Colwell on your account, or any expenses incurred for you?"

All of this evidence was excluded. These rulings are assigned as errors, and are the

basis of the appeal. If they are correct, the denial of the motion to set aside the nonsuit was not erroneous.

[1] The disallowance of the amendment was proper. The character of the transaction was determined by the allegations of the complaint, and not by the characterization of the pleader. The duty of the court was to examine these allegations, and ascertain what the transaction amounted to, and whether it described a "trust" or a "mortgage."

[2] The court excluded this evidence upon the objections made by the defendant, and upon the further ground that, although parol evidence might have been admitted, had the mortgage been one to secure a present debt, this rule was not applicable in a case such as this was claimed to be, where the mortgage was to secure future advances. There is no difference in the rule whether the mortgage was given to secure future advances or a present debt. *Matz v. Arick*, 78 Conn. 383, 391, 56 Atl. 630; *Weissman v. Volino*, 84 Conn. 326, 80 Atl. 81. As early as *French v. Burns*, 35 Conn. 359, 363, we said:

"The rule that an absolute deed, if intended as a security for a debt, is to be regarded as a mortgage, is too well known to require the citation of authorities in support of it."

In *Williams v. Chadwick*, 74 Conn. 252, 255, 50 Atl. 720, 721, we said:

"But a conveyance, absolute in form, will in equity be regarded as a mortgage, when the facts show that the real transaction is a transfer of property merely to secure the payment of a debt."

The test to be applied is:

"Was the conveyance in fact made as security for some debt?" *Fosdick v. Roberson*, 91 Conn. 571, 575, 100 Atl. 1059, 1060; *French v. Burns*, 35 Conn. 359.

[3] The deed of land evidences the intention to pass title, and does not express the contract pursuant to which the deed was given. *Lynch v. Moser*, 72 Conn. 714, 719, 46 Atl. 153; *Lovell v. Hammond Co.*, 66 Conn. 500, 510, 84 Atl. 511. The consideration of the deed serves to prevent a resulting trust in favor of the grantor. It may be shown by parol, and this evidence is not limited to cases involving fraud, accident, or mistake. *Jones on Mortgages* (7th Ed.) § 286.

The defendant meets the contention that these deeds, though absolute on their face, were in fact mortgages, by claiming: First. That it nowhere appears in the evidence or finding that the court made such a ruling. This is inaccurate; it so appears in the printed record, and also in the record of the court of which the printed record is a part. Second. That the evidence of the agreement could not be proved by parol, since the purpose is to secure a transfer of lands held under an express trust, and in the absence of allegations of fraud, accident, or mistake. We have seen that this was not the purpose of the plaintiffs; their purpose was to show that the transaction alleged, which they at-

tempted to prove, was a mortgage, and therefore it was permissible to prove that the deed, though absolute on its face, was in fact a mortgage.

[4] The transaction as disclosed in the complaint must decide whether it was a mortgage. Mrs. Anderson concededly transferred three pieces of real estate to the defendant, and these were incumbered with mortgages, and she and her husband agreed to continue in the possession of these premises, to pay the charges maturing upon these premises, keep them in repair, collect the rent, and keep an accurate account of all receipts and disbursements, and to pay a named rental for the house occupied by them as the final accounting between the parties; and in consideration of these transfers and of these agreements the defendant agreed to make certain advances to the plaintiffs, to engage Mr. Anderson to do certain work, to permit the plaintiffs to hold possession of these premises, and to occupy one of the houses without paying rent until the final accounting between the parties, at a time about two or three years distant.

No other purpose of these transfers is disclosed, save the advances promised to be made and the work promised to be given. Whether the defendant had in fact made advances or not would not change the character of this transaction. It was a transfer to secure the payment of advances promised to be made, and to secure contracts for work to be given. This is a plain case of a mortgage. It would be an unwholesome and unknown sort of equity which would permit one to obtain a transfer of valuable real estate upon a promise to make advances, and to subsequently upon their repayment retransfer, and then, upon failure to make the advances, refuse to compel a retransfer.

But this is not that case. Here the defendant did make advances by paying certain mortgages upon these premises, and for these the plaintiffs agreed to account; and if the technical rule which the defendant sought to have enforced had prevented the plaintiffs from securing a retransfer, the facts alleged would have made imperative the accounting which the parties are alleged to have agreed to make. All of this evidence was clearly admissible upon either ground.

There is error, the judgment is set aside, and a new trial is ordered.

BORABACK and SHUMWAY, JJ., concur.

BEACH, J. (dissenting). I think the opinion, although it follows the record, is mistaken in saying that the plaintiffs agreed to hold the property, keep the charges against it paid, keep it in repair, and collect the rents. The other allegations of the complaint and the plaintiffs' brief show that the word "defendant" should be substituted for "plaintiff" in the second sentence of the fourth

paragraph of the complaint.¹ As I understand it, the case tried to the court was one where the defendant was in possession under an absolute deed, and the grantor offered to prove a contemporaneous parol agreement to reconvey two or three years from date, on the theory that the transaction alleged in the complaint was in effect a mortgage.

The complaint, however, alleges an agreement under which the defendant, the alleged mortgagee, was to be paid an agreed rental by the plaintiffs for a part of the premises, and was also to be charged with the cost of keeping all the premises in repair. This seems to me utterly inconsistent with the theory that the defendant was merely a mortgagee; and the practical result of the account stated is that the defendant, who is supposed to have become a mortgage creditor to the extent of \$1,800 by paying off mortgages (which he must have paid, in any event, for his own protection) is to have this credit more than canceled by a charge of some \$2,000 for repairs on the alleged mortgaged premises.

I cannot see how such a pleading can be treated as a bill to redeem.

PRENTICE, C. J., concurs.

(92 Conn. 672)

WILLIAMS BROS. MFG. CO. v. NAUBUC FIRE DIST.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. TAXATION — 276—PLACE OF TAXATION—CORPORATIONS—"ESTABLISHMENT."

Under Gen. St. 1902, §§ 2328, 2329, providing that, where a corporation has two or more establishments for transacting its business in different towns or taxing districts, the establishments with their personal property shall be assessed in the town or taxing district where in they are situated, any building in which any part of the business of the corporation is carried on is an establishment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Establishment.]

2. TAXATION — 263—PLACE OF TAXATION—STATUTE.

Under Gen. St. 1902, § 2342, requiring the property of any trading, mercantile, or mechanical business to be assessed in the town, city, or borough where the business is carried on, where a corporation has different buildings in different towns, cities, or boroughs, each building will be assessed in the town, city, or borough in which its business is carried on.

3. TAXATION — 263—PLACE OF TAXATION—"CARRIED ON BUSINESS."

Under Gen. St. 1902, § 2342, requiring the property of any trading, mercantile, or mechanical business to be assessed in the town, city, or borough where the business is carried on, the business of a manufacturing corporation is car-

ried on where the various parts of the plant are located, and not where its office is located.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carry On Business.]

Appeal from Superior Court, Hartford County; Edwin B. Gager, Judge.

Appeal by the Williams Brothers Manufacturing Company to the Board of Relief from the assessment of its property by Naubuc Fire District. From the action of the board in lowering the assessment, the Naubuc Fire District appeals. No error.

Alvan Waldo Hyde, of Hartford, for appellant. Stewart N. Dunning, of Hartford, for appellee.

WHEELER, J. The defendant, Naubuc Fire District, is a municipal corporation. The plaintiff is a manufacturing corporation. Both corporations are organized under the laws of Connecticut and located in the town of Glastonbury. The plant and principal office of the plaintiff is in Glastonbury. A small portion of its land and the building containing its general offices and a part of one of its factories are situated in the Naubuc fire district. The larger part of its land and the rest of its manufacturing buildings and the factory office from which the factory is operated are situated in Glastonbury and outside the limits of this district. The plaintiff, in October, 1915, made return of its property subject to taxation to the assessors of Glastonbury, and included in this list was an item showing the "average amount of goods on hand of manufacturers for whole or part of year preceding date of listing, including raw stock, and finished and unfinished product \$79,000." On June 12, 1916, the assessors of this fire district gave the plaintiff notice that the value placed upon its real estate was \$35,283, and that upon the average amount of goods in its hands during the preceding year was the said amount of \$79,000. Upon the plaintiff's appeal the board of relief of this district reduced the value of the real estate of the plaintiff \$8,283, and refused to reduce this assessment of \$79,000 placed upon its goods on hand. The plaintiff, claiming to be aggrieved by the action of the board of relief took this appeal to the superior court. The court found that:

"The average value of the plaintiff's goods on hand during the year preceding the date of listing, including raw stock, and finished and unfinished product in its entire plant in the town of Glastonbury was \$79,000, and the value of such goods actually within this fire district was \$9,000."

The court held that the assessment should include only the value of the goods on hand in the district, and that the assessment of \$79,000 should be reduced to \$9,000.

The issue raised by the appeal is as to the true rule of assessment by the district of the goods on hand of the plaintiff, including raw stock and finished and unfinished product.

The fire district claims that, under the statutes: (1) A manufacturing business carried on within the limits of the fire district was subject to taxation there; (2) the statutory rule of assessment of such a business

¹ The sentence referred to reads as follows: "The plaintiff was to hold said property, to keep the charges against it maturing from time to time paid up, keep it in repair, and collect the rents, preserving an accurate account of all receipts and disbursements on account of said property."

was the average amount of goods kept on hand for sale during the year preceding the date of assessment; (3) the manufacturing business of the plaintiff was located and carried on in the district; and (4) the average amount of goods kept on hand in connection with said business in the town of Glastonbury must be included in determining the value of the business.

The defendant fire district was authorized to lay and collect taxes for the purposes for which it was organized, viz. to light and sprinkle streets. P. A. 1915, c. 192. This statute does not contain any specific regulations, prescribing the method of taxation or the property to be taxed, but Gen. St. § 2001, provides that the laws relating to school districts shall apply to fire districts. And the law classifies the classes of property upon which the levy of taxes by a school district shall be had, specifying among these any manufacturing business, subject to taxation, located or carried on in the district. G. S. §§ 2328, 2329 are the provisions of the statutes under which the property of corporations in the defendant district may be taxed for the benefit of the district. These, in substance, provide that:

"The real estate shall be set in the list of the town in which such real estate is situated, and its personal property shall be set in the list of the town in which it has its principal place of business or exercise its corporate powers; and when it shall have two or more establishments for transacting its business in different towns or taxing districts, it shall be assessed and taxed for every such establishment, and for the personal property attached thereto or connected therewith, in the town or other taxing district having the power of taxation in which such establishment is." *Field v. Guilford Water Co.*, 79 Conn. 70, 71, 68 Atl. 723.

The amendment of section 2329 has not substantially changed this analysis of these sections.

[1] Establishment, as used in this statute, refers to those agencies which serve for transacting the business of the corporation. All such, together with the personal property attached thereto or connected therewith, come within this provision of this statute. It is subject to assessment in the town or taxing district in which the establishment is situated. Any building in which any part of the business of the corporation is carried on is an establishment within the meaning of this statute. That this is the true construction of the word "establishment" is apparent from a reading of the amendment made by chapter 17 of Public Acts 1898, p. 148, to the original act.

G. S. § 2329, applies to all "municipal divisions," of which the defendant fire district is one. And the personal property situated within the district is to be taxed in that district. If this section were the only one relating to the levy of taxes upon corporations, no controversy would have arisen. But the fire district insists that G. S. § 2342, fur-

nishes a special rule of assessment for the levy of taxes upon property of this kind belonging to a corporation situated in the fire district. This section provides that the property of any trading, mercantile, or mechanical business, belonging to an individual or a corporation, shall be assessed in the name of the owner or owners in the town, city, or borough where the business is carried on, and that:

"The average amount of goods kept on hand for sale during the year, or any portion of it when the business has not been carried on for a year, previous to the first day of October, shall be the rule of assessment and taxation."

[2] As originally passed, this section of the act (chapter 47, § 12, Public Acts 1851), related exclusively to trading and mercantile businesses, but later on this section was made applicable equally to corporations engaged in any manufacturing or mechanical business. It clearly contemplates a going business, and the rule of assessment is applicable only to such. We can see no reason why this rule may not apply to each of the two or more establishments situated in different towns, cities, or boroughs. So construed, the statutes can stand together. Moreover section 2342 does not appear to relate to any municipal division except towns, cities, and boroughs.

[3] The contention of the district that the business was carried on where its office was is not sound. The business was carried on where the various parts of the plant are located. We so construed this section in the case of *Jackson v. Union*, 82 Conn. 266, 270, 73 Atl. 773, and held that the place of office did not control, but the place where the timber was cut and prepared. If the personal property of the plaintiff was taxed in the district where its office was, as the district claims, then such parts of the personal property as were located outside this district and in an adjoining district would be also subject to taxation in this district. A construction leading to double taxation should be avoided. Since the defendant can lawfully light and sprinkle streets only within the district the plaintiff's property outside the district could receive no benefit from the district, and a construction which imposes taxes with no possibility of benefits should be avoided.

There is no error. The other Judges concurred.

(79 N. H. 48)

Petition of CARLTON et al.

(Supreme Court of New Hampshire. Strafford. June 29, 1918.)

1. WILLS —527—RESIDUARY CLAUSE—GIFT TO LEGATEES.

Under residuary clause, giving to the "legatees" of the will in proportion to the amount "already given them," proportions of legatees are determined by considering gifts of real estate and personal property, of whatever nature.

2. EXECUTORS AND ADMINISTRATORS — 72 —
DETERMINING AMOUNT OF RESIDUARY GIFTS
— EVIDENCE.

The appraisal made pursuant to Pub. St. 1901, c. 189, §§ 1, 2, of the property scheduled in the inventory returned by the executors, is not conclusive in determining shares, under residuary gift to the legatees in proportion to the amount already given them.

Petition of Edward E. Carlton and another, as executors, for advice. Case discharged.

Petition for advice by the executors of the will of Cora C. Furber. The will was dated August 26, 1916, and proved March 27, 1917. The material parts of the will are as follows:

"Third. I give, bequeath, and devise to my brother, Edward E. Carlton, of Springfield, Massachusetts, the sum of ten thousand (\$10,000) dollars: also the contents of my home in said Dover: also a cottage and contents of the same and land situate in Alton, New Hampshire and known as the Cora C. Furber property, to him, the said Edward E. Carlton, his heirs and assigns forever. * * *

"Sixth. I give to Alice S. Furber of Manchester, New Hampshire, niece of the late Dudley L. Furber, the sum of five thousand (\$5,000) dollars together with an annuity policy which I hold in the Massachusetts Life Insurance Company of Springfield, Massachusetts, in the sum of five thousand (\$5,000) dollars running fifteen years. * * *

"All the rest, residue and remainder of my property of any name and nature and wherever found, I give, bequeath and devise unto the legatees of this will in proportion to the amount already given to them, their heirs, and assigns forever."

The executors ask to be advised whether, in making distribution of the residue of the estate, the inventory value of the contents of the home in Dover and of the land in Alton given to Edward E. Carlton by the third clause and the value of the annuity policy given to Alice S. Furber by the sixth clause of the will should be considered in ascertaining the shares of the several legatees in such residuum. The will contains gifts of specified sums in money to six persons, beside those named in the above clauses.

Dwight Hall, of Dover, for executors.
Jones, Warren, Wilson & Manning, of Manchester, for Alice S. Furber.

PARSONS, C. J. [1] "The word 'devise' is more specially appropriated to a gift of lands, and every person taking an interest in the produce of real estate directed to be sold is, strictly speaking, a devisee, and not a legatee. * * * But the terms are used indifferently; legatees may take under a bequest to 'all my devisees above named; * * * and the word 'legacy' may be applied to real estate, if the context of the will show that such was the testator's intention." *Ladd v. Harvey*, 21 N. H. 514, 528; *Webster*, Dict. title "Bequeath"; *Bouv. Law Dict.* title "Legacy." As to the land in Alton, technically Edward E. Carlton is a devisee, and not

a legatee; but, using language with the same precision, he is one of "the legatees of this will," because of the gift to him of \$10,000 and other personal property. His share is proportioned, not by the amount devised or bequeathed to him, but by "the amount already given" to him. "The word 'give' is of the largest signification, and is applicable as well to real as personal estate." *Hooper v. Hooper*, 9 Cush. (Mass.) 122, 129. The gift by the third clause to Edward E. Carlton included both real and personal estate, and the amount given him is the total value of the gift. So of the gift of two classes of personal property to Alice S. Furber by the sixth clause, cash and the annuity policy. The total value of her gift is the amount given to her.

It is not probable the testatrix understood the shade of difference in meaning which may be found between the terms "legatee" and "devisee." But the will is evidence that the scrivener was skilled in legal phraseology. In the two cases where a gift of real estate is made, clause third, above considered, and the residuary clause, care was taken to insert the appropriate word "devise" for a gift of real property by will. It is probable, if the testator had intended to limit the division of the residue by the amounts of her gifts of personal estate, apt words would have been used to express such intention. For the same reason it is clear that the amounts already given by the will were not understood to be limited to cash gifts. The executors are advised that the value of the property given to Edward and Alice other than cash should be included in ascertaining the amount already given them by the will.

[2] By "inventory value" in the question submitted is understood the appraisal made of the property scheduled in the inventory returned by the executors to the probate court. P. S. c. 189, §§ 1, 2. In *Seavey v. Seavey*, 37 N. H. 125, this appraisal was held admissible in controversies between strangers to the appraisal. The conclusion that such appraisal is admissible at all has since been criticized, if not expressly overruled. *Derry v. County*, 62 N. H. 485, 487, 488; *Concord Land & Water Power Co. v. Clough*, 60 N. H. 609, 610, 45 Atl. 565. But in *Seavey v. Seavey* the appraisal, though considered admissible as prima facie evidence, was expressly held not to be conclusive. It is not conclusive of value upon the assessment of the inheritance taxes. Laws 1905, c. 40, § 13; S. P. S. p. 99. No ground is perceived upon which this appraisal can be held conclusive upon the distributees of this will in determining their several shares in the residuum. If there is controversy, the value should be determined in some proceeding to which all interested are parties.

Case discharged. All concurred.

(79 N. H. 34)

SPINNEY v. TOWN OF SEABROOK et al.

(Supreme Court of New Hampshire. Rockingham. July 19, 1918.)

1. TAXATION ¶602—COLLECTION—ARREST OF DELINQUENT TAXPAYER—"CIVIL PROCESS."

Where a tax collector commits a delinquent taxpayer to the county jail as authorized by Pub. St. 1901, c. 60, § 8 (re-enacted in Laws 1913, c. 82, § 5), the arrest is a civil and not a criminal process; a collector under Pub. St. 1901, c. 60, § 1 (Laws 1913, c. 82, § 6) having, in the collection of taxes, all the powers vested in constables in the service of civil process.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Civil Process.]

2. PRISONS ¶18(6)—SUPPORT OF PRISONER—CIVIL PROCESS—LIABILITY OF COUNTY.

Pub. St. 1901, c. 282, § 4, providing that county commissioners shall allow jailor reasonable compensation for support of prisoners confined on criminal process, does not make county liable for board of prisoners confined on civil process.

3. COUNTIES ¶208—ACTION AGAINST.

An action at law ordinarily does not lie against a county.

4. PRISONS ¶18(1)—LIABILITY OF TAX COLLECTOR—SUPPORT OF DELINQUENT TAXPAYER COMMITTED TO JAIL.

Tax collector who commits delinquent taxpayer to jail is not personally liable for latter's support while confined in jail; Pub. St. 1901, c. 60, § 16, providing that tax collector shall not be liable for any cause except official misconduct.

5. TOWNS ¶30—AUTHORITY OF SELECTMAN—TAX WARRANTS.

Under Pub. St. 1901, c. 59, § 7, defining duties of selectmen of a town in issuing tax warrant, a town has no control over the selectmen in the performance of such duty and has no right to instruct them to issue or not to issue a warrant or to direct collector how to execute the warrant.

6. PRISONS ¶18(6)—SUPPORT OF DELINQUENT TAXPAYER COMMITTED TO JAIL—LIABILITY OF TOWN.

Where tax collector commits delinquent taxpayer to county jail, the town whose selectman issued the tax warrant is not liable for his support while in jail in the absence of an agreement to pay for such support and in the absence of statutory provision imposing such liability.

7. PRISONS ¶18(6)—SUPPORT OF PRISONER—CIVIL PROCESS—TOWN'S LIABILITY.

Under Pub. St. 1901, c. 235, § 12, providing that the person at whose suit a person is committed to jail on civil process except for trespass, tort, or bastardy, shall give bond to jailor to pay prison charges, and neither section 11 nor section 12 making such person directly liable, a town causing arrest of delinquent taxpayer is liable for his support, if at all, only upon a bond.

8. PRISONS ¶18(1)—JAILOR—PRISONER ON CIVIL PROCESS.

Jailor is not bound to receive a poor prisoner in a civil action and incur expense of his support without some indemnity therefor.

9. PRISONS ¶18(1)—PRISONER ON CIVIL PROCESS—COMPENSATION FOR KEEPING.

Where jailor receives prisoner on civil process and supports him in jail without security for the prison charges or without aid from overseers of the poor, his only remedy is against the prisoner alone who is primarily liable.

Young and Peaslee, JJ., dissenting.

Transferred from Superior Court, Rockingham County; Allen, Judge.

Action by Ceylon Spinney against the Town of Seabrook, County of Rockingham, and another. Transferred from superior court to Supreme Court. Claim against defendant county disallowed; judgment for other defendants.

Action against the town of Seabrook, county of Rockingham, and one Perkins, as special tax collector of the defendant town, brought to recover certain prison charges and board from October 11, 1913, to December 18, 1914, of a delinquent taxpayer of Seabrook, who was committed to the county jail, of which the plaintiff was the jailer, by Perkins acting under a warrant given by the selectmen of the town for the collection of taxes. No bond for the prisoner's board in jail was demanded by the plaintiff and no bond for that purpose was given. The board was furnished by the plaintiff, for which he has received no pay. The taxpayer upon taking the poor debtor's oath was discharged. The county and the town moved for directed verdicts in their favor. Perkins moved that the action be dismissed as to him. Without ruling on these motions, the superior court, Allen, J., transferred the case from the October term, 1917, of the superior court.

Ernest L. Guptill and Ralph C. Gray, both of Portsmouth, for plaintiff. William H. Sleeper, of Exeter, for the County. Page, Bartlett & Mitchell, of Portsmouth, for the Town and for Perkins.

WALKER, J. [1] By section 8, c. 60, P. S. (re-enacted in section 5, c. 82, Laws 1913), it is provided that:

"For want of goods and chattels whereon to make distress, the collector may take the body of any person neglecting or refusing to pay the tax assessed against him, and commit him to the common jail."

Section 9 provides that:

"The jailor shall receive and detain such person in his custody until he pays such tax, cost of commitment, and charges of imprisonment, or until he is otherwise discharged by due course of law."

An arrest by a collector of taxes, under his warrant authorizing such procedure for the nonpayment of taxes, is a civil, not a criminal, process. The purpose of the arrest and of the commitment to jail is not to punish the prisoner as a criminal for failure to pay the tax assessed against him, but to compel the payment of the tax as a civil obligation. For the accomplishment of this purpose, "every collector, in the collection of taxes/committed to him and in the service of his warrant, shall have the powers vested in constables in the service of civil process." P. S. c. 60, § 1; Laws 1913, c. 82, § 6. That the collection of taxes is deemed by the Legislature to be a civil process is also recognized in section 17 of the same chapter, where

it is provided that a tax may be "collected by suit at law or bill in equity." The imprisonment in jail of one who fails to meet his tax obligation is merely one means of collecting the tax, in the same way that the imprisonment of a debtor on execution is one means of collecting the debt. In *Butler v. Washburn*, 25 N. H. 261, and in *Gordon v. Clifford*, 28 N. H. 402, an arrest upon a tax warrant was treated as having been made in a civil proceeding, and no case holding a contrary doctrine has been called to our attention.

[2, 3] The contention therefore that the county is liable for the board of the prisoner while in jail assumes that such liability may exist when the commitment is made in a civil suit, for there is no statute explicitly imposing that burden upon the county in proceedings for the collection of taxes. If there is such a liability, it can only be derived from the general statute providing for the support of prisoners in jail. But that statute (P. S. c. 282, § 4) is as follows:

"Every jailer shall provide each prisoner in his custody with necessary sustenance, * * * and the county commissioners shall allow him, out of the county treasury, a reasonable compensation for the support of all prisoners confined on criminal process."

That the county under this statute is not liable for the board of prisoners confined in jail on civil process is so obvious as to require no argument, and such has been the purport of the decisions on this subject. *Amherst v. Hollis*, 9 N. H. 107; *De Comcey's Petition*, 22 N. H. 368; *Plymouth v. Haverhill*, 69 N. H. 400, 46 Atl. 460; *Locke v. Belknap County*, 71 N. H. 208, 51 Atl. 914. In the absence of statutory authorization, no reason is apparent for a different conclusion whether the imprisonment is for the collection of a tax or the collection of an ordinary debt. While an action at law ordinarily does not lie against a county (*Day v. Coos County*, 77 N. H. 582, 93 Atl. 965), the question of law as to the liability of the county has been considered as though it had been regularly presented as a claim.

[4] Nor is it apparent why the collector should be liable. He committed the prisoner in the execution of his warrant, which authorized him to proceed in that way in the attempt to collect the tax. Like a sheriff in committing a defendant upon an execution authorizing the act, he incurred no liability for the prisoner's support in jail. *Stevens v. Merrill*, 41 N. H. 309. That was a matter in reference to which he could exercise no control, and for which he could not be held responsible under the statute, which provides that a collector of taxes shall not be liable to any suit, "for any cause whatever, except his own official misconduct." P. S. c. 60, § 16. *Kelley v. Noyes*, 43 N. H. 209. Acting as a public officer (*Winchester v. Stockwell*, 76 N. H. 193, 81 Atl. 526), he incurred no liability for the board of the prisoner.

[5] The town of Seabrook in its private capacity did not authorize or direct the arrest and imprisonment of the delinquent taxpayer. The selectmen in issuing the tax warrant to the collector did not act as the agents of the town. It had no control over them in the performance of that duty, which was imposed upon them, and not upon the town, by the statute. P. S. c. 59, § 7. The town had no more right to instruct the selectmen to issue or not to issue the warrant, or to direct the collector how to execute the warrant, than it has to abate a tax (*Hampstead v. Plaistow*, 49 N. H. 84, 97), or to pass a vote in town meeting "directing the collection of delinquent assessments so fast only as can be done with convenience and without pressure" (*Northumberland v. Cobleigh*, 59 N. H. 250, 255). In an action for the recovery of a tax it was said in *Canaan v. District*, 74 N. H. 517, 536, 70 Atl. 250, 257:

"The plaintiff as a town in any capacity has no control over the questions involved in this tax. It cannot by town vote direct whether the property in question should be assessed for taxation or not, or determine its value. By similar action it could not authorize this suit. It has no control over it. * * * Although * * * a party to the controversy, which is between the state in the exercise of its taxing power and the taxpayer defending."

"The taxes collectible under the statute are in no sense debts owed to the town as a corporation, but to the public." *Winchester v. Stockwell*, supra, 76 N. H. 194, 81 Atl. 526.

[6] If the defendant town had passed a vote directing the collector to arrest the delinquent taxpayer and commit him to jail upon his neglect to pay the tax, the vote would be unauthorized and void, and the town would incur no liability thereunder for the acts of the collector in making the arrest, or for the expense incurred by the jailer in furnishing board to the prisoner. The town, in the absence of any affirmative action in the premises, and in the absence of any statutory duty imposed upon it in reference to prisoners' charges, cannot be held liable in the present case. It has no such interest in proceedings for the collection of taxes that it can be deemed to be in the position of a plaintiff in an action for the recovery of a debt. *Canaan v. District*, supra.

[7] But if this conclusion were wrong, or if it should be assumed that the town was the moving party in the proceedings resulting in the arrest and imprisonment of the taxpayer, it would only be liable to the jailer, if at all, for the prison charges upon a bond given for their payment. In P. S. c. 235, § 11, it is provided that:

"No person committed on civil process shall be detained in prison for the nonpayment of prison charges, except in actions of trespass, case for torts, and prosecutions for bastardy; but such charges shall be a debt against the prisoner."

And in section 12 that:

"The person at whose suit any person is committed to jail," except in the above-mentioned

cases, "shall give bond to the jailer, with satisfactory surety, or such as may be approved by a justice, to pay the prison charges."

In either of the excepted cases, if no bond is furnished, the prisoner, under section 13, may be "released by order of the supreme (superior) court or of a justice thereof." It is significant that there is no provision that the plaintiff shall be responsible for the prison charges if they are not paid by the prisoner. The plaintiff is not directly liable for them. They constitute a debt against the prisoner. The plaintiff's liability arises only upon his giving the required bond for their payment.

It was provided in R. S. c. 189, § 12, that the plaintiff in a civil suit causing the imprisonment of the defendant shall give a bond to the jailer "to pay the prison charges in case of the prisoner's inability; otherwise such prisoner shall be discharged." This applied in all civil suits; the exceptions mentioned in the present statute above quoted were not introduced until 1845. Laws 1845, c. 237. In 1844, *Harris v. Sullivan County*, 15 N. H. 81, was decided, in which it was held that a bastardy proceeding is not a criminal prosecution and that the county is not liable for the support of the prisoner in jail in such an action, as it would be in a criminal case. In concluding the opinion the court say:

"As Colby was confined on process issued in a civil suit, it was the duty of the complainant to tender such a bond as the statute requires. The gaoler might have discharged Colby, if he had seen fit so to do; but, as he did not do this, his compensation for the prisoner's support is a matter between the prisoner and himself, with which the county has nothing to do."

In the revision of 1837 the statute in question took its present form, omitting the words "otherwise such prisoner shall be discharged." G. S. c. 221, § 12. This change was regarded by the commissioners as verbal merely, and not as affecting a modification of the law. It was probably considered that, if the bond was not furnished, a discharge of the prisoner would be the logical result, without the use of express language to that effect. *Harris v. County*, therefore, is a direct authority for the proposition that if a bond is not furnished for the prison charges in a civil suit, not included in the exceptions introduced in 1845, the jailer, who might have discharged the prisoner but saw fit to hold him, can only look to him for compensation for his board while in jail.

While it is unnecessary in this case to decide what relief the jailer might have in case of a defendant committed to his custody in an action of trespass, or an action

of tort, or a prosecution for bastardy, which are excepted from the operation of section 12, it may be suggested that, when no bond is given and when his claim for board against the prisoner is worthless on account of the prisoner's poverty, it might be the duty of the overseers of the poor of the town in which the jail is located to provide for his support in accordance with the provision of section 1, c. 84, P. S. In *Amherst v. Hollis*, 9 N. H. 107, it was held that a prisoner confined in jail upon an execution may be a pauper within the meaning of the statute then in force for the relief of the poor (which is in effect the same as the present statute), and that it is the duty of the overseers of the poor of the town in which the jail is located to relieve him. The court say that:

"Imprisonment for debt certainly does not furnish a reason why a person should not be relieved, if poor and unable to maintain himself."

It might be added that it is also no reason why the expense of maintaining the prisoner should be imposed upon the jailer, or why, in the absence of a bond for his protection in supporting the prisoner or other contractual obligation, he should be permitted to hold the plaintiff authorizing the commitment responsible for the expense, which is directly chargeable to the prisoner.

[8, 6] In this view of the legislative purpose the argument, that in a case like the present one the county or town is liable, because it is unreasonable to assume the Legislature intended to make the jailer liable, is not of convincing force or logically persuasive. It is not evidence that the Legislature intended that some other party, not specifically designated in the statute, should be held liable. The jailer may protect himself; if he does not, as was said in *Harris v. County*, supra, his compensation "is a matter between the prisoner and himself." That burden is not imposed upon the jailer. He is not bound to receive a poor prisoner in a civil action and incur the expense of his support without some indemnity therefor. But if he does receive him and supports him in jail without security for the prison charges, or without aid from the overseers of the poor, his only remedy is against the prisoner alone who is primarily liable.

Upon the facts of the reported case, the order must be: Claim against the county disallowed. Judgment for the other defendants.

YOUNG and PEASLEE, JJ., dissented; the others concurred.

(79 N. H. 61)

LA POINT v. MONADNOCK PAPER MILL.

(Supreme Court of New Hampshire. Hillsborough. June 29, 1918.)

1. MASTER AND SERVANT ⇨356—FELLOW SERVANT.

Laws 1911, c. 163, § 2, makes an employer, failing to accept the provisions of the act, liable for injuries to a servant caused by a fellow-servant's negligence.

2. MASTER AND SERVANT ⇨226(1)—ASSUMPTION OF RISK.

An employé does not assume the risk incident to the method of work which he adopted in lifting, where his foreman participates in it.

3. MASTER AND SERVANT ⇨286(27)—QUESTIONS FOR JURY.

Whether defendant's foreman should have forbidden plaintiff's method of work in lifting, or whether the foreman's participation in it required care which he failed to use, were questions for the jury.

4. MASTER AND SERVANT ⇨356—ASSUMPTION OF RISK.

Laws 1911, c. 163, § 2, takes the defense of assumed risk away from employers who fail to accept the provisions of the act.

Transferred from Superior Court, Hillsborough County; Marble, Judge.

Case for negligence, brought under Laws 1911, c. 163, by Albert J. La Point against the Monadnock Paper Mill. Trial by jury, and verdict for the plaintiff. Transferred from the September term, 1917, upon the defendant's exceptions to the denial of its motion for a directed verdict and to a portion of the charge to the jury. Exceptions overruled.

The facts are stated in the opinion.

Doyle & Lucier, of Nashua (A. J. Lucier, of Nashua, orally), for plaintiff. Jones, Warren, Wilson & Manning, of Manchester (Allan M. Wilson, of Manchester, orally), for defendant.

PEASLEE, J. [1] The plaintiff was an employé of the defendant in a paper mill; and, as the defendant had not accepted the provisions of Laws 1911, c. 163, it is liable in this action for injuries to the plaintiff caused by the negligence of any of its other servants. *Id.*, § 2.

[2] It could be found from the evidence that the plaintiff had lifted the rear end of a roll weighing 800 pounds from a truck on which it was lying, his object being to help move the roll forward on the truck. A fellow servant, who attempted to assist in the operation by lifting the forward end, was unable to do so. Thereupon the foreman, Claffin, who was capable of lifting 500 pounds or more, took hold of the forward end, lifted it suddenly, and, as he did so, thrust the roll and the truck against the plaintiff, who still held the rear end. The added weight or strain thus put upon the plaintiff caused the injuries for which this action is brought. It

is evident that fair-minded men might well conclude that the act of the foreman was a negligent one. The defendant argues that because there were other men and appliances available for moving the roll, therefore it is not liable, since the plaintiff voluntarily undertook to do the work in the more dangerous way. One answer to this is that it could be found that the plaintiff had no reason to anticipate that the foreman would negligently put upon the plaintiff the dangerous strain to which he was subjected. It is certain that Claffin saw the method the plaintiff was using, and not only did not forbid it, but himself participated in the transaction. In this state of the evidence it cannot be concluded as matter of law, either that the plaintiff voluntarily undertook a risk not within the scope of his employment, or that his taking the method of work into his own hands was the cause of his injury.

[3] The defendant also contends that it was error to give the following instruction to the jury:

"In cases of this nature the master is bound to exercise reasonable care to provide the servant with a sufficient number of suitable assistants or fellow servants to properly do the work. I do not understand that there is any claim but that there were sufficient workmen about the mill whom Mr. Claffin could have secured to help in lifting the roll. The alleged negligence, as I understand it, is the failure of Mr. Claffin, who represented the defendant, to procure them. The plaintiff says that Mr. Claffin did not act as a reasonably prudent man in failing to order more men to do the work. The defendant says that he did. And that is a question of fact for you to decide."

It is true, as the defendant claims, that there were plenty of men available for the work; but any theory of negligence in that respect was expressly excluded from consideration. The point submitted by this instruction was whether the foreman, because of his position and superior knowledge, ought to have exercised his authority and prevented the opportunity for the occurrence of such an accident. Whether he should have done so, or whether the method the plaintiff adopted should have been tacitly indorsed by the foreman, was peculiarly a question for the jury. They might have found, either that the foreman should have forbidden the plaintiff's line of endeavor, or that participation in it required care which the foreman failed to use when he lifted the forward end of the roll. The instruction excepted to merely served to submit one of these views for the consideration of the jury.

[4] Nor is the instruction open to objection upon the ground that the plaintiff assumed the risk of this method of work, since the statute takes this defense away from employers who do not accept the provisions of the act. Laws 1911, c. 163, § 2; *Nawn v. Railroad*, 77 N. H. 299, 305, 91 Atl. 181.

Exceptions overruled. All concurred.

(79 N. H. 44)

JANVRIN v. POWERS et al.

(Supreme Court of New Hampshire. Rockingham. June 29, 1918.)

1. FRAUDS, STATUTE OF §158(4)—ORIGINAL PROMISE—EVIDENCE.

Evidence held to show that the promise of a property owner to pay for materials furnished to a contractor was an original and not a collateral undertaking, and therefore not within the statute of frauds.

2. FRAUDS, STATUTE OF §23(2)—ORIGINAL PROMISE—EVIDENCE—INTEREST OF PROMISOR.

Where property owner, to induce materialman to furnish lumber to contractor, promised to see that it was paid for, personal benefit to him by reason of fact that his contract with builder was very advantageous was sufficient to remove contract from statute of frauds.

3. MECHANICS' LIENS §118—NECESSITY OF NOTICE.

If a lumberman furnishes material to a contractor upon the promise of the owner of the property to see that it is paid for, the lumberman has a lien, under Pub. St. 1901, c. 141, § 10, notwithstanding he gave no notice in writing of his intent to claim a lien.

4. APPEAL AND ERROR §856(3)—DIRECTION OF VERDICT—GENERAL MOTION—EFFECT.

General motion for directed verdict, without assigning specific reasons, is of no avail, if there is any ground upon which the jury could find for the other party.

5. MECHANICS' LIENS §280(2)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In lumberman's action for price of materials and to impress lien on the property, on the theory that the owner, to induce him to furnish the lumber to the contractor, promised to see that he was paid therefor, evidence that the value of the house would have been greatly in excess of the contract price was competent to show the promise, and that the owner practically assumed control of the work.

6. APPEAL AND ERROR §907(2)—PRESUMPTIONS.

It is presumed, in the absence of evidence, that the jury followed the instructions of the court.

7. TRIAL §255(4)—RECEPTION OF EVIDENCE—PRESERVATION OF EXCEPTIONS.

If a party fears that evidence may be considered by the jury for an improper purpose, or that the argument may mislead the jury, he should request further instructions cautioning the jury as to the use to be made of the evidence or argument.

8. MECHANICS' LIENS §118—NOTICE—WAIVER.

The provisions of Pub. St. 1901, c. 141, §§ 13, 15, requiring a subcontractor to give notice to the owner of his intent to claim a lien, are solely for the benefit of the owner, and he may waive such notice.

Transferred from Superior Court, Rockingham County; Sawyer, Judge.

Action by John A. Janvrin against Thomas Powers and Robinson Bros. Case transferred from superior court on defendant Powers' exceptions. Exceptions overruled.

Action on the common counts, with an account for lumber and supplies annexed. Robinson Bros. defaulted, and the case was submitted to the jury only against Powers. There was an attachment in the suit to secure a lien for the plaintiff on the property of Powers. Robinson Bros. took a contract

to build a bungalow for Powers, and the materials specified in the account annexed to the writ were furnished by the plaintiff and used in its construction. The plaintiff did not give to Powers a written notice that he should claim a lien. The trial was by jury, and the issues submitted to them were whether the plaintiff had a lien upon the property of the defendant, and when it attached. The jury found that the plaintiff did have such a lien, and when it attached, although no question is now raised about the latter finding. The defendant's motions for a nonsuit at the close of the plaintiff's evidence, and for a directed verdict at the conclusion of the evidence, were denied, subject to exception. The exceptions to evidence, to the argument of counsel, and to the charge of the court, taken by the defendant, sufficiently appear from the opinion.

Eastman, Scammon & Gardner, of Exeter, for plaintiff. Sleeper & Brown, of Exeter, and Ernest L. Guptill, of Portsmouth, for defendant.

PLUMMER, J. The defendant's motion for a nonsuit was based upon the following grounds: That, if any promise was shown on the part of the defendant, it was simply a collateral promise to pay the debt of another, and further that no notice in writing was given him, as required by statute. No grounds are set forth upon which the defendant relied in his motion for a directed verdict, but it is assumed they were the same as for the nonsuit. The plaintiff is seeking in this case to establish a lien upon the defendant's property. The defendant's position, as disclosed by these motions, is that, as the promise upon which the plaintiff relied was not in writing, he cannot maintain his action (P. S. c. 215, § 2), and also upon the statute (P. S. c. 141, §§ 13, 15) which requires a subcontractor to furnish to the owner a notice in writing of his intention to claim a lien and a statement of his account once in 30 days. The evidence of the plaintiff tended to prove that he knew nothing about the financial condition of Robinson Bros.; that before he furnished any materials to them to build the defendant's house he saw the defendant about furnishing such materials, and that the defendant told the plaintiff to go ahead and furnish the materials for them to build the house, and let him know from time to time, and he would see that the plaintiff was paid; that the plaintiff would not have furnished the materials if the defendant had not promised that he would see him paid; that as the work progressed the defendant telephoned to find out if a payment had been made by the Robinsons; that later the plaintiff's wife telephoned to the defendant about the work, and he asked if the Robinsons had made a payment, and she said, "No," and gave to the

defendant the amount then due for materials, whereupon the defendant said he guessed he was in bad, and he could not understand why people did not do, as they agreed, his work was as good as a gold bond, etc.; that before the completion of the job the plaintiff wrote defendant a letter, giving him the amount of his bill, and that the Robinsons had ordered a little more material, probably amounting to \$50 or more, and that he was notifying him of the amount of the bill to protect both himself and the defendant; that, referring to this letter in his testimony, the defendant said, "I knew I had to pay for the lumber that Robinson Bros. was putting in there for me, and I expected to, and supposed they had paid them till I got that letter;" that during the progress of the work the defendant ordered materials of the plaintiff; that before the completion of the house one Robinson, who had been in charge of the work, abandoned it, and the other Robinson came to take charge; that he told the defendant he had gone as far as he could, that he had nothing to do with, and that the defendant said, "You go right ahead, and, if the plaintiff don't draw the lumber, we will get somebody that will."

[1] From the evidence tending to prove the above statements, it could be found that the plaintiff furnished the materials upon the credit of the defendant, and that the defendant's promise was an original and not a collateral undertaking, and therefore not within the statute of frauds. In *Lakeman v. Mountstephen*, L. R. 7 H. L. 17, the facts were not unlike those in this case. There the defendant, who was the surveyor for a certain board of health for whom the plaintiff had been doing sewage work, on some question being raised about the continuance of the work, said: "You go on and do the work, and I will see you paid." It was held that there was evidence upon which the jury might find that the credit was given to the defendant, so as to make his promise original, and not collateral. The following cases, similar to the case at bar, hold that the promise was an original undertaking and not within the statute: *Clifford v. Lubring*, 69 Ill. 401; *Jefferson County v. Slagle*, 66 Pa. 202; *Merriman v. McManus*, 102 Pa. 102; *Weyand v. Crichfield*, 8 Grant, Cas. (Pa.) 113. "The question to whom the credit was given is always for the jury to determine, upon all the circumstances." *Browne*, St. Fr. 254; *Walker v. Richards*, 41 N. H. 388; *Connolly v. Waycott*, 63 N. H. 618; *Moshier v. Kitchell*, 87 Ill. 18; *Pettit v. Braden*, 55 Ind. 201; *West v. O'Hara*, 55 Wis. 645, 13 N. W. 894; *Larson v. Jensen*, 53 Mich. 427, 19 N. W. 180.

[2] There was evidence on the part of the plaintiff that the defendant had obtained from Robinson Bros. a contract for the construction of his house that was very advantageous to him. Accordingly any promise he made to the plaintiff that would enable

the Robinsons to obtain materials for the building of the house would inure to the benefit of the defendant. The legal principle which is laid down in the following language, to determine if a promise is within the statute of frauds, would seem to be applicable to this case:

"The distinction is between a promise the object of which is to promote the interest of the party making the promise. The former is within the operation of the statute; the latter is unaffected by it. And where the guarantor is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not." 1 *Reed*, St. Fr., c. 8, § 70; *Calkins v. Chandler*, 36 Mich. 524, 24 Am. Rep. 593.

[3] As the jury were warranted upon the evidence in finding that the defendant made an original promise to the plaintiff to pay for materials, the defendant's second ground upon which he bases his motions, namely, that no notices in writing were given the defendant, as required by statute, is of no consequence, because, if the defendant was an original promisor, no such notices were necessary to give the plaintiff a lien upon the defendant's property. P. S. c. 141, § 10.

[4] If the defendant did not intend to base his motion for a directed verdict on the reasons specified in his motion for a nonsuit, but upon a general motion for a verdict without any specific reasons, that would not aid him. In that event, a verdict could not be directed for the defendant, if upon any view of the case the jury could find a verdict for the plaintiff, and we have already pointed out a ground upon which the jury could find such a verdict.

[5] The defendant excepted to evidence that the value of the house which the Robinsons contracted to build would exceed the contract price by several hundred dollars. The defendant also excepted to the argument of the plaintiff upon this evidence. The plaintiff was seeking to prove that the defendant promised that he would pay him for the materials furnished, and further that the defendant ordered material, and at a certain time in the progress of the work practically assumed control of it. This evidence and argument upon it was competent for that purpose.

[6] The court cautioned the jury in reference to the use that they should make of this evidence in the following language:

"You are not to render a verdict for the plaintiff, establishing a lien, simply because the defendant secured a low price, if you find he did, for the building of his cottage. If he got a low price for it, he is entitled to the benefit of it."

It is presumed, in the absence of evidence, that the jury followed the instructions of the court. *Davis v. Railroad*, 75 N. H. 467, 470, 76 Atl. 170; *Turner v. Mfg. Co.*, 75 N. H. 521, 522, 77 Atl. 999; *Lawrence v. Towle*, 59 N. H. 28, 31.

[7] If the defendant feared that this evidence might be considered by the jury for an improper purpose, or that the plaintiff's coun-

sel had argued it in a manner that would induce the jury to make a wrong use of it, and that the cautionary statement made by the court was not sufficiently clear and specific to fully inform the jury of the proper application of the evidence, and prevent them from making a wrong use of it, he should have requested the court for further instructions. *Bank v. Ferguson*, 58 N. H. 403; *Dow v. Merrill*, 65 N. H. 107, 111, 18 Atl. 317; *Pitman v. Mauran*, 69 N. H. 230, 40 Atl. 392; *Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369.

The defendant excepted to argument of plaintiff's counsel, wherein he reviewed and commented upon the defendant's conduct relating to the matters in controversy. We think the evidence fairly warranted the argument.

[8] The court in his charge, referring to the requirements in the statute (P. S. c. 141, §§ 13, 15) that the subcontractor shall give a written notice and statement of his account to the owner of the property in order to entitle him to a lien, stated that the notices were solely for the benefit of the owner, and therefore he may waive them. The defendant excepted to this statement. No error was committed in giving this instruction. There can be no question but that the provisions in this statute requiring notices are for the benefit of the owner. The statute prevents subcontractors from acquiring liens upon the property of owners unless the statutory notices are given, and is for the protection of owners. The defendant's contention that he could not waive the statutory requirements of notice cannot be sustained. The statute being for his benefit, there is no doubt that he could waive it. *Battle v. Knapp*, 60 N. H. 361; *Flynn v. Insurance Co.*, 77 N. H. 431, 92 Atl. 737; *Kelsea v. Insurance Co.*, 78 N. H. 422, 425, 101 Atl. 362. See *State v. Albee*, 61 N. H. 423, 428, 60 Am. Rep. 325.

Exceptions overruled. All concurred.

(79 N. H. 11)

BENOIT v. PERKINS et al.

(Supreme Court of New Hampshire. Co8a.
May 7, 1918.)

1. APPEAL AND ERROR ⇐1003 — REVIEW — FINDINGS OF FACT.

The Supreme Court cannot revise or set aside the finding of the jury as against the weight of evidence; but the only question is whether there was any evidence in support of their conclusion.

2. FRAUD ⇐17—LIABILITY OF VOLUNTEER—ACTIVE INTERVENTION.

One who though under no obligation to act at all voluntarily undertakes to do a thing, to give another such information as was necessary for her safety, is liable for resulting damage, not only if he carelessly omits to give information of an essential detail, but if he fraudulently conceals it.

3. TRIAL ⇐166 — JOINT MOTION FOR NON-SUIT.

Exception to overruling of joint motion of defendants for nonsuit and verdict is unavailing,

where there is evidence sufficient against at least one defendant.

4. APPEAL AND ERROR ⇐882(17)—REVIEW—INVITED ERROR.

A verdict based on an instruction may not be complained of by the party requesting the instruction.

5. FRAUD ⇐17—FAILURE TO SPEAK—NECESSITY OF DUTY.

For failure to speak to be actionable fraud, there must have been a duty, from the relation of the parties to speak.

6. TRIAL ⇐260(6)—INSTRUCTIONS—REQUESTS COVERED.

A requested instruction that there must be legal obligation to speak, that failure to do so may be actionable, being substantially covered by others given, need not be given.

7. TRIAL ⇐252(17)—INSTRUCTIONS—APPLICATION TO EVIDENCE.

Giving an instruction as to the law if defendants acted, or assumed to act, for another in employing plaintiff was error; there being no evidence that they took part in the employment.

8. WITNESSES ⇐349—CROSS-EXAMINATION—CREDIBILITY.

Asking on cross-examination a defendant, who had testified to having taken possession of deceased's property and turning it over to the executor, if she did not have trouble with the executor, is competent on witness' credibility.

9. APPEAL AND ERROR ⇐971(3)—CROSS-EXAMINATION—CREDIBILITY—EXTENT.

The proper extent of cross-examination going to credibility of witness is settled at the trial.

10. TRIAL ⇐121(1)—ARGUMENT—USE OF EVIDENCE.

Counsel may in argument use, for purposes for which it is competent, evidence admitted subject to exception.

11. TRIAL ⇐121(1)—ARGUMENT—USE OF EVIDENCE.

Using in argument for a purpose for which it is incompetent evidence admitted subject to exception is error; and, if permitted, subject to exception, would destroy the verdict.

12. APPEAL AND ERROR ⇐688(2) — RECORD—SCOPE OF REVIEW—ARGUMENT.

Exception to the use in argument of evidence admitted subject to exception is unavailing, where the record does not show what use counsel proposed to make of it.

13. TRIAL ⇐121(1) — ARGUMENT—MISSTATEMENT OF EVIDENCE.

A mere misrecollection or accidental misstatement of evidence by counsel in argument does not render the trial unfair as matter of law.

14. TRIAL ⇐121(1) — ARGUMENT—MISSTATEMENT OF EVIDENCE.

The case turning on defendant's credibility, and he denying any telephonic communication with plaintiff, to which she testified, misstatement by plaintiff's counsel in argument, repeated and reiterated over objection, that witness testified to seeing plaintiff when she came to telephone defendant was error.

15. TRIAL ⇐133(1)—ARGUMENT—FINDING AS TO PREJUDICE.

It being impossible to say that it could not be found that forcible and repeated misstatement in argument, over objection, of material evidence was harmful, the verdict cannot stand, whether or not there be withdrawal and disregarding instructions, in the absence of a finding by the presiding judge, which the offending party must obtain, that it was harmless.

Young, J., dissenting.

Exceptions from Superior Court, Coös County; Chamberlin, Judge.

Action by Hilda Benoit against Charles B. Perkins and others. Verdict for plaintiff, and defendants bring exceptions. Exceptions sustained in part; verdict set aside.

Case in the nature of deceit to recover damages for injuries received while employed as a companion of one Marie Bordet. The declaration alleged that the defendants were the agents, counselors, and next friends of one Marie Bordet; that she was of unsound mind; was subject to fits of insanity, in which she was liable to do injury to herself and others; that the defendants had assumed the care of her, and, knowing the fact of Mrs. Bordet's insanity, conspired together to keep knowledge of it from the plaintiff in order to induce her to enter Mrs. Bordet's employ; that in ignorance of Mrs. Bordet's condition the plaintiff did enter her employ, and because of the condition which the defendants concealed from her was injured. The case was tried upon the general issue before Chamberlin, J., and a jury, who found a verdict for the plaintiff. The defendants excepted to the denial of their motions for a nonsuit and a verdict, to the admission of evidence, to statements of plaintiff's counsel in argument, and to certain instructions given the jury.

The evidence tended to prove that Mrs. Bordet's husband had been employed at Wentworth Hall, a summer hotel in Jackson, for many years. He owned a cottage there, in which he and Mrs. Bordet spent at least one winter, though usually they lived in New York during that season. The defendant James N. Berry had also been employed for years as manager of Wentworth Hall, and lived there with his wife when the hotel was open. He also owned a cottage in Jackson, in which he lived at other times. In the fall of 1914 Mrs. Bordet's husband died, and Mr. and Mrs. Berry went to New York with Mrs. Bordet and her husband's body. Mrs. Bordet spent the winter in New York, but in May, 1915, came to Jackson, going to cottages kept by the other two defendants, Mr. and Miss Perkins. The mother of Mrs. Bordet had died the year previous, and her husband's will was imperfectly executed. From the loss of her husband and mother and impending financial trouble, Mrs. Bordet became despondent and depressed in mind, and while at the Perkins cottages developed fits of mental instability, in which she endeavored to commit suicide. Mr. and Miss Perkins were advised of her condition; that she was liable to repeat the attempts and needed institutional care. Neither of the defendants wished her to stop at their resorts during the summer, though there was no evidence she desired to do so. The defendants' evidence was that she wished to live at her own cottage and desired a companion. A Miss Trickey, who lived in Jack-

son, having learned this fact from a Mrs. Harriman, meeting Mrs. Benoit in Bartlett, where she lived, asked her if she knew of a good woman who would go to Jackson and stay with Mrs. Bordet. Mrs. Benoit replied that she might like to go herself, and arranged to come to Jackson to see about taking the place. Upon two occasions she saw Mrs. Bordet at the Perkins cottages, and agreed with her upon the employment and its terms. Upon her first trip to Jackson she met Mr. Berry at the Jackson Falls house, where Miss Trickey lived, and had an interview with him. The defendants' evidence was that the interview was arranged for the purpose of informing the plaintiff of Mrs. Bordet's condition before she entered into any agreement with her, and that this condition was fully explained to her. The plaintiff denied that she was told of Mrs. Bordet's mental instability, suicidal tendencies, or attempts to kill herself. June 26, 1915, the plaintiff went to live with Mrs. Bordet at her cottage in Jackson. Nine days later, July 5th, Mrs. Bordet committed suicide by setting fire to her clothing, which she had previously saturated with alcohol. The plaintiff claimed injury from the shock of the tragedy and the physical exertions she was thereby called upon to make. The evidence was printed in full as an appendix. Further facts and the ground of the exceptions taken appear in the opinion.

Drew, Shurtleff, Morris & Oakes, of Lancaster (Geo. F. Morris, of Lancaster, orally), for plaintiff. Sullivan & Daley, of Berlin, and E. E. Hastings, of Fryeburg, Me. (H. Sullivan, of Berlin, orally), for defendants.

PARSONS, C. J. [1] The gist of the plaintiff's complaint is that the defendants, knowing that Mrs. Bordet was mentally unbalanced with suicidal tendencies, induced or permitted her to enter Mrs. Bordet's employ without informing her of that fact. The defendants' answer before the jury was that they did tell the plaintiff all they knew. This issue was there tried, and this court has no jurisdiction to revise the finding of the jury, or to set it aside as against the weight of the evidence. The only question here is whether there was any evidence in support of the conclusion reached by the jury. The plaintiff's statement that she was not told was some evidence; and, if a wrong result has been reached, the defendants have no remedy here.

[2] The defendants contend, in support of their motion for a directed verdict, that upon the evidence their failure to inform the plaintiff was not a breach of any legal duty owed by them to her. If it be assumed that the defendants, knowing Mrs. Benoit was proposing to enter Mrs. Bordet's employ, were under no legal obligation to the plaintiff to act at all in the matter, to give her any information, still there was no error in

the denial of the motions for a nonsuit and a general verdict for the defendants. "Where one voluntarily undertakes to do a thing, whether that be by representation or by positive act, a duty is imposed upon the party making the representation or doing the act of exercising care." *Conway Bank v. Pease*, 76 N. H. 319, 324, 82 Atl. 1068; *Pittsfield Co. v. Shoe Co.*, 71 N. H. 522, 533, 53 Atl. 807, 60 L. R. A. 116; *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41. There was evidence that when Mrs. Benoit came to Jackson upon information of the opportunity, she was met at the Jackson Falls house by the defendant Mr. Berry, and had a conference with him as to the proposed employment. The defendants say and their evidence tended to prove that the meeting was arranged in order that Mrs. Benoit should be informed of Mrs. Bordet's condition before she negotiated with her as to the proposed service. The accounts of this interview differ in only one particular. Mr. Berry and Mrs. Berry say the plaintiff was told of Mrs. Bordet's suicidal tendencies and attempts. Mrs. Benoit says the contrary, and the jury have found with her. Assuming the defendants are correct in their contention that they were under no legal obligation to inform Mrs. Benoit as to Mrs. Bordet's condition, it could be found from the evidence that Mr. Berry at least undertook to give her such information as was necessary for her safety. Undertaking the task, he was bound to care in its execution, and liable if he carelessly omitted to inform her of an essential detail. A fortiori he is liable if, as could be found, he with intent to defraud concealed from her facts material to her safety, and because of her lack of information she acted to her subsequent injury.

[3, 4] As reported in the case, the motions for a nonsuit and verdict are general, in behalf of all the defendants collectively. Exceptions to such motions are overruled when it appears there was evidence which prevents the allowance of the motions as made. *Moody v. Perley*, 78 N. H. 17, 18, 95 Atl. 1047. The stenographer's minutes, printed as an appendix state that the motion for a direct verdict was "for the defendants individually and collectively." The exception was not so transferred, and no argument has been made of the evidence as applied to separate defendants. The question may be of no practical importance, and its consideration is postponed until asked for by the parties.

The ground upon which the denial of the motion for a verdict has been placed was recognized in the defendants' second request for instructions, which was:

"If you find the defendants undertook to disclose to the plaintiff, Mrs. Benoit, the mental condition of Mrs. Bordet, and that the defendants told the plaintiff the facts as they were, or as they, the defendants, believed them to be, then the defendants are not liable."

This instruction was given, and a verdict based thereon would be legally sound, and in any event irrevocable here; the law being stated as the defendants requested.

The fact that the case contained evidence from which could be found a breach of a duty assumed by at least one of the defendants requires the overruling of the contention that there was nothing for the jury. This conclusion is reached without considering whether upon other grounds the evidence would sustain a verdict against any or all of the defendants.

The exceptions to the instructions refused and given are next to be considered.

[5] As the jury were told in the charge, the evidence did not disclose false statements made to the plaintiff as to Mrs. Bordet's condition, but there was some evidence that the plaintiff was not told of Mrs. Bordet's occasional mental instability and suicidal attempts. Fraud may consist in the intentional concealment of a material fact as well as in a false statement of a fact. *Hanson v. Edgerly*, 29 N. H. 348, 354; *Page v. Parker*, 43 N. H. 363, 367, 80 Am. Dec. 172. "At common law, a fraud may be committed by the omission to disclose a material fact under some circumstances." *Stewart v. Emerson*, 52 N. H. 301, 820. But the fraudulent concealment of known facts with intent to mislead, and which in fact does mislead, another to his damage does not constitute actionable fraud, unless there be some obligation which the law recognizes to disclose the facts concealed. *Potts v. Chapin*, 133 Mass. 276. "I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose." *Lord Chelmsford, Peck v. Gurney*, L. R. 6 H. L. 377, 390. The duty to speak must arise from the circumstances, or there must be some relation of trust and confidence between the parties upon which to build the duty to disclose before the failure to disclose can be deemed a fraud whatever motive led to the concealment. 1 Story's Eq. §§ 207, 208; 2 Kent Com. §§ 482-492. "If this failure [to give information] were not in and of itself a fraud, it is not made so by alleging that it was induced by a desire to deceive and defraud the plaintiff (*Van Weel v. Winston*, 115 U. S. 228 [8 Sup. Ct. 22, 29 L. Ed. 384]). It was not a fraud unless there was some legal duty resting upon the defendant to make the disclosure. It may be that in foro conscientie the disclosure should have been made; but, unless a party has the right to this information, not only in that forum, but juris et de jure, the withholding of it cannot be classed as a legal fraud. * * * There must be some relation of trust and confidence existing between the parties upon which to build the duty to disclose before the right to a

disclosure can be enforced by the courts. * * * No additional strength is given to the allegation of fraud by stating that Packard and defendant colluded and conspired together to conceal the fact for the purpose of defrauding the plaintiff. If there were no duty resting on either to disclose the fact, each had the right to agree to be silent. The agreement to be silent where each has the right so to be is not made illegal by alleging it was done pursuant to conspiracy and collusion between the parties, without going further and showing that the concealment was but one step in carrying out a conspiracy which was unlawful, and it must be shown that it was unlawful and how, and what the steps were which were illegal or fraudulent. Mere general allegations of fraud and conspiracy are of no value as stating a cause of action." *Wood v. Amory*, 105 N. Y. 278, 281, 282, 11 N. E. 636.

[6] The defendants requested the court to charge the jury:

"If you find that there was no relation existing between this plaintiff, Mrs. Benoit, and the defendants, or either or any of them, by reason of which said defendants were under any legal obligation to disclose to the plaintiff, Mrs. Benoit, any facts tending to establish the sanity or insanity of Mrs. Bordet, Mrs. Benoit having asked for no information respecting Mrs. Bordet's mental condition, then your verdict must be for the defendants"

—and excepted to the refusal to instruct as requested. There was no evidence that Mrs. Benoit made any inquiries of the defendants as to Mrs. Bordet or the nature of the employment she proposed to undertake. It does not appear that she trusted anything to them. In fact she appears to have resented their interest in the matter. For she testified she did not see at the time why she should see Mr. Berry when she was going to work for Mrs. Bordet and was making the trade with her. It is not claimed that this request does not correctly state the law or was inapplicable to the evidence, but the contention is that the request was substantially covered by the instructions given. This position is well taken. The necessity of legal obligation to speak as the foundation of a charge of fraud from failure to do so was recognized when it was said:

"In order to be a material misrepresentation there must be some relations existing between the parties in the way of contracts of employment, of dealings in some form where there is a duty on the part of the person knowing an event or a matter which might be important to state."

[7] As to what would constitute such a relation in this case the jury were further instructed:

"The allegation in the writ is that these defendants assumed to act for Mrs. Bordet, whom they knew was an insane person. * * * If they were acting for Mrs. Bordet, and Mrs. Bordet was competent to authorize them to act, or ratify their acts, they would be her agents. If they were acting as next friends, as it is stated in the writ, if they assumed to act for her and take care of her in her condition, which

they knew and understood, as far as the evidence disclosed, then they were bound to act in good faith and honesty. It was their duty to disclose to this plaintiff at that time, before she engaged there, any information which as honest and reasonable men and women they should disclose there to enable her to protect herself. * * * In other words, you must find, before you can find a verdict for the plaintiff, that they assumed to act for her, for Mrs. Bordet, in some capacity."

To this instruction the defendants excepted upon the ground that there was no evidence that the defendants assumed to act for Mrs. Bordet. If there was no evidence that the defendants assumed to act for Mrs. Bordet in some capacity, the jury could not find they did so assume, and under the law laid down in the instructions the issue should not have been submitted to the jury. The preliminary question in consideration of this exception is, What was understood at the trial to be meant by the expression "acting for Mrs. Bordet in some capacity"—what from the charge must the jury have understood thereby? The plaintiff's claim was that she was injured because she entered Mrs. Bordet's employ without understanding its dangers. If she made her contract of employment with Mrs. Bordet, it was Mrs. Bordet's duty to warn her. If she made it with some one else acting for Mrs. Bordet, the duty of information rested with them. "Acting for Mrs. Bordet in some capacity" must therefore have been intended to mean representing her in relation to the proposed employment. The charge expressly so implies; for, after stating as before quoted that the duty to speak must arise from some relation existing between the parties by way of contracts of employment, the abstract statement is illustrated by the case of one employing another to work in his barn without informing him of a defect in its floor or to care for a vicious horse without giving notice of the character of the horse. From this language the jury could have inferred that they were at liberty to find that the defendants acted, or assumed to act for Mrs. Bordet in making the contract of employment, and that, if they did so act, they were legally bound to disclose what they knew. As a legal proposition, if these facts could be found, the statement may be unexceptionable. The case would then be of parties dealing together, one being in possession of facts material to the treaty which the other did not know and could not learn. The case would be within *Hanson v. Edgerly* and *Page v. Parker*, supra. But, as the defendants contend, the rule was inapplicable because there was no evidence in the case authorizing the conclusion that the defendants acted, or assumed to act, for Mrs. Bordet in the dealing which resulted in the contract. If the defendants, or either of them, had anything to do with the means by which information of the situation which Mrs. Benoit accepted reached her, the plaintiff failed to estab-

lish the fact by proof. Mrs. Benoit, learning of the opportunity by means, so far as the case goes entirely independent of the defendants, came to Jackson, and made her contract with Mrs. Bordet, and not with or through any of the defendants, acting or assuming to act for Mrs. Bordet.

Much stress has been laid in the argument upon the defendants' interest in Mrs. Bordet, and the subject was referred to in the charge. Long acquaintance with and friendship for Mrs. Bordet doubtless placed upon the defendants a moral, if not a legal, duty to care for her, and to see that whoever took charge of her was a suitable person and was instructed as to the care necessary for her protection, but this duty, whether legal or moral, was owed Mrs. Bordet, and not to the plaintiff. If in performance of a duty they owed Mrs. Bordet the defendants employed the plaintiff to care for her, the legal duty to Mrs. Benoit of informing her of the nature and perils of the service required would have been imposed; but, in the absence of evidence that, acting for themselves or for Mrs. Bordet, they took some part in the employment of the plaintiff, the case was improperly made to turn upon such employment by the defendants, of which there was no evidence. It is not error to refuse to give an instruction, unobjectionable as matter of law, if there is no evidence to which the legal proposition is applicable. *Kuba v. Devonshire Mills*, 78 N. H. 245, 99 Atl. 91. But it is error to submit to the jury a question upon which there is no evidence. *Moody v. Perley*, 78 N. H. 17, 95 Atl. 1047. The exception to the charge upon this ground is sustained. Whether the fraud charged was the proximate cause of the damage claimed has not been questioned.

[8, 9] One of the defendants, Miss Perkins, testified that after Mrs. Bordet's death she took possession of her money and jewelry and turned it over to her executor. Subject to exception the plaintiff was permitted to ask her upon cross-examination if she did not have trouble with the executor. The question was competent upon the witness' credibility. The extent to which an examination of this nature should be carried is settled at the trial. *Gutterson v. Morse*, 58 N. H. 165.

[10-12] The remaining exceptions necessary to be considered are to the argument of counsel. One is to a reference to the testimony just referred to as admitted subject to exception. The evidence was in the case, and counsel could use it for the purpose for which it was competent. Use for a purpose for which it was incompetent would be error, and, if permitted by the court subject to exception, would destroy the verdict. *Burnham v. Stillings*, 76 N. H. 122, 79 Atl. 997. The record does not show what use counsel proposed to make of the evidence.

As far as the record shows, the only question presented to the court when exception was taken was whether there was such evidence in the case.

[13-15] The remaining exceptions relate to misstatements of the evidence made in the course of the argument. "While a verdict may be set aside for the introduction in argument of facts not contained in the evidence, and a persistent misstatement of the evidence may amount to such introduction so as to render the trial unfair, a mere misrecollection or accidental misstatement of the evidence does not render the trial unfair as matter of law." *State v. Wren*, 77 N. H. 361, 364, 92 Atl. 170. In the case cited the error consisted in ascribing the testimony of one witness to another. The jury were cautioned by counsel and court to rely upon their own recollection of the testimony of the witnesses, and not upon the statements of counsel, and the error was found by the trial court to be harmless in fact.

One of the statements objected to in the present case, however, cannot be passed over as "mere misrecollection or accidental misstatement of the evidence." Mrs. Benoit testified that Mr. Berry telephoned to her, asking her what her terms would be. Mr. Berry denied making such inquiry or having any telephonic communication with the plaintiff. Counsel stated that a Mrs. George, who was a witness, when asked if she saw Mrs. Benoit, replied, "Only when she came to telephone to Mr. Berry," and argued with great force the value of a fact coming in this way from a witness incidentally and without express inquiry upon the point. The vital point in the case turns upon the credibility of Mr. Berry. Despite objection, the statement was twice repeated, reiterated, and enlarged upon. There was no such testimony in the case. What Mrs. George did say was that Mrs. Benoit came to her house to answer by telephone a letter she had received from Miss Trickey. It is not probable counsel intended to misstate the evidence. He may have had in mind what he had expected the witness to say rather than her actual testimony. If so, he placed before the jury a fact which he failed to get into the evidence, material upon a vital point in the case; and, when the matter was called to his attention, he reiterated the statement and enlarged upon it. "A statement by counsel in argument of material facts of which there was no evidence, direct or inferential, is ordinarily reversible error, unless there is a finding that it did not render the trial unfair." *Gosselin v. Company*, 78 N. H. 149, 151, 97 Atl. 744. "When exception was taken to the improper statement, it was incumbent upon the defendant to withdraw it, obtain an instruction to the jury not to consider it, and a finding of fact from the presiding justice that the trial was not rendered unfair thereby." *Lemay v. De-*

mers, 77 N. H. 563, 564, 94 Atl. 262. These cases of recent date merely restate the rule, which has been consistently applied since the decision of Bullard v. Railroad in 1886, 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367. Under this rule a verdict is set aside, not as a punishment for the misconduct of counsel, but to secure to the opposite party a fair trial. Bullard v. Railroad, *supra*. Hence the good faith of counsel in stating the fact as one proved by the evidence is immaterial; the question remains, Has the trial been fair? Here the jury has been urged to use in the decision of the issue before them a fact which has not been proved. If the fact were an immaterial one, or from the situation it was not probable the jury who heard the evidence were misled by the misstatement of it, it would be plain that there was no lack of fairness in the trial. But the fact stated may be, as in this case, a material one. The forcible and repeated statement of it by counsel may have had more influence upon the minds of the jury than their recollection of what the witness really said. If this latter is probable, it is probable the verdict has been unfairly obtained. In the case of such an error, how may it be corrected? To require counsel, stating his recollection of the evidence, to reverse himself or run the risk of losing the verdict whenever objection is made, should subsequent investigation of the record disclose he was in error, would give the objecting party an unfair advantage. To stop the argument for an examination of the record whenever controversy arose as to the evidence would be, in most cases, impracticable. When, as in this case, upon subsequent examination of the record it appears that the objecting party was in the right, and that there was a material misrepresentation of the evidence by the party obtaining the verdict, the verdict ought not to stand, if produced by the misrepresentation. Whether the trial was rendered unfair by the error is a question of fact to be settled, like all questions of fact relating to procedure at the trial, by the presiding justice. In the course of his argument counsel disclaimed any intention to misquote the evidence, and the jury were instructed generally that they should be guided by their own recollection of the evidence, and not by counsel's recital of it, although nothing was said by counsel or court with special reference to this particular statement. Conceding that for a misstatement of this kind what took place was a sufficient compliance with the rule requiring withdrawal of an improper statement and obtaining disregarding instructions, there is no finding that the error was harmless in fact. The burden of obtaining this finding is properly placed with the party in fault. It cannot be said there was no evidence upon which a finding fatal to the verdict could be made. Hence, in the

absence of the contrary finding, the verdict cannot stand.

Exceptions sustained in part; verdict set aside.

WALKER and PLUMMER, JJ., concurred. PEASLEE, J., concurred in the result. YOUNG, J., dissented.

(183 Md. 23)

MURPHY et al. v. STUBBLEFIELD.
(No. 4.)

(Court of Appeals of Maryland. May 1, 1918.)

1. PLEADING \S 204(3)—DEMURREE—EFFECT.

In action in assumpsit on seven counts of which six were good, the defect, if any, in the seventh, which sought recovery on two separate notes, did not render the entire petition subject to general demurrer.

2. USURY \S 111(1)—PLEADING—REQUISITES.

Since usury is a statutory defense, the terms of Code Pub. Civ. Laws, art. 49, § 5, stating how usury shall be pleaded, must be strictly complied with.

3. USURY \S 111(2)—PLEADING—REQUISITES—"DISCOUNT."

In action on notes, plea that the notes were made with the intention that they should be discounted by plaintiff and that plaintiff gave less than their face value, the sum retained being usurious, was a good plea of usury; the term "discount" referring to a loan and not a sale of the paper, and meaning a loan with a right of taking the interest in advance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discount.]

4. GUARANTY \S 77(2)—LIABILITY—EXAMINATION OF REMEDIES AGAINST MAKER.

The maker of a note upon which payment was guaranteed by defendants could recover from them regardless of the fact that he made no attempt to recover from the maker, their liability being absolute.

5. WITNESSES \S 268(12) — CROSS-EXAMINATION—SCOPE.

In action on notes, under defense of usury, defendants could not cross-examine plaintiff as to the amount he paid for the notes, his understanding of the transaction, nor call on him for production of the check, but should make him their own witness as to such matters.

Appeal from Superior Court of Baltimore City; Robert F. Stanton, Judge.

Action by Thomas W. Stubblefield against William J. Murphy and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

John L. G. Lee and J. Albert Baker, both of Baltimore, for appellants. Charles F. Diggs, of Washington, D. C., and Watson M. Sherwood, of Baltimore, for appellee.

STOCKBRIDGE, J. This action is one in assumpsit, and the first six counts in the declaration are the common counts in that form of action. The seventh count is as follows:

"And for that one Fred. A. Dolph on the 24th day of November, 1916, by his promissory note now overdue, promised to pay to himself, or order, \$1,000 four months after date, and the defendants indorsed the same to the plaintiff, and jointly and severally guaranteed payment of said note, and the said note was duly presented for payment and was dishonored, whereof the defendants had due notice and did not pay the same."

The eighth count is similar to the seventh, the note mentioned in it bearing the same date as that declared on in the seventh count, having the same length of time to run, and for the same amount. The two notes mentioned were attached to the narr. each being in this form:

"\$1,000.00.

"Baltimore, Md., November 24, 1916.

"Four months after date I promise to pay to the order of myself, one thousand dollars, at Baltimore, Md., with interest at 6 per cent. from date. Value received. Fred. A. Dolph.

Indorsed: "Fred. A. Dolph."

"Calvert Bldg., Baltimore, Md.

"For value received we hereby jointly and severally guarantee the payment of the within mentioned note; and also hereby jointly and severally waive demand, protest and notice of nonpayment thereof.

Wm. J. Murphy.

"Anna C. Murphy.

"Wm. Bevan.

"Susie R. Bevan.

"Herman A. Rehling.

"Louisa Rehling.

"H. T. Weber.

"James F. Davis.

"H. S. Robinson.

"T. W. Stubblefield."

When the time of maturity arrived, neither of the notes were paid, but were protested for nonpayment, and notice was mailed to all those whose names appeared on the back of the note with the exception of the maker.

The suit was brought under the speedy judgment act applicable in the city of Baltimore and contained the affidavits required by the Act of 1886, c. 184. Within the time required under the act for the filing of pleas, in order to prevent a judgment by default, all of the defendants named with the exception of H. S. Robinson appeared and filed the general issue pleas. In the affidavit attached to those pleas the defendants admitted \$1,344 to be due to the plaintiff, and disputed the balance of his claim, and in August, 1917, the plaintiff took a judgment for the sum of \$1,344 with costs against the defendants who had pleaded. The next step took place on December 8, 1917, when the defendants obtained leave of the court to file an additional plea, and the same day the following plea was entered:

"That on the 24th day of November, 1916, defendants sent to plaintiff two notes of \$1,000 each, with the understanding that said notes were to be discounted by plaintiff; that plaintiff gave to defendants only \$1,800, and refused to pay more; that defendants then tendered to plaintiff the entire sum advanced, with interest, and demanded the return of notes, which plaintiff refused; and that the amount disputed in this case is usurious interest demanded on said loan and retained by plaintiff from the amount of said notes."

[1] A motion *ne recipiatur* to the additional plea having been overruled, a demurrer was entered. The contention of the appellants is that the legal result of the demurrer was to make the error mount up to the first error in pleading, and that such error is to be found in the seventh count of the declaration, and consists in a misjoinder of two causes of action in a single count. The insuperable difficulty for the adoption of this view lies in the fact that, in so mounting up, the demurrer becomes a general demurrer to the declaration, and, as long as there is one good count, the narr. will stand and cannot be reached by a general demurrer. In this case the action was in *assumpsit*, the first six counts being the usual common counts in that form of action, and as repeatedly held, these not being open to demurrer, even if the seventh count could have been held liable to demurrer if standing alone, the present objection to it is not maintainable as enough would be left to enable the plaintiff to maintain the action.

[2, 3] The judge of the superior court sustained the demurrer to the additional plea, and the correctness of that ruling is now called in question by this appeal. Apparently what the pleader had in mind in preparing that plea was to set up the defense of usury with regard to both of these notes. What is requisite for a valid plea of usury has remained practically unchanged since the Act of 1845, c. 352, now embodied in the Code, art. 49, § 5. Being a statutory defense, the terms of the statute must, of course, be strictly complied with. If the plea sets up a loan, then the plea was good, for usury applies only with regard to a loan. On the other hand, if the plea sets up a sale, then the plea was bad, since on the sale of negotiable paper the vendee is in an entirely different position from the one who makes a loan upon similar paper. The term which is used in the plea itself is "discounted," and it is therefore material to inquire whether under the circumstances of this case the use of the word "discount" implies a sale or a loan. In *Amer. & Eng. Ency. of Law* (2d Ed.) vol. 2, p. 469, it is said:

"To discount paper as used in a business of banking is only a mode of loaning money with the right of taking the interest allowed by law in advance."

The term has been defined by this court in almost the same language in *Weckler v. First National Bank*, 42 Md. 592, 20 Am. Rep. 96, where Judge Miller says:

"The ordinary meaning of the term 'to discount' is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due until some future period, less the interest which would be due thereon when payable."

And the same rule has been reaffirmed in *Black v. Bank*, 96 Md. 428, 54 Atl. 88, in which Judge Pearce, after quoting from Judge Miller, adds:

"Only the legal rate of interest would be due on the principal when payable, and thus Judge Miller's definition of the term is shown to be the same as that given above. If the legal rate were exceeded, a presumption might arise that the parties intended, or the law implied, a sale rather than a discount, because a sale (between ordinary parties at least) would be legal at any rate of deduction agreed on, but, where a bank discounts paper at a rate exceeding that allowed by law, the transaction would be within the usury law."

While the plea in this case may be open to criticism as to its form, each and all the requisites for a plea of usury, as set forth in the section of the Code referred to, will be found to be contained in it, and it is specifically alleged that it was the purpose in the making and guaranteeing of the note to have the same discounted. There is no suggestion legitimately to be drawn from anything contained in the plea that it was the idea, either of the maker or of the guarantors, that it was for the purpose of a sale; on the contrary, the plea alleges that the note was drawn to be "discounted," and that the deduction made therefrom was such an amount as to constitute usury. There is nothing in the language of the plea itself to give any force to a presumption of sale, rather than loan, so as to make effective the presumption which, as noted by Judge Pearce, may, but does not necessarily, arise.

In the view of this court, therefore, it is error to have sustained the demurrer to the plea, an error which was highly prejudicial to the defendants, since it took away from them the opportunity of presenting evidence to substantiate the theory of usury. See authorities already cited, and very full note upon this subject in 105 Am. St. Rep. p. 509.

[4] No valid objection arises from the fact that, so far as appears either from the pleadings or evidence, there was no attempt made upon the part of the holder of these notes to recover on them from the maker, Fred. A. Dolph. The present defendants were clearly liable upon these notes whether viewed as indorsers or guarantors. Any question upon that ground is effectively settled by *Wood Machine Co. v. Ascher*, 103 Md. 133, 62 Atl. 1023, 115 Am. St. Rep. 343, and cases therein cited.

The record contains four bills of exceptions, but they all relate to a single question and may be disposed of together.

[5] At the trial of the case the plaintiff was put upon the stand and testified to being engaged in the real estate business in the city of Washington, and that he sometimes bought commercial paper; that in December, 1913, H. S. Robinson called on him, stating that he had a note which he wished to sell, and he produced to the plaintiff one of the notes in question, and the plaintiff purchased the same; that three days later he purchased the second note from him; that the witness gave him his check in payment for both notes. The notes were then read in evidence,

and the plaintiff rested. The defendants' counsel called for the production of the check given in payment for the notes, which was objected to, and the sustaining of that objection constitutes the first exception. The second bill of exceptions was to the ruling of the court in sustaining an objection to a question asked on cross-examination, "How much did you pay Mr. Robinson for those notes?" The third bill of exceptions was to a similar ruling by the court to a question also asked on cross-examination of the same witness, whether he had ever had any conversation with a Mr. Bracy in regard to those notes. And the fourth bill of exceptions was to the refusal of the court to permit the plaintiff on cross-examination to be asked, "Did or did you not understand that Mr. Robinson was not the owner of those notes?"

The demurrer to the additional plea having been sustained, these rulings were in harmony therewith, since the plain purpose in each one of the questions objected to was to establish, by the plaintiff himself, usury. The burden of proof to sustain the plea of usury necessarily devolved upon the defendants. It was the essential part of their case. The questions were objectionable at the time, and in the manner, when propounded, because they were not legitimate cross-examination of the plaintiff, and a defendant cannot establish usury, fraud, misrepresentation, or deceit under the guise of a cross-examination of the plaintiff. *Williams v. Banks*, 19 Md. 38.

The rule is stated in *Jones on Evidence* (2d Ed.) § 820, in this way:

"The rule sustained by the Supreme Court and which prevails in most of the states is that the cross-examination can only relate to facts and circumstances connected with the matters stated in the direct examination of the witnesses. If any party wishes to examine a witness as to other matters, he must do so by making the witness his own."

And with slight verbal changes the same rule is announced by Mr. Greenleaf, in his work on *Evidence* (16th Ed. § 445), and it has been followed in this state in numerous instances, of which *Griffith v. Diffenderfer*, 50 Md. 478, is a good example. See, also, *Herrick v. Swomley*, 56 Md. 439. Almost the same question here presented arose in *Youmans v. Carney*, 62 Wis. 580, 23 N. W. 20, where it was held that, if the direct examination of the payee of a note is confined to the genuineness of a signature or the identity of the note, the adverse party has no right to cross-examine as to consideration. See, also, *Bell v. Prewitt*, 62 Ill. 361.

The defendants might, had they so desired, have called the plaintiff as their own witness, and examined him upon the several questions which were propounded to him on the cross-examination, but which were ruled out, as already noted. If they had done this, the evidence should have been admitted; but the defendants would have been bound thereby

except as provided by section 5 of article 35, Code P. G. L. In the manner in which it was attempted to be introduced, not being legitimate cross-examination, the ruling of the court with regard to them was free from error.

It follows from what has been said that the judgment of the court below must be reversed.

Judgment reversed, and cause remanded for a new trial; costs to be paid by the appellee.

(133 Md. 91)

O'DUNNE v. SAFE DEPOSIT & TRUST CO.
OF BALTIMORE. (No. 19.)

(Court of Appeals of Maryland. June 19, 1918.)

1. APPEAL AND ERROR §936(2)—FEES—ALLOWANCE BY LOWER COURT—REVIEW.

The action of the lower court in fixing counsel fees, where authorized to do so, is treated as presumptively correct, as it has better means of knowing what is just and reasonable than an appellate court can have.

2. WILLS §707(1) — ATTORNEY APPOINTED BY COURT—AMOUNT OF FEE—REVIEW.

An order, on exceptions by the trustee, suing to construe a will, reducing from \$2,500 to \$750 the fee allowed to counsel appointed to represent infant defendants, found entitled to an annual income of \$3,714.12, as against their parents, reversed on the evidence, and a fee of \$1,000 allowed.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Eugene O'Dunne appeals from an order sustaining the exceptions of the Safe Deposit & Trust Company of Baltimore, trustee under the will of Joshua P. McCay, deceased, to the allowance of a counsel fee for representing certain infant defendants, under an appointment by the court, on a bill by the trustee to construe the will. Order reversed, and cause remanded for the passage of an order fixing the fee at \$1,000.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Randolph Barton, Jr., of Baltimore, for appellant. Charles McH. Howard, of Baltimore, for appellee.

CONSTABLE, J. The sole question presented in this appeal is to the adequacy of a fee allowed by the lower court to counsel appearing for certain infant defendants under an appointment by the court. No question has been raised as to the right of the solicitor to be compensated for this is admitted.

For the disposition of this case it will not be necessary to go with any great detail into the facts of the case out of which the right of the appellant to a fee arose, and we will therefore content ourselves with setting out the memorandum of facts which was forwarded by the appellant to several members of the bar for the purpose of aiding them

in forming an opinion as to what would be a proper fee to be allowed the appellant by the court for his work in preparing and trying the case, and so as to enable them to testify at the hearing on that question:

"Joshua McCay left in trust to the Safe Deposit & Trust Company, under the will construed in this case, an estate of a little over \$1,000,000. There was provision, after the death of his widow (now dead), to divide into quarters and hold each quarter in trust for children and descendants. The one-quarter interest of the Mary Morgan share is \$241,378.12. Her three children are Howard (died April, 1917), Mary Nicholls (living, no children), and Rowland Morgan (living, three living children). Howard Morgan, deceased, left two infant children. The annual income on the Howard Morgan share, being one-third, was \$3,714.12, with like amount to his brother, Rowland, and sister, Mary Nicholls. A bill was filed by the Safe Deposit & Trust Company April 4, 1917, to construe the will, and particularly the ninth clause thereof, to determine in whom the income is vested, whether in the infant children of Howard Morgan, deceased, or whether in his administrator, and also the rights of the surviving brother and sister as to income, and eventually as to corpus, on the death of the survivor of said Morgan children.

"It was contended by Mr. Vernon Cook, representing Mrs. Nicholls and Rowland Morgan, that the grandchildren of testator take vested interests, and contended by Mr. O'Dunne, counsel for the infant children of Howard Morgan, deceased, and the infant children of Rowland Morgan (now living), that the right to income is vested in these great-grandchildren, and not in their parents, and that, on the death of the survivor of said Mary Morgan children, her then living descendants at the time of termination of the trust shall be the ones to whom the corpus shall be distributed. The case was set for argument before Judge Duffy September 25th, and counsel were excused two or three times a day, for two or three days, waiting on a pending case. It was later finally and fully argued by Mr. Charles McH. Howard for the Safe Deposit Company, by Mr. Jesse Bowen for Rosa McCay Lockwood, by Mr. L. A. Dent, of Washington (with whom was Mr. Frank Gosnell), for Emily Proctor, and by Mr. Vernon Cook for Rowland Morgan and his sister, Mary Nicholls, and by Eugene O'Dunne for the infant children of Howard Morgan, deceased, and for the infant children of Rowland Morgan (living). Elaborate briefs were prepared and filed by Mr. Dent, on behalf of himself and Mr. Gosnell (35 typewritten pages), by Mr. Vernon Cook (10 pages), and the inclosed by Mr. O'Dunne on behalf of the infant children aforesaid (said last brief was of 62 printed pages). On November 9th Judge Duffy handed down the inclosed opinion and decree sustaining the contention of the infant children of Howard Morgan, deceased, and of Rowland Morgan (living)."

At the time of the signing of the decree on the points involved in the case, some discussion arose among the counsel and court as to the amount of the fees to be allowed to respective counsel for their services in the case. From certificate of the court in the record it appears that:

"The court asked Mr. O'Dunne what counsel fee he proposed taking, and Mr. O'Dunne stated that he had no particular amount to name; that in this particular case all of the services rendered were peculiarly within the knowledge of the court; that his brief had been filed and

left with the court, and that he was willing to leave the matter to be determined by the court; and reminded the court that he had left with the court certificates, or letters, from Mr. Fisher, Mr. Barton, and Mr. Machen for the court's consideration, and asked if any of the gentlemen present had any suggestions to make to the court on the subject. None were made, and the court, after reading the letters of Messrs. Barton, Fisher, and Machen, stated that he would allow the fee of twenty-five hundred dollars (\$2,500), to be paid out of the corpus of the Howard Morgan share. Mr. O'Dunne thereupon suggested that the court add to the form of decree, as drawn by Mr. Howard, that the same be made subject to exceptions. The court thereupon indicated that he would make it, subject to exceptions to be filed in thirty (30) days, and the decree was thereupon revised accordingly by Mr. Charles McH. Howard, and thereafter signed by the court."

Exceptions to the allowance of \$2,500 counsel fee were filed by the Safe Deposit & Trust Company, trustee, under the will. A hearing was had on the exceptions and testimony heard in open court. The exceptant produced four witnesses in support of its contention that the fee was too large. All these witnesses had been closely identified with the trial of the case and were all men of exceptional knowledge of cases along the line of this case. There was Mr. John W. Marshall, vice president of the Safe Deposit & Trust Company of Baltimore, and who at that time was head of the trust department of his company; Mr. Frank Gosnell, a member of the law firm of Marbury, Gosnell & Williams, and who had represented one of the parties in the litigation; Mr. Vernon Cook, a member of the law firm of Haman, Cook, Chesnut & Markell, and who represented one of the parties throughout the case; Mr. Jesse N. Bowen, a member of the law firm of Semmes, Bowen & Semmes. These gentlemen were thoroughly familiar with every feature of the case, and testified as to what in their opinion would be proper compensation for the work accomplished by Mr. O'Dunne. Mr. Marshall placed his estimate at \$500, Mr. Cook at \$750, Mr. Bowen at \$1,000. Mr. Gosnell testified that previous to the hearing he had considered \$500 adequate compensation, but during the hearing he changed this estimate to \$1,000.

The respondent, previous to the hearing, had requested Mr. D. K. Este Fisher, a member of the law firm of Fisher, Bruce & Fisher, Mr. Arthur Machen, Jr., a member of the law firm of Machen & Williams, and Mr. Randolph Barton, Jr., a member of the law firm of Barton, Wilmer & Stewart, all accomplished lawyers, with a wide experience in cases of this character, to give him certificates, in the form of letters as to what would in their

opinion be a proper compensation to be allowed him in the case just tried. He furnished them with a memorandum of facts, which we have set out above, and talked to them generally about the case. Mr. Barton and Mr. Machen were unable to attend the hearing, but their certificates were filed. Mr. Fisher attended the hearing and testified. Mr. Fisher and Mr. Machen each placed their estimate at \$2,500, and Mr. Barton at \$3,000. The court passed an order sustaining the exceptions, wherein it reduced the fee from \$2,500 to \$750.

[1, 2] The fixing of counsel fees, where courts are authorized to do it, has always been regarded by them as one of their most delicate duties, and especially unpleasant is it to appellate courts to have to review allowances made by the lower courts. Mr. Miller, in his work on Equity Procedure, in the notes to section 568, in dealing with this subject, has well said that the action of the lower court is treated as presumptively correct, since it has better means of knowing what is just and reasonable than an appellate court can have, and cites several authorities to that effect. While, of course, we want to give due weight and consideration to the finding of the lower court, and especially so since it heard every detail of the case and decided every question raised, which puts it in a peculiarly strong position, so as to form a correct opinion as to the value of the services rendered, yet it is difficult to reconcile its views with that of the experienced lawyers testifying for the respondent. It may be that those lawyers, with all their experience and knowledge, did not occupy the same character of position which would enable them, because of their nonassociation with the case, to form as correct an opinion as to the value of the services mentioned as the court who heard and decided the case and the lawyers who took part in its trial. It is also difficult to reconcile the court's present opinion of \$750, formed after the hearing on exceptions, with the amount it placed of its own accord in the nisi order of \$2,500. But there is a diversion of views among the lawyers testifying for the exceptant; two out of the four say \$1,000 would be proper compensation, while the other two are for \$500 and \$750, respectively. While we are of the opinion that the estimates placed by the respondent's witnesses are entirely too large, yet we are of the opinion that \$1,000 should be allowed the appellant. We will therefore reverse the order.

Order reversed, and cause remanded so as to pass an order in conformity with the foregoing opinion; the costs to be paid out of the Mary Morgan fund.

(123 Md. 670)

**ZINK v. STATE OF MARYLAND, to Use of
RENSTROM, et al. (No. 52.)**

(Court of Appeals of Maryland. May 27, 1918.)

**1. MASTER AND SERVANT §330(3)—DIREC-
TION TO DRIVE AUTOMOBILE—PERSONAL
SERVANT—SUFFICIENCY OF EVIDENCE.**

In action against owner of automobile for death of pedestrian, evidence held to show that direction given by owner to driver to take third person to car line was personal direction, making driver owner's personal servant, and not servant of company of which owner was manager.

**2. DEATH §104(8)—DEATH BY WRONGFUL
ACT—INSTRUCTION ON DAMAGES.**

In state's action for wife for death of husband, wife's age at death having been 37 and husband's 44 years, instruction not specifically directing that in estimating prospective damages jury should consider probable duration of joint lives of wife and husband, was not erroneous, in view of small disparity in age.

Appeal from Baltimore Court of Common Pleas; Morris A. Soper, Judge.

Action by the State of Maryland, for the Use of Hilda Rebecca Renstrom, and others, against John H. Zink. From judgment for plaintiffs, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Lucius Q. O. Lamar and Wm. L. Marbury, both of Baltimore, for appellant. Lewis W. Lake and J. Cookman Boyd, both of Baltimore, for appellees.

PATTISON, J. August Renstrom, husband and father of the equitable plaintiffs, while walking upon the public highway leading from Wagner's Point to Stone House Cove, in Anne Arundel county, Md., on the 24th day of January, 1917, was knocked down and killed by an automobile owned by the defendant and driven by one Upham, who, as the declaration alleges, was at such time the agent of the defendant.

Renstrom at the time of the accident was employed by the Curtis Bay Chemical Company located upon Stone House Cove. He, each day, went to and from his home in Baltimore city to his place of employment upon the cars of the United Electric Railway Company of Baltimore city, the terminus of which, at Stone House Cove, is about four city blocks from the plant of the Curtis Bay Chemical Company. Upham, as well as the defendant, was an employé of the United States Asphalt Refining Company, whose plant is located in the vicinity of Stone House Cove, about a mile and one-eighth from the terminus of the car line of the railway company. To accommodate the employées of the Asphalt Refining Company and others employed or living in that locality, a public jitney bus line had been established by the city railway company, starting at the terminus of the car

line and running upon the public macadam road to Wagner's Point.

On the day of the accident the jitney operating upon this line was disabled, and at the hour of 5 o'clock in the afternoon of that day, when the factory of the Asphalt Refining Company shut down, there was no jitney to take its employées to the terminus of the car line, consequently they, with the employées of other companies, were required to walk to the terminus of the car line in order to take the car to their homes in the city. The defendant, who also lived in Baltimore city, used an automobile owned by him in going to and from the plant each day. The car and jitney lines were not used by him. Upham boarded at the same house with the defendant, in the city, and rode with him each day to and from the plant of the company.

On the occasion of the accident it seems that the defendant was detained at the office of the company after the hour of the shutting down of its plant, and while there in conversation with a visitor, one Schlee, an employé of the company, called at the office, and the defendant asked him "what he was doing there," as it was after office hours. He said, "Well, the jitney bus was broken down and he was not able to go home." The defendant then turned to Upham, who was in the office waiting to return to the city with him in his automobile, and said to him, "What are you doing?" Upham replied, "nothing," and the defendant then said, "Well, take him [Schlee] up to the car line," meaning that he should take him in his (the defendant's) automobile, and both Schlee and Upham left his office. On their way to the car line, in the automobile of the defendant, they overtook other employées of the Asphalt Refining Company, who had started to walk to the car line. Three of these, either by invitation, or at their request, got upon the running boards, or upon the rear of the machine, it having but two seats in it. It was while upon the road, on the way to the car line, that Renstrom was knocked down and killed by the automobile driven, as we have said, by Upham.

Howard J. Eyerly, an employé of the Curtis Bay Chemical Company, testified:

That he, at the time of the accident, which was about ten minutes after 5 o'clock in the afternoon of January 24, 1917, was walking with Renstrom and two other employées of that company upon the public highway on their way to the car line. They were walking four abreast upon the road, he to the extreme left with Renstrom next to him on the right, "and I heard the buzzing of the machine, or some kind of a noise, and it made me turn around, and I just happened to get my head around and I saw this big gray machine, something on the order of a racing car, and a right heavy machine at that, and I hollered 'Look out!' That was all I had time to do, was to holler 'Look out!' and as I hollered 'Look out!' I stepped to the left like, about a foot, and Gus, the man who got hit, stepped one step ahead and just

got his head around like this, when the machine came along and caught him. The machine knocked him down head first, and knocked him at least 10 feet in front of the machine, and then the left front wheel ran over his head again. The machine kept on about 200 or 250 feet, and in the meantime I started to run after the machine, because I thought the fellow was not going to stop, but he stopped . . . and we picked him [Renstrom] up and took him up to Brooklyn."

He further testified that he never heard any horn blow, and that the road was straight at this point, and that there was no obstruction in the road, more than a few men who were walking upon it; that when he looked around the automobile was about 75 feet behind him and was going, as he judged, about 35 miles an hour. "It went by me like a streak of lightning; just missed me." The automobile at that time was on the extreme left side of the road. Renstrom died the next day after being carried to the hospital.

Benjamin Max, one of those present with Renstrom and the witness Eyerly on the occasion of the accident, also testified as to the happening of the accident, but as his testimony was practically the same as that of Eyerly, we need not repeat it here.

Wycliff O. Manger, an employé of the Asphalt Refining Company, who was with Upham in the automobile at the time of the accident, testified:

That he was sitting in the front of the machine on the floor with his feet out on the step, looking ahead. "We passed different workmen on their way home, blowing the horn every time we passed any one. I noticed there was a cart in the distance, and they started to blow their horn, and blew it continuously to let the cart know they wanted to pass it on the left. There were four men walking on the left side of the road, right in front of the cart, as though they were getting out of the way of the cart. He (Upham) blew the horn and started to get over to the left side of the road to pass the cart, expecting the men to hear the horn and step off the road. It seemed they didn't hear the horn and didn't pay any attention to it until we were within, I guess, 20 or 30 feet of them, and they each started to look back over his shoulder and they saw the machine and they scattered. Two went to the right in front of the cart and two went off to the left. One man on the extreme left, he got off the side of the road, but the second man from the left, he was the last one to look back over his shoulder, and didn't get off before we reached him, and the left lamp of the machine struck him in the back and knocked him down alongside of the road. We continued on, slowing down, about 50 feet and came to a stop."

He also testified that the car was going about 10 or 12 miles an hour. This evidence of Manger is supported by that of Disney and Schlee, but Schlee further testifies:

That he "was down to the plant and Mr. Upham came to the office with the car. They generally bring it up about 5 o'clock, and Mr. Zink drives it home. He goes down in it in the morning and goes home in it at night, and Mr. Zink was in the office, and Upham said, 'Come on, Schlee, I will take you up to the car line,' and the other boys were all along the road, and they got in as we went by."

He also testified that he himself at times had used the car when told to do so by the defendant, but was unable to say that the business for which he used it was for the company. He was then asked: "What was the nature of the business?" He answered: "Different errands. Q. What kind of errands? A. Well, sometimes he sent me to his house."

The defendant, when placed upon the stand in his own behalf, testified that he was the manager of the United States Asphalt Refining Company, and had been manager since 1913; that the company employed possibly so many as 150 men, the number varying on different days; that the plant was about a mile and one-eighth from the trolley car line; that the company did not provide transportation for its employes to and from the trolley line, but the United Railway & Electric Company operated a bus line from Stone House Cove to Wagner's Point, upon which the buses run every 20 minutes. The witness also testified as to the conversation which we have already given, in which he told Upham to take Schlee to the car line. When he was asked: "Was it within your employment with the company to provide means for the employes of the company to get to the car line?" he answered:

"I had not any instructions in the matter whatever. The man was standing there and I used the discretion; as to whether it was personal discretions or not, I did not consider that at the moment. If there was any one else walking along the road and I felt like picking them up, I would—"

Here the witness was interrupted by his counsel asking him:

"But did you have personal interest in having Mr. Schlee taken to the trolley car that night? He was not in your employ, was he? A. No, sir. Q. Well, was it to your personal interest to have him sent to the car, and, if so, why? A. I had not any personal interest other than I considered a favor, that is all. Q. But the company had an interest in it, didn't it? A. I don't know. Q. You don't know whether it made any difference to the company whether the men had transportation or not? A. Well, they may have or not, but I did not consider that at the time I told them to take the machine."

He was then asked, upon cross-examination:

"Was it part of your duty to furnish transportation from these works to the car lines? A. No, sir. Q. Was there anything in the employment of these men, since you had charge of the employment, that was a condition to furnish them transportation from the works to the car line? A. No, sir. Q. Do you know of the jitney being broken down any other time than this? A. Yes, sir. Q. And how had the men gotten to and from the works then? A. Some of them walked and some of them were picked up on the other machines and taken to their car line. Q. Was this after office hours? A. Yes, sir."

At the conclusion of all the evidence the plaintiffs offered two prayers, both of which were granted; the defendant offered six prayers. The third, fifth, and sixth were granted; the first, second, and fourth were refused. Exceptions were taken to the rul-

ings of the court in granting the plaintiffs' prayers and in refusing the defendant's said prayers. The defendant, by his first prayer, asked the court to instruct the jury that there was no evidence adduced "legally sufficient to prove that at the time when August Renstrom was struck by the automobile mentioned in the declaration, said automobile was being operated by the defendant, John H. Zink, or his servant or agent, as alleged in the declaration." It is upon the court's ruling in rejecting this prayer and in granting the plaintiffs' prayers that the defendant chiefly relies in his efforts to have the judgment for the plaintiffs, in the court below, reversed.

It is conceded that the automobile, driven by Upham at the time of the accident, was the automobile of the defendant; and the undisputed evidence in the case shows that at such time it was being used by Upham upon the express direction of the defendant in carrying Schlee to the car line. These facts show that Upham, at the time of the accident, was the agent or servant of the defendant, unless, as claimed by the defendant's counsel, Zink, the defendant, was acting as manager of the Asphalt Refining Company in giving such directions.

To have taken the case from the jury under the prayer offered, it would have been necessary for the court to have held, as a matter of law, that by the undisputed evidence in the case the defendant was acting as the manager of the Asphalt Refining Company, and not personally, in directing Upham to take Schlee to the car line in his automobile. It was not a condition of their employment that the company should provide its employés transportation from the plant to the car line. The railway company had provided a jitney bus line from its cars to Wagner's Point, and the employés of the Asphalt Refining Company had, at their own expense, availed themselves of such transportation in going to and from their homes to the company's plant. The bus upon this line upon previous occasions had become disabled, and at such times failed to provide means of transportation for the company's employés and others to and from the car line to the plants at which they worked; and at such times said employés and others walked to and from the car line, unless picked up, as stated by the defendant, by some automobile traveling upon that road.

The plant of the company had shut down for the day and the employés, other than Schlee, had started to the car line, but Schlee, knowing that the defendant was still at the office of the company and thinking he would soon start in his automobile for his home in the city, passing by the terminus of the railway company's car line upon his way to the city, goes to the office of the company, no doubt for the express purpose of riding with him in his automobile as far as

the terminus of the car line, and thus avoiding walking that distance.

[1] Upham, at the time, was at the office of the company waiting to return to the city with the defendant in his automobile; the defendant, as we have said, having been detained by a visitor at the office. The defendant, seeing Schlee at the office at a time of day when he ordinarily would have been on his way home, asked him why he was there, and when told by Schlee that the bus was disabled and not running, the defendant turned to Upham and said, "What are you doing?" Upham replied, "Nothing," when the defendant said to him, "Well, take him up to the car line." These facts, in our opinion, do not show that the direction given by the defendant to Upham to take Schlee in his private automobile to the car line was given by him as the manager of the company, but on the contrary, show that such direction was a personal one, which made Upham his personal agent or servant. The correctness of this conclusion, we think, is further shown by the evidence of the defendant himself. He testified, when asked what interest if any he had in Schlee, that he had none, but regarded his act in sending Schlee to the station as a personal favor, and in doing so was prompted by the same feeling that would prompt him in picking up any other person walking upon the road in like situation, and from what he further said it can well be gathered that the company was not at all considered by him in what he did, in respect thereto, but the act was purely a personal one upon his part.

The decision here reached, upon the facts of this case, is not at all inconsistent with the decisions in the cases of *Broderick v. Detroit Union Station & Depot Co.*, 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382, *Wilson v. Banner Lumber Co.*, 108 La. 590, 32 South. 460, and others cited by the appellant; the facts in those cases differ widely from those in the case before us; nor is the conclusion we have reached at variance with the principles enunciated in *Bailey on Personal Injuries*, vol. 3, p. 2005.

[2] The plaintiffs' second prayer is not in full accord with what this court, in *Baltimore & Reisterstown Turnpike v. State*, Use of *Grimes*, 71 Md. 583, 18 Atl. 884, said it should be. In that case this court, in discussing a prayer like the one before us, said:

"It would be better and safer to say that in estimating the prospective damages to the widow the jury were to take into consideration the probable duration of their joint lives," meaning the joint lives of herself and husband.

The court, however, said that:

"Although not perhaps as explicit as it might be, yet fairly interpreted, it means, as we understand it, that in estimating the prospective damages to the widow, the jury are to take into consideration the reasonable probabilities of her life and the life of her husband, or, in other

words, the probable duration of their joint lives."

A reason assigned in that case, why the prayer should be more explicit, as suggested, was that:

"In some cases there may be a great disparity between the ages of the husband and wife. The husband may be advanced in years, and in feeble health, and the wife may be in the prime of life, and in such cases it would not be just to estimate the pecuniary loss suffered by her in taking into consideration the probable duration of her life, irrespective of the probable duration of the life of her husband."

The record in this case discloses that at the time of the death of the husband he was 44 years old and in perfect health, while the wife was at that time 37 years of age. This was not such a disparity in their ages as to warrant us in holding this prayer bad because of it, in view of the action of the court in the former case from which we have just quoted. As in that case no objection was made to the instruction because of such defect, and, as there said, we must assume the jury understood it to mean the joint lives of herself and husband. *Baltimore & Ohio R. R. Co. v. State, Use of Trainor & others*, 33 Md. 542; *Baltimore & Ohio R. R. Co. v. State, Use of Woodward*, 41 Md. 288; *Cumb. & Penn. R. R. Co. v. State, Use of Hogan*, 45 Md. 234; *Phila., Wilm. & Baltimore R. R. Co. v. State, Use of Bitzer*, 58 Md. 372.

We find no error in the court's rulings in granting the plaintiffs' prayers, and in our opinion the defendant's second and fourth prayers were properly refused.

The judgment of the court below will therefore be affirmed.

Judgment affirmed, with costs to the appellee.

(123 Md. 52)

MAYOR AND CITY COUNCIL OF HAGERSTOWN v. FOLTZ. (No. 11.)

(Court of Appeals of Maryland. June 19, 1918.)

1. NEGLIGENCE § 60 — PROXIMATE CAUSE — REMOTE CONSEQUENCES.

A defendant, charged with causing injury through negligence, is not liable, unless alleged negligence was the proximate, and not the remote, cause of the injury.

2. MUNICIPAL CORPORATIONS § 800(6) — OBSTRUCTION ON SIDEWALK—INJURY TO CHILD — PROXIMATE CAUSE.

City's alleged negligence in permitting a table to remain upon a sidewalk, in violation of an ordinance prohibiting obstructions thereupon, was not proximate cause of injury to small child, caught between table and automobile that backed upon the sidewalk.

3. MUNICIPAL CORPORATIONS § 819(4) — ACTION FOR INJURY TO CHILD — CONTOUR OF STREET AND CURB—PROXIMATE CAUSE.

In action against city for injuries to child from automobile backing over curb onto sidewalk, where alleged negligence of city consisted of faulty contour of street and curb at such point, in that driveway part of street was higher than sidewalk, evidence held insufficient to show

that the accident was the natural and probable consequence of the alleged negligence.

Appeal from Circuit Court, Frederick County; Glenn H. Worthington and Edward C. Peter, Judges.

Action by Stella Blanche Foltz, by her father and next friend, Ceits R. Foltz, against the Mayor and City Council of Hagerstown. Judgment for plaintiff, and defendant appeals. Reversed, without a new trial.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOOK-BRIDGE, and CONSTABLE, JJ.

Alex. R. Hagner, of Hagerstown (Jacob Rohrbach, of Frederick, and J. A. Mason, of Hagerstown, on the brief), for appellant. Omer T. Kaylor and Frank G. Wagaman, both of Hagerstown, for appellee.

PATTISON, J. The infant appellee, Stella Blanche Foltz, by Ceits R. Foltz, her father and next friend, recovered judgment in the lower court against the mayor and council of Hagerstown for personal injuries received by her in the manner hereinafter stated in the declaration. The declaration contained three counts. A demurrer was sustained to each and all of them, but the second count was amended, under leave of the court, and a demurrer filed thereto was overruled.

This amended count of the declaration alleged that the defendant, pursuant to its charter rights and powers, passed an ordinance prior to the happening of the injuries complained of, and which was then in force, making it unlawful for any person to obstruct in any way any street, highway, lane, alley, crossing, or sidewalk of Hagerstown; that for a long time prior to, and at the time of, the injuries complained of, a certain obstruction, to wit, a large table, was placed on the sidewalk of said town, at or near the intersection of South Potomac and Antietam streets, and the defendant,

"although it had notice of the violation of the provisions of the ordinance aforesaid, negligently, carelessly, and wrongfully took no measures whatever to enforce the provisions of said ordinance, and negligently, carelessly, and wrongfully permitted said obstruction to remain at the place aforesaid, and in consequence thereof the said obstruction was at the place aforesaid on the said sidewalk at the time of the injuries hereinafter alleged; that it was lawful for automobiles to turn around in the street opposite the said obstruction, and that by reason of the contour of said street and curb at said place that the defendant knew, or by the exercise of reasonable care should have foreseen, that automobiles turning at said point were likely to pass from said street onto the sidewalk; that on or about the 10th day of April, A. D. 1916, the said Stella Blanche Foltz was lawfully passing on and along the sidewalk of said Hagerstown, near the obstruction aforesaid, at the intersection of the streets aforesaid, and that an automobile was then and there being turned in said street, and was then and there backed upon the sidewalk opposite said obstruction, and that the body of the said infant was caught between the said automobile and said obstruction, and the said infant was

by the obstruction aforesaid greatly torn, mangled, and bruised, and caused to suffer great bodily and mental pain and anguish, and great and permanent injuries, and that said injuries were so received by the said infant as a direct and immediate consequence of the aforesaid negligence of the defendant in the premises."

The amendment to the second count consists of the italicized words appearing in the above amended declaration. The evidence discloses that the table mentioned in the declaration was upon the sidewalk in front of the grocery store of Ernest Miller, at the southwest corner of Potomac and Antietam streets, in said town, where it had been for a number of years prior to the happening of the accident. This table, used by Mr. Miller in placing thereon flower bulbs, vegetables, and other articles that were offered and exhibited by him for sale, was 12 feet in length, 2½ feet in width, and 1 foot and 9 inches in height, and sat against the front wall of the store building, below the show window of the store, the sill of which came within a few inches of the top of the table, in an angle caused by the projection of a stoop or steps out from said building upon the sidewalk, extending to a point beyond the width of said table; the height of the stoop or steps being about the same as that of the table. The sidewalk in front of the store, at the point where the table was located, was 10½ feet in width; that is to say, the distance from the front wall of the store building to the curbstone was 10½ feet, and the distance from the eastward or outer side of the table to the curbstone was 8 feet.

On the afternoon or evening of the accident, the infant plaintiff, at that time 5 years of age, had gone with her mother to the store of Mr. Miller. The mother had made her purchase, and had left the store, and had turned to the right upon the sidewalk, with the infant plaintiff to her left, she being between the front wall of the store building and her infant daughter, and while so walking upon the sidewalk, with the infant plaintiff's right hand in her left hand, the automobile, owned by Clap and driven by one Kretz, backed against and over the curb upon the sidewalk, and in some way, not very definitely stated in the testimony, caught the infant plaintiff between the rear part of the automobile and the table, inflicting the personal injuries complained of. The mother, as she testified, did not observe the automobile until it was practically upon them, although at such time she had made only a few steps from the door of the store, which was upon the corner of the streets, and in making her exit through that door, and in turning to the right on South Potomac street, she faced that street at the point where the automobile was being turned. The evidence is not clear as to what part of the machine struck the table, but from the character of the break in the table, as described by the witnesses, it is most probable that it was the rear end of one of the rear springs of the

automobile, and that the child was between the springs, and was struck by some part of the machine which did not extend so far to the rear as the rear ends of its springs. It is evident that the child was not caught between the table and that part of the automobile which struck the table, breaking the board upon it, for, had she been so caught, we cannot conceive how she could have escaped instant death. The noise of the impact was heard, not only by Mr. Miller, who was in his store at the time, but by others across the street, which shows the force with which the automobile struck the table, and, had the table not been there, the automobile, considering the force with which it was backed, would no doubt have gone to the wall of the store building, only 2½ feet away, inflicting the same, if not more, serious injury to the child.

[1] As it appears to us, the real question in this case is whether the alleged negligence of the defendant in permitting the table to remain upon the sidewalk in violation of the alleged ordinance was the proximate cause of the injuries complained of. It is a maxim that the law looks at the proximate, and not at the remote, cause of an injury. Out of the application of this maxim grows the liability or nonliability of a defendant charged with the infliction of an injury by his negligence. Unless the alleged negligence of the defendant was the proximate cause of the injury of which the plaintiff complains, there can be no recovery. For consequences of which his act or omission was only a mere condition or remote cause, the defendant is not liable. The constantly recurring problem is: Did the defendant's act or omission proximately cause the plaintiff's injury, and was such act or omission a want of ordinary care, or was the act or omission of the defendant only a remote cause or mere condition of the injury? No ultimate test of such character has yet been formulated. It is by analysis and synthesis, rather than by definition, that the distinction between proximate and remote cause must be made. 16 Am. & Eng. Ency. of Law, 428. In the case of *Young Co. v. State ex rel. Kabat*, 117 Md. 247, 83 Atl. 347, we said, speaking through Judge Burke:

"It is * * * well settled that to sustain the action it was incumbent upon the equitable plaintiffs, not only to offer evidence legally sufficient to prove the negligence of the defendants under the rule stated, but they were bound to offer evidence legally sufficient to show that the negligence charged resulted in the death of Vincent Kabat. Actionable negligence is an act, or omission of duty, which is the proximate cause of an injury. No matter to what extent, or in what respect, a party may be negligent, such negligence does not constitute a cause of action, unless the negligence charged and the injuries sued for bear the relation of cause and effect."

In the more recent case of *State v. W. B. & A. Elec. Rd. Co.*, 130 Md. 612, 101 Atl. 549, Judge Burke, speaking for this court, said:

"It is admitted that the rule is difficult of application. But it is generally held that, in or-

der to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

[2] If the facts and circumstances above related were the only facts and circumstances upon which the plaintiff relied, it is clear that the alleged negligence of the defendant in permitting the table to remain upon the sidewalk in violation of the ordinance was not the proximate cause of the injuries sustained by the plaintiff, and this was so held by the court below, for not until the declaration was so amended as to involve the alleged faulty construction and contour of the street and curb at the place where the automobile was turned did the court hold that the facts alleged constituted a cause of action. We are therefore to inquire whether the facts offered in evidence under the aforesaid amendment to the declaration, considered in connection with the facts and circumstances already related, show that the negligence with which the defendant was charged was the proximate cause of the injuries suffered by the plaintiff.

Kreitz, the driver of the automobile which passed over the curb upon the sidewalk, inflicting the injuries complained of, was running his machine down Potomac street on its westward side, and upon reaching Antietam street attempted to turn in Potomac street without backing his automobile; but, as he says, there were three young ladies standing in the street near the southeast corner of Antietam and Potomac streets, about two feet from the curb, and because of their presence there he was prevented from making the turn without backing his machine. At this time the front part of his car was within three or four feet of the young ladies and was east of the east rail of the track, the after part of it being over the rails. It was then that he started to back his car, and in doing so he "threw out the clutch and put it in reverse gear," giving the car a backward motion, and it backed over the curb upon the sidewalk. He did not look back to see where his car was going, although he says he used his foot brake before reaching the curb, and, feeling the car go over the curb, he applied the emergency brake.

Stewart Miller, assistant engineer of the city of Hagerstown, when called to the stand by the plaintiff, testified that South Potomac street, at the point where the accident happened, is approximately 60 feet in width from house line to house line, and is 37.7 feet in width between the curbs; that it is paved between the curb with vitrified brick; that there was a trolley track about the center of Potomac street, the western rail of which was 16 feet and 9 inches from the western curb of the street; and that the elevation of the street at said rail was 11 inches higher

than the bottom of the gutter at the curb on the west side of the street. The curb, which was of limestone 6 inches thick, arose to an elevation of about 6 inches above the bottom of the gutter. Its outer edge was somewhat worn. He, however, upon cross-examination, testified as follows:

"1 Q. Is there anything, in your opinion as an engineer, wrong with it, with reference to a reasonable construction of the street? 1 A. No, sir. 2 Q. (by Court). Is that a reasonable and proper construction there at that corner of that street, in your judgment? 2 A. Yes, sir. 3 Q. In which direction does the water drain on Potomac street? 3 A. It drains north." That on the west side of Potomac street the water flows north to the south side of Antietam street, and then west down the south side of said last-named street.

This testimony of the assistant engineer, witness for the plaintiff, was supported by Ferguson, the engineer of the city, a witness of the defendant, who had been engineer of the city for a little over 8 years, and, like the assistant engineer, was not in the service of the city when the street was paved, some 17 or 18 years before the happening of the accident. He, when asked:

"1 Q. In your opinion as city engineer, and as a street and road builder and civil engineer, will you please tell the court and jury whether that is a proper and reasonable construction of a street of that kind at that place where the accident happened? 1 A. It is. 2 Q. Why? 2 A. It is a very usual construction in the building of city streets."

The court then asked him:

"1 Q. Is there anything unusual in having the street, or driveway part of the street, higher than the pavement sidewalk? 1 A. No, sir; not at street intersections. I should say, with the exception of streets that are well provided with subsurface drainage, it is the rule rather than the exception. 2 Q. What kind of drainage do you have in Hagerstown? 2 A. At this point there is only surface drainage."

He also testified there had been no change in the streets since he had been city engineer. It had neither been lowered or raised in that time. It had remained the same.

Other witnesses, called by the plaintiff, who had frequently turned their cars upon the street at that point by backing them, testified that they never had any difficulty in avoiding going over the curb, as was done in this case. The condition of the street was practically the same at the time of the happening of the accident as it was when paved more than 17 years before said time. The grade or contour of the street was the same when the accident occurred as it was when first paved, and the evidence fails to disclose, during the whole period from the time said street was paved to the happening of this accident, that any automobile had ever backed over the curb and upon the sidewalk, in attempting to turn in the street.

[3] In our opinion there is nothing in these facts and circumstances which tend to show that the accident was the natural and probable consequence of the alleged negligence of the defendant, and that the act of Kreitz in backing the car over the curb and

upon the sidewalk, resulting in the injuries suffered by the plaintiff, ought to have been foreseen by the defendant, in the light of such facts and circumstances. Therefore, as this court said in *County Commissioners of Anne Arundel County v. Collison*, 122 Md. 95, 89 Atl. 327:

"Unless the testimony tended to show that the negligence relied upon was the proximate cause of the accident, there was nothing upon which a jury could predicate a verdict for the party complaining, and the court should have declared that as a matter of law, and directed the jury so to find."

We must therefore hold that the court erred in its refusal to grant the defendant's fourth prayer, asking that a verdict be directed for the defendant because of a want of evidence legally sufficient tending to show that the alleged negligence of the defendant was the proximate cause of the accident. The judgment of the court will therefore be reversed.

Judgment reversed, without a new trial, with costs to the appellant.

(123 Md. 78)

LOHMULLER et al. v. SAMUEL KIRK & SON CO. (No. 14.)

(Court of Appeals of Maryland. June 19, 1918.)

1. NUISANCE §75—POWER TO RESTRAIN.

The power to restrain a party from using his own property so as to destroy or materially prejudice the rights of his neighbor is within the established jurisdiction of the courts of equity.

2. NUISANCE §72—INJUNCTION.

Not every inconvenience in nature of nuisance to person's dwelling, especially in a large commercial and manufacturing city, will call forth restraining power of equity by injunction; case must appear to be one of real injury, where a court of law would award substantial damages.

3. NUISANCE §72—INJUNCTION—OPERATION OF HAMMERS.

Where operation of hammers by manufacturer of silverware in business section of city caused lawyers in adjacent office building some annoyance and discomfort when their windows and those of the factory were open, lawyers could not enjoin alleged nuisance; their damages not being so substantial, and interference with their rights so serious, as to call for such relief.

4. NUISANCE §67—NOISE FROM OPERATION OF HAMMERS.

It is the duty of a manufacturer of silverware to operate its factory so as to cause tenants in an adjacent office building no more annoyance and discomfort than is reasonable and to be expected and necessary in the lawful conduct of the business.

5. NUISANCE §80—INJUNCTION—NOISE.

Only where noise complained of in suit to enjoin a nuisance is productive of actual physical discomfort to a plaintiff of ordinary sensibilities, and under all the circumstances is unreasonable and an invasion of his rights, can a court of equity intervene by injunction.

Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

"To be officially reported."

Suit by John W. Lohmuller and others against the Samuel Kirk & Son Company.

From decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

William C. Coleman and Randolph Barton, Jr., both of Baltimore (Semmes, Bowen & Semmes, of Baltimore, on the brief), for appellants. Harry N. Baetjer, of Baltimore, for appellee.

THOMAS, J. The bill of complaint in this case was filed to enjoin an alleged nuisance, and the present appeal is from a decree dismissing the bill, after a hearing upon the bill, answer, and proof.

The plaintiffs, John W. Lohmuller, Vincent L. Palmisano, John W. Prinz, and Martin Lehmayer, were engaged in the practice of law, with offices in the Calvert Building, located at the southeast corner of Fayette and St. Paul streets, in the city of Baltimore. Mr. Lohmuller, Mr. Palmisano, and Mr. Prinz have occupied rooms Nos. 463 to 469, on the fourth floor, since February, 1916, and Judge Lehmayer has had his offices in rooms Nos. 563 to 569, on the fifth floor, directly above the offices of the other plaintiffs, since 1905. The Calvert Building fronts on Fayette street, and that portion of the building in which the plaintiffs' offices are located extends back to an alley, between 24 and 25 feet wide, known as "Bank Lane." The offices of the plaintiff extend about 80 feet along Bank lane, and have three windows opening on Bank lane and a window opening on an alley between the Calvert Building and the Equitable Building, just east of the Calvert Building. The defendant, the Samuel Kirk & Son Company, owns and occupies a large building known as Nos. 106 and 108 East Baltimore street, in which it carries on the business of buying, selling, and manufacturing jewelry, silverware, and other valuable articles. This building, which is 50 feet wide and four stories high, extends from the north side of Baltimore street to the south side of Bank lane, and from one-third to one-half of the north end of the building is opposite the Calvert Building and the offices of the plaintiffs, and the remaining portion of the north end of the defendant's building is opposite the building of the New Amsterdam Casualty Company. The defendant's factory for the manufacture of silverware and for repair work is located on the fourth or top floor of its building, and at the north end of this floor the defendant has installed four iron hammers, used in the manufacture of repoussé silver. These hammers, which weigh about three pounds each, are suspended above a bench, and are operated by the foot of the silversmith. The fourth or top floor of the defendant's building is below the level of the fifth floor of the Calvert Building, and in the north end of the fourth floor of the defendant's building there are seven win-

dows opening on Bank lane. The bench above which the hammers are suspended is opposite and about 10 feet from the third window from the east side of defendant's building, and this window, according to the plat filed with the record, is 30 feet and 9 inches from the east window of Judge Lehmayr's offices and 27 feet from the east window on the sixth floor of the New Amsterdam Casualty Company building. Henry Adams, a consulting engineer, and a witness produced by the plaintiffs, describes the use of these hammers as follows:

"These hammers are secured on a bench. They are, I think, four of them, and they are suspended—the hammers are suspended—about this bench, and at the edge of the bench there are bars, in the shape of a V, tapered bars, secured at the bench, and there is a small point at the end, tapered. Now, the hammer strikes near the support by foot power, as the operator sits there, and he can strike as strong a blow or as light a blow as he wants. He has his piece of silver on which the design is outlined in his hand, and he has a feeling—he touches his finger on the work and he moves that piece of silver over that point and strikes his blow continually, sometimes heavy and sometimes light, according to the design he wants to bring out. It is not a direct blow, it is an indirect blow. You hear the noise from the hammer here (indicating) and certain noise at the end of the bar. In the room itself when they are going, with the other machinery going, you do not hear that noise as penetrating as you hear it outside of the room."

Mr. Kirk, the president of the defendant company, gave the following explanation of the use of these hammers:

"I have drawings now that I have made myself of a device that I had hoped would lessen the noise and accomplish the same result, and, after talking with our mechanics and the foreman of our department and several of our men, it was found that if the devices were made and put in operation it would lessen the noise very little, and it would require the restraining of our entire force, as the snarling iron is the standard equipment, and it meant also that every chaser that we would get in from an outside source would have to be retaught, and, another thing it did, it eliminated the sense of feel that the present iron has, and therefore it would practically make it very difficult to do the work. * * * I can explain it: The iron is held in a vise. It is a three-pound hammer, and the hammer is attached—the handle of that hammer is attached by a cord to a treadle that is held up by a spring, and on the other end is the spring that holds the hammer up. The hammer does not fall of its own weight; it falls on account of the blow, which is the weight of the man's foot as he puts it there. It is as near balanced as possible, almost like the scale. The piece of silver is put over the snarling iron, and the men hold either one or two fingers on the iron in order to guide it. The sense of feel in the first two fingers of their hand must be absolutely accurate and keen; otherwise they cannot judge what they are doing. For instance, a direct blow would not accomplish the same purpose. There is no other way to do it than the one way, and I think Mr. Adams will agree with me that that is true. We have studied every known method to try to reduce that noise, particularly since Judge Lehmayr's complaint, and we have spent a great deal of money in trying to relieve the situation."

Judge Lehmayr described the noise as he heard it in his office as follows:

"Well, these hammers when I am in my office, I suppose it would be as far away from me as one end of this courtroom is from the other, say about 30 or 35 feet, and they make a terrible noise. As for the windows (the windows in his office) being open, your honor, the windows are kept open very often in October, and on a day like this. The windows are open at this time and also sometimes in March and sometimes in April, and even in winter windows are kept open. It is true they are kept open only to a small extent for the purpose of ventilation. The noise is of such a character that it absolutely renders it impossible to use the offices when it is going on. It is intermittent. It used to go on day after day, but since this bill has been filed it has decreased. They do not use the hammers as much now, but before it was at all hours of the day; sometimes one hammer was going, sometimes two and sometimes three, three at one time. * * * It is a peculiar penetrating noise. It goes right through you, it affects the nerves, it is a nerve-racking noise. It is almost enough to give you nervous prostration. No matter how hot it is, if you want to stay in my office you have to close the windows and keep them closed to carry on a conversation. I would have my stenographer at the opposite side of my desk dictating a letter to her, and all of a sudden these hammers would start, and that would be the end of it. I would either have to shut the windows or go in one of the further rooms that Mr. Binswanger occupies; he is a subtenant of mine. * * * You cannot conduct an ordinary conversation while these noises are going on. You cannot hear a telephone conversation."

He also stated that the noise came in through the window opening on the alley between the Calvert Building and Equitable Building, and further testified as follows:

"Q. (By Mr. Baetjer): You mean the noise would come around there? A. Yes; the noise from the hammers; yes.

"The Court: Around the corner?

"The witness: Yes.

"Mr. Coleman: There is a court there?

"The Witness: Yes. That is almost as close as the other windows. You hear the noise there just as bad. When you strike iron on iron it gives a peculiar noise, but when that iron in turn strikes silver, it is a reverberating noise, almost enough to set you crazy."

Mr. Lohmuller, who, as we have said, occupied one of the offices on the fourth floor below the offices of Judge Lehmayr, and other witnesses, testified to the disturbing character of the noise to those occupying the offices of the plaintiffs when the plaintiffs' windows and the windows in the defendant's building were open, and the difficulty of carrying on a conversation over the telephone. Mr. Adams, the consulting engineer, who, by arrangement between the plaintiffs and the defendant, examined the defendant's factory, and tested the noise in Judge Lehmayr's office with the windows in his office and the defendant's building open, and while the hammers were being operated for the purpose of affording him every opportunity to do so, described the noise as follows:

"Judge Lehmayr was sitting opposite me at his desk, and I talked to him and it was very difficult; that is, annoying all the time. Your attention was called to these noises all the time on your ears while you were there, continually so. * * * It is exceedingly annoying. It is not a continuous sound you could get used to; it is a loud and then reduced again sound, and

then goes ahead, continually changing all the time."

When asked whether he, as an expert, could suggest any way in which the noise could be remedied, he replied that they could not change the machines very well "because expert workmen and the touch has to be there," but that he thought something could be done by putting a glass inclosure around the bench above which the hammers were suspended; by moving it to another, but less favorable, location in the shop; by putting a canvas deflector in front of the defendant's windows and the windows of Judge Lehmayr's office, or by putting a glass deflector 2 feet wide in Judge Lehmayr's office window. He further testified on cross-examination that the factory of the defendant was crowded; that it is necessary in a manufacturing plant to have the various units together so that the work can be passed from one to the other, and that that is particularly so in a business like the defendant's, where there are precious metals and "there could be a loss"; that the president of the company had his office in the factory on a raised platform, where he could overlook the entire floor, and a telephone on his desk, and that Mr. Kirk, the president of the defendant, said to him that he was willing to pay a handsome fee to anybody who could suggest a way to do away with the noise, and that he "had tried every means they knew of, including the employment of engineers, to remedy it."

Mr. Laudeman, a witness for the plaintiffs, who was the manager of the Calvert Building and had been connected with the company that owns the building for about 23 years, testified that he occupied offices on the sixth floor of the building, immediately over the offices of Judge Lehmayr, and that he had not been seriously annoyed by the noise from the defendant's factory; that Judge Lehmayr had complained to him about the noise, and had asked that his rent be reduced on account of it; that the rent had not been reduced, but that the rent was going to be raised, and that Judge Lehmayr was aware of that fact.

Mr. Pearre, a witness for the defendant, testified that he was the secretary and treasurer of the New Amsterdam Casualty Company, and occupied offices in the company's building, in which there were two windows on Bank lane, and that he had never had any complaints about, and had never been annoyed by, noises from the factory of the defendant.

Mr. Breckett, the assistant secretary of the New Amsterdam Casualty Company, whose office is on the sixth floor of that company's building, testified that his office is a little above the level of the top floor on which the defendant's factory is located, with three windows opening on Bank lane opposite the defendant's building; that he

had occupied his office, and had been almost "continuously" in it during the business hours of the day, for about 2 years, and that he had never been annoyed by noise from the defendant's factory. It appears by the plat we have referred to that the east window in this office of Mr. Breckett is only 27 feet from the window in defendant's factory opposite which the bench over which the hammers are suspended is located.

Mr. Henry O. Kirk, who succeeded his father as president of the defendant company and who had been connected with the company, and the partnership that preceded the organization of the company, for 30 years, testified that his entire business career had been with that company, and that he had charge of the manufacturing and designing department, and gave his entire time to it, and that his office was situated in the centre of the fourth floor, "right in the centre of the manufacturing"; that the firm of Samuel Kirk was organized in 1815, and had been engaged in the manufacture of silverware at 114 East Baltimore street from that date until 1894; that in 1894 they moved into the building 106 East Baltimore street, and that in the following year they also occupied the building 108 East Baltimore street, and continued their business in those buildings until the fire of 1904; that after the fire the defendant erected its present building at a cost of \$200,000, and has occupied it since the summer of 1905; that the defendant has invested in the machinery and tools in its factory about \$90,000; that its building was erected "especially for the purpose" for which it is used, and that to change the location of the hammers would require the defendant to either rearrange its entire shop, which would be very expensive, or to move its factory to another location. It further appears from the testimony of Mr. Kirk that the hammers referred to have always been used by the defendant, and those who preceded it in the business, and that they are indispensable in the manufacture of silverware. When the defendant occupied 114 East Baltimore street the windows of its factory opening on Bank lane were opposite Barnum's Hotel, located on the present site of the Equitable Building, and a type foundry. The building in which the type foundry was located was subsequently purchased by the Calvert Building and Construction Company, but was used by the type foundry for a number of years thereafter. It adjoins the Equitable Building and, under a lease from the Calvert Building & Construction Company, is now occupied by the Baltimore City Printing & Binding Company, which conducts a printing establishment there. The building now owned by the New Amsterdam Casualty Company was formerly the St. Paul Telephone Exchange Building, and after the fire of 1904 was used, for 4 years, as a hotel, and the rooms in the "rear part of the

hotel," on the fifth and sixth floors, were used as guest rooms. Mr. Kirk also explained why it would not be practicable for the defendant to put a glass inclosure around the hammers, or canvas screens outside of its windows, and stated that the complaint of Judge Lehmayr was the first and only complaint the company, or those who preceded it in the business, had ever received about the noise from its or their factory.

The bill of complaint alleges that the section of the city in which the plaintiffs' offices and the defendant's building are located had never been a "factory district," but had been for many years "a retail business, and office building district," but the evidence in the case tends to show that, in addition to the defendant's factory, the type foundry, and the printing establishment referred to above, there have been a number of other like enterprises and several bowling alleys conducted in that neighborhood.

[1, 2] The bill prayed that the defendant be enjoined from operating its hammers in such manner as to produce the noise complained of, and in regard to the principle invoked by the plaintiffs in this case there can be no question or difficulty. The power to restrain a party from so using his own property as to destroy or materially prejudice the rights of his neighbor is within the well-established jurisdiction of courts of equity. But, as was said by Judge Alvey, in *Adams v. Michael*, 88 Md. 128, 17 Am. Rep. 516:

"It is not every inconvenience, however, in the nature of a nuisance to a party's dwelling, especially in a large commercial and manufacturing city, that will call forth the restraining power of a court of chancery by injunction. To justify an injunction to restrain an existing or threatening nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling and seriously interfere with the ordinary comfort and enjoyment of it. Unless such a case is presented a court of chancery does not interfere. It must appear to be a case of real injury, and where a court of law would award substantial damages."

In the case of *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325, the same learned judge said:

"In all such cases, the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant. This is the criterion laid down in the authorities, and, unless the facts show such a state of things, a court of equity will not interfere. * * * And in determining the question of nuisance from smoke or noxious vapor, or from noise or vibration, such as alleged in this case, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance that he might rightfully claim if he were dwelling in the country. Ev-

ery one taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent."

Of course the learned judge did not mean that because a party lives in a city he is compelled to endure all kind of noises, for he said there was a limit to the discomfort and annoyances to which a party living in a city or manufacturing district is "required to subject himself without remedy." But what the court meant was that, in determining whether the plaintiff is entitled to the relief sought, the court must take into consideration, not only the character of the noise, but also the locality in which the alleged nuisance is created. These cases are quoted and approved in the more recent cases of *Hendrickson v. Standard Oil Co.*, 126 Md. 577, 96 Atl. 153, and *Singer v. James*, 130 Md. 882, 100 Atl. 642. In the case of *Gallagher v. Flury*, 99 Md. 182, 57 Atl. 672, Judge Pearce said:

"But the proximity of dwellings to disagreeable or objectionable structures is an inevitable incident of life in cities and towns. As was said in *Hyatt v. Myers*, 73 N. C. 232: 'If a man, instead of contenting himself with the quiet and comfort of a country residence, chooses to live in town, he must take the inconvenience of noise, dust, flies, rats, smoke, soot, cinders, etc., caused in the use and enjoyment of his neighbors' property, provided the use of it is for a reasonable purpose, and the manner of using it is such as not to cause any unnecessary damage or annoyance to his neighbors.'"

In the case of *Bonaparte v. Denmead*, 108 Md. 174, 69 Atl. 697, this court said:

"It must be borne in mind that this is not a suit at law for damages, as in *Manion's Case*, supra [87 Md. 81, 39 Atl. 90], but a bill for an injunction; and it must also be remembered that 'nothing is better settled in this state than that the granting or refusing an injunction rests in the sound discretion of a court of equity.' * * * Even in the case of a suit at law, this court said, in *Manion's Case*, supra: 'But the fact just noted suggests caution in dealing with the rights of the owners or occupants of [livery] stable property. It cannot be denied that a [livery] stable in a town adjacent to buildings occupied as private residences is, under any circumstances, a matter of some inconvenience and annoyance, and must more or less affect the comfort of the occupants, as well as diminish the value of the property for the purpose of habitation. But this is equally true of various other erections that might be mentioned, which are indispensable, and which do, and must, exist in all towns.' * * * In *Adams v. Michael*, 88 Md. 129 [17 Am. Rep. 516], this court said: 'The granting of injunctions on applications of this character involves the exercise of a most delicate power, and the court is always reluctant to act, except in cases where the right is clear and unquestioned, and the facts show an urgent necessity.' That was an application to restrain a threatened, or rather an anticipated, nuisance, but the reference to the reluctance of the court to act except in cases where the facts show an urgent necessity is clearly applicable to an application like the present, against an alleged existing nuisance, where there is any reasonable doubt from the testimony as to the urgent necessity of applying this summary remedy."

The cases to which we have referred and from which we have quoted dealt with al-

leged nuisances caused by noises, noxious gases, and smoke affecting both the value and the enjoyment of the dwelling house or residence of the plaintiff. In the case at bar, at the time the suit was brought, one of the plaintiffs was occupying his offices under a lease for 1 year, and the others had a lease for 5 years, beginning in February, 1916, and the rules and principles announced in the cases mentioned would seem to apply with even greater force to the facts and circumstances of this case, where the alleged nuisance exists in the business section of a large city, and where the only injury complained of is the annoyance to which the plaintiffs are subjected when occupying their offices.

[3-5] It would serve no purpose to make further reference to the evidence in the case, all of which we have carefully examined and considered. While it shows that the noise complained of does subject the plaintiffs, when they are occupying their offices with their windows and the windows of the defendant's factory open, to some annoyance and discomfort, the record does not, in our judgment, present such a clear case of an invasion by the defendant of the rights of the plaintiffs as entitled them to the relief prayed. It is, of course, the duty of the defendant to so operate its factory as to cause the plaintiffs no more annoyance and discomfort than is reasonable and to be expected, and necessary in the proper and lawful conduct of its business. On the other hand, the plaintiffs cannot hope to escape the annoyances that are to be expected in the neighborhood in which they are located, and which are incident to the reasonable and lawful enjoyment of the property of their neighbors. It is only where it is clear that the noise complained of is productive of actual physical discomfort to a plaintiff of ordinary sensibilities, and is, under all the circumstances of the case, unreasonable, and an invasion of his rights, that a court of equity can intervene by injunction.

Decree affirmed, with costs.

(132 Md. 540)

HULL v. PHILADELPHIA & R. RY. CO.
(No. 48.)

(Court of Appeals of Maryland. April 3, 1918.)

1. **COMMERCE** §27(6) — "INTERSTATE COMMERCE"—RAILROAD EMPLOYÉ.

A freight brakeman, who is a member of a crew taking a train from a point in one state to a point in another state, is engaged in "interstate commerce" within meaning of federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. **MASTER AND SERVANT** §88(6)—DEATH OF EMPLOYÉ—RELATION OF PARTIES—RAILROAD EMPLOYÉS—"EMPLOYÉ."

Where two railroad companies had agreement whereby each had the right to use the tracks

of the other, an employé of one road, who was killed while working on the tracks of the other road, is not at time of death an "employé" of latter road, under federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665), although agreement specified that train employés should be subject to regulations and orders of company owning tracks on which they worked.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

Action by Elizabeth Hull, administratrix of estate of John M. Hull, against the Philadelphia & Reading Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Omer T. Taylor and Frank G. Wagaman, both of Hagerstown, for appellant. Henry H. Keedy, Jr., of Hagerstown (Charles C. Keedy, of Hagerstown, on the brief), for appellee.

BOYD, C. J. This is an appeal from a judgment rendered in favor of the defendant (appellee) in a suit brought by the appellant under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), to recover for loss sustained by reason of the death of John M. Hull in Harrisburg, Pa. There are three counts in the declaration, all of which allege that John M. Hull, the son of Elizabeth Hull, the plaintiff, was at the time of the injuries and death complained of and for some time prior thereto had been, a servant and employé of the defendant, and was employed and engaged in the performance of his duties in interstate commerce. The alleged negligence relied on is stated differently in the three counts, but it is only necessary to say that the declaration is sufficient to bring the case within the federal Employers' Liability Act, if the facts sustained it. The defendant filed the general issue plea and one alleging that John M. Hull was not on or about the 17th of March, 1917, or at any other time, a servant or employé of the defendant. At the conclusion of the testimony offered by the plaintiff, the defendant offered a prayer that:

"Under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant."

That was granted, and a verdict was rendered accordingly, upon which the judgment appealed from was entered.

Mr. Hull belonged to a crew employed by the Western Maryland Railway Company, and was freight brakeman. The day before the accident, the crew had taken a train, hauled by a Western Maryland engine and operated by Western Maryland employés,

from Hagerstown, Md., to Rutherford, Pa., and when he was killed the same crew was engaged in taking a train from Rutherford to Hagerstown. The Western Maryland road extends from Hagerstown, Md., to Lurgan, Pa., and the defendant's road from Lurgan to Rutherford, and for the purpose of operating trains from Hagerstown to Rutherford and back the two roads entered into an agreement which will be referred to later.

[1] We will first consider the question suggested by the special plea—whether Hull was an employé of the defendant within the meaning of the federal Employers' Liability Act. There can be no doubt about his being engaged in interstate commerce. Robert A. Warner conductor of the train, testified that they had taken a train from Hagerstown to Rutherford, arriving at the latter place some time the day before, and were called about 12:15 a. m. on the 17th of March by the yardmaster of the Rutherford yard of the defendant company. He directed them to get a train of cars off the west-bound yard and pick up seven cars at Harrisburg. They proceeded from Rutherford to Harrisburg on the west-bound main track, on which track their train was standing when they stopped for the seven cars, which they added to their train. The yardmaster at the Rutherford yard gave him instructions as to the operations connected with the movement of the train. The Philadelphia & Reading supplied the person to take the place of Hull as a member of the crew after he was killed. The witness said that his instructions were that when on the line of the Philadelphia & Reading he should obey the rules and instructions of that company.

The federal Employers' Liability Act provides:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his * * * personal representative, for the benefit of the surviving widow or husband and children of such employé * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employé of such carrier," etc. U. S. Comp. St. 1916, § 8657.

There have already been a large number of decisions on various questions which have arisen under Employers' Liability Acts in the state and federal courts, but it is rather remarkable that there are not more directly bearing upon the question we have before us.

One of the principal cases relied on by the appellant is *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. In that case it was shown that the North Carolina Railroad Company was not an interstate railroad, its tracks and property lying wholly within the state, but it had leased its road to the Southern Railway Company, which is an interstate railway, and a fireman em-

ployed by the latter company in interstate commerce was killed on the road of the lessor by the alleged negligence of the lessee. Justice Pitney said in the early part of his opinion that:

"Under the local law, as laid down in *Logan v. North Carolina R. Co.*, 116 N. C. 940, 21 S. E. 959, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employé of the lessee, injured through the negligence of the latter."

After referring to the decision of the lower court in 153 N. C. 500, 72 S. E. 858, he said:

"It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employé as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between the states,' and that the deceased was 'employed by such carrier in such commerce' within the meaning of the federal act; provided, of course, he was employed by the lessee, in such commerce at the time he was killed."

In the case of *Southern Ry. Co. v. Lloyd*, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. Ed. 402, an engineer in the general employ of the Southern Railway Company was injured on the road of the North Carolina Railway Company, being the same company mentioned in the *Zachary Case*, and the relation was the same between the two companies as in that. The plaintiff sued and recovered judgment against both companies, which was affirmed by the Supreme Court of the state and later by the Supreme Court of the United States, citing the *Zachary Case* as the authority for it.

We quoted at length from the *Zachary Case* because the appellant relied so strongly on it, and, being decided by the Supreme Court of the United States, it is necessary to ascertain whether it is applicable to this case. After giving it our most careful consideration, we have reached the conclusion that it is not. Justice Pitney shows clearly that the decision is based on the local law of North Carolina, as announced by the Supreme Court of that state, which makes a lessor railway company responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road, as is seen by the quotations we have made. He said what the act clearly declares

that, in order to bring the case within the terms of the federal act, "defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce." As the North Carolina Railway Company had made the lease without being authorized by a statute expressly exempting it, it could not escape its responsibility under the rule adopted in that state, and Justice Pitney said, as shown above, that the lease "constitutes the lessee the lessor's *substitute or agent*, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible." (*Italics ours.*) No such relation exists between these two railroad companies. There was no lease, and the appellee had not turned over its charter duties to the Western Maryland Railway Company. It was still in the discharge of those duties, but the two companies by agreement used each other's tracks in the performance of their duties in certain interstate commerce.

It is not unusual for two railroad companies to make such, or similar, arrangements. Sometimes there is the relation of lessor and lessee, and, without citing the cases in the notes, it will be seen by reference to 33 Cyc. 706-707, that the courts are not altogether in harmony in reference to some matters arising when that relation exists. Then there are a number of cases which have arisen when one company has permitted the use of its road by another (*Id.* 710), and still others, where companies were operating or using roads of others (*Id.* 713). When we are called upon to ascertain whether a person is a servant or employé of another, sometimes the question arises as to whether, although he is a general servant of one master, he has become the servant of another, in some particular employment. See 26 Cyc. 1285, where the effect of the servant of one master being under the control of another is considered, but on the next page of that volume it is said:

"The fact that one railroad company uses the track and stations of another under contract between them does not as a rule make the employé of either company fellow servants with the employé of the other."

It is undoubtedly true that two railroad companies operating under such a contract as the one in this case bear a very different relation to each other from those operating under a lease, where one has practically turned over the operations of its road to the other.

[2] Hull was unquestionably an employé of the Western Maryland Railway Company, and not of the appellee, until he reached Lurgan on his trip the day before he was killed, and would have been as soon as he reached Lurgan on the return trip, had he not been killed. To hold that he had ceased to be an

employé of the Western Maryland and had become one of the appellee from the time he reached Lurgan would be contrary to what is generally understood by the term "employé," and would unquestionably be contrary to the spirit, if not the letter, of the agreement between the two companies, which was offered in evidence by the appellant. There is not the slightest suggestion in that agreement that the crew of one company was to be regarded as the crew of the other, while on the latter's line. We will refer to such parts of the agreement as we deem material.

Paragraph 2 is as follows:

"Freight trains to run through between Hagerstown and Rutherford in both directions and each company agrees to supply motive power in the above proportions so as to equalize the service performed."

Paragraph 4 provides that, "Crews of each road to run through with their engines over the line of the other company."

Paragraph 5 provides, in part, that each company to compensate the other for the use of the others' engines and crews on their line at the rates per hour set out. Time to begin at Rutherford and Hagerstown when crew is called for.

Paragraphs 6, 7, 8, 9, and 10, are as follows:

"6. The division of earnings of traffic not to be disturbed or in any way affected by this arrangement.

"7. Each company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

"8. No charge shall be made for water and terminal facilities.

"9. Neither company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five (75) cents per engine to be made.

"10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road."

Paragraphs 16 to 21, inclusive, are as follows:

"16. Each company to relieve and return as promptly as practicable the engines and crews of the other at ends of runs.

"17. Each company to have the right to object and to enforce objection to any unsatisfactory employé of the other running upon its line.

"18. All cases of violation of rules or other derelictions by the employé of one company while upon the road of the other shall be promptly investigated by the owning company, and the result reported to the employing company, with or without suggestions for disciplining, the employing company to report to the other the action taken.

"19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one company is operating upon the road of the other, a copy must be sent to the proper officer of each company.

"20. The employé of each company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest co-operation to be given by the one company to the other in all such matters.

"21. The employé of each company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning company."

There would seem to be no doubt that the provisions of the contract referred to above show that the two companies did not intend to make the regular employes of the one company the employes of the other, when on the latter's line; on the contrary, it is apparent that they intended the very opposite. The appellant relies on paragraph 10, but there is nothing in that to show that the employes of the other company are to be regarded as employes of the owning company. The appellee would undoubtedly be responsible to an employe of the Western Maryland Railway Company for injuries sustained by reason of the negligence of the appellee's employes or agents, but not under the federal Employers' Liability Act. Suppose that act had not been passed before this accident, could it have been successfully contended that the appellee was not responsible for the death of Hull because its employes were his fellow servants? That would have extended the fellow-servant doctrine very far, and certainly beyond what had been done in this state.

In *P. W. & B. R. R. Co. v. State*, use Bitzer, 58 Md. 372, 400, that company, the Baltimore & Ohio Railroad Company, and other railroad companies had an agreement with reference to the use of the defendant's road in Baltimore. There was an agreement between the companies in that case. This court said:

"Whatever effect this agreement might have upon the parties to it, it could not have any upon strangers to it, nor alter nor change the relations of either of them towards third parties, nor have the effect of making those, who were employed and paid wages by either of the contracting parties, the coemployes of the agents and workmen of the other parties, nor make the others liable, either severally or jointly, for any loss or damage caused by the neglect of any one of them, even had the agreement been silent in this respect. But in order to guard against any such result, the agreement itself expressly provides, that, 'if an accident shall happen whereby damages to persons or property shall be incurred, the party on whose road the same shall happen shall alone be responsible.'"

It will be observed that paragraph 10 is not a new provision in such agreements. The opinion went on to say, in reference to the principle that every employe assumes the risk of the negligence of his coemployes:

"Samuel Bitzer was not employed or paid by the appellant, but was employed by the Baltimore & Ohio Railroad Company, and therefore this principle is not applicable to him."

That case settled the question for this state that the employes of the several railroad companies could not, in working under such an agreement, be considered coemployes. One of the objects of this act, as explained by Sen. Doliver on the floor of the Senate, was to modify the old law of the negligence of coemployes. He spoke of the law in this country that an employe injured by the negligence of a fellow workman could not recover, and said:

"This bill abolishes that doctrine, and gives the employes the right to recover for injuries arising

from the negligence of his fellow workmen. That is the first proposition. The second proposition modifies the law whereby in other generations workmen were held by the court to assume the risk arising from defective machinery." Thornton on the Federal Employers' Liability and Safety Appliance Acts (2d Ed.) § 1.

It is obvious that there was no necessity to pass the federal act for the benefit of the employes of one company when injured by those of another company, under such circumstances as we have in this case, so far as the doctrine of fellow servant is concerned. It would be regarded as carrying the doctrine to an unjustifiable extreme, if in a suit for the death of Hull, brought outside of this act, the defense of fellow servant had been allowed. Under the language of the federal act, there is less ground for holding the employes of the several companies to be coemployes, than there was in such a case as Bitzer's. The general principle is also recognized in *Bentley, Shriver & Co. v. Edwards*, 100 Md. 652, 60 Atl. 283, although that was not a railroad case.

In the case of *Robinson v. B. & O. R. R. Co.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849, Robinson was a porter on a Pullman car, was required to obey the rules and regulations of the railroad company, and collected tickets and fares from passengers coming on the train after 8 o'clock a. m. He was injured by the alleged negligence of the railroad company and sued under the federal Employers' Liability Act. It was held that he was not an employe within the meaning of that act. Justice Hughes said:

"We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the act."

So it may be said that Congress may have been presumed to know that such arrangements as existed between these two companies were often made, and if it had intended to make the employes of the "owning company," as the agreement calls it, coemployes of the other company, it would have used language "to indicate a purpose to include" them.

The fact that the crews of the other company were subject to the rules and regulations of the owning company cannot be material in determining the question. That is, of course, necessary for the safety of all persons traveling on the line of the owning company, as well as all working on it. The business could not be successfully conducted on a road over which many trains ran, if the "employes of each company," to use the language of paragraph 21, while upon the tracks of the other, were not subject to and

required to conform "to the rules, regulations, discipline and orders of the owning company." But that would certainly not have the effect of making them employes of the owning company, any more than it would the porter on a Pullman car, or an express agent, or mail agent traveling on the train. In *Oliver v. Northern Pac. Ry. Co.*, 196 Fed. 432, it was held by the United States District Court that a porter on a Pullman car could recover under the federal act under the circumstances of that case, but the decision was based on the ground that he was employed by an association composed of the railroad company and the Pullman company, which were joint owners of 50 cars. In *Mo., K. & T. Ry. v. Blalack*, 105 Tex. 296, 147 S. W. 559, an agent of an express company who handled baggage, but there was no proof of employment by the railroad company, was held to be a passenger and not an employe within the meaning of the act. See, also, same company v. West, 38 Okl. 581, 134 Pac. 655, to the same effect. It is the duty of the owning company to use all reasonable efforts to protect the employes of what we might call the "visiting company," and, even if there was no agreement on the subject, the owning company could enforce such rules and regulations as are necessary for the protection of its own employes and property, as well as those of the other company.

We have not thought it necessary to discuss the case of *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480, and other cases cited by the appellant, as we do not think they are applicable to the facts of this case. That a general servant or employe of one company may become the servant or employe of another in some special employment cannot be doubted. For convenience we cited above 28 Cyc. 1285, where many such cases are referred to. We cannot agree, however, with the appellant that when Hull was killed he was engaged in work for the appellee in the sense the authorities speak of such employment. His crew was then taking a train to their regular employer's road—one of the very things they were employed by the Western Maryland Railway Company to do. The distance between Hagerstown and Rutherford, as shown by the agreement, was 81 miles, and a regular run of the crews was from Hagerstown to Rutherford and return, just as it was with the crews of the appellee from Rutherford to Hagerstown and return. But, after all, this case does not turn on nice distinctions as to whether a person can be said to be an employe under certain facts and not under other facts, but whether John M. Hull was an employe of the appellee within the meaning of the federal Employers' Liability Act. For reasons we have stated, we feel constrained to hold that he was not.

We are of the opinion, then, that under the

language of the act, under the agreement between the two companies, so far as it is binding (and the appellant put it in evidence), and under what we regard as the reasonable and practicable view of the question, as well as under such authorities as we deem applicable, we must hold that the federal Employers' Liability Act does not apply to this case. As that conclusion must result in an affirmance of the judgment, it is unnecessary to discuss the question of negligence.

Judgment affirmed, the appellant to pay the costs.

(132 Md. 464)

STATE, to Use of DUNHAM, v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(No. 28.)

(Court of Appeals of Maryland. April 8, 1918.)

1. GUARDIAN AND WARD §177—SURETIES—DISCHARGE OF GUARDIAN—EFFECT.

Code Pub. Civ. Laws, art. 93, §§ 155, 165, 181, as to liability on guardian's bond, do not impose a liability where guardian under direction of orphans' court has accounted for and paid over all funds of estate, and court has made order discharging her and her surety, for money expended by plaintiff for education of wards, and not included in guardian's account, order being unquestioned.

2. GUARDIAN AND WARD §160—ACCOUNT OF GUARDIAN—CORRECTION.

Orphans' court would have authority to correct errors in account of guardian after final ratification, and to abrogate and modify orders when necessary to promote ends of justice.

3. GUARDIAN AND WARD §178—BREACH.

Refusal of guardian to pay for maintenance and education of ward out of property under her control would constitute breach of bond, and creditor could resort to suit upon it.

4. GUARDIAN AND WARD §58—DEMANDS AGAINST WARDS—PRIORITY.

It is duty of guardian to pay all demands against ward, having regard to priorities, in full, or, if estate is insufficient, pro rata.

Appeal from Baltimore City Court; Chas. W. Heuveler, Judge.

"To be officially reported."

Suit by the State, to the use of James A. Dunham, against the Fidelity & Deposit Company of Maryland and another. A demurrer on behalf of defendant named to the declaration was sustained, and from judgment for costs in favor of such defendant plaintiff appeals. Affirmed without prejudice.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

George Ross Veazey, of Baltimore, for appellant. Benjamin A. Stansbury, of Baltimore, for appellee.

BRISCOE, J. This suit was brought on the bond of Mrs. Agatha W. McShane, guardian of Mary W. Vest, George Graham Vest, Jr., and John W. Vest, beneficiaries under the will of George P. Vest, deceased, of the state of Missouri, in the name of the state, for the use of James A. Dunham, a creditor,

to recover the sum of \$465.86, alleged to be due him, for the education of two of the infant children of the testator. The trial of the case, in the Baltimore city court, resulted in a judgment for the plaintiff against the guardian, one of the defendants, for the sum of \$450, with interest and costs. From this judgment, no appeal has been taken. A demurrer to the declaration, on behalf of the appellee, the surety on the bond, the other defendant in the case, was sustained by the court below, and from a judgment for costs, in favor of this defendant, the plaintiff has taken this appeal.

The main question to be considered is the liability of the appellee, the surety on the bond, and this is presented by a demurrer to the plaintiff's declaration. As the facts appear from the declaration and are somewhat unusual, we will set out the declaration, at length. It is as follows:

"(1) That in the year 1904 G. G. Vest, a citizen of the state of Missouri, died in that state, leaving a will, one of the provisions of which was as follows: 'One-third of my estate, after carrying out the provisions heretofore set forth in regard to my wife, shall be held by my said trustees and executors for the benefit of the three children of my deceased son, George P. Vest, namely: Mary W. Vest, George Graham Vest, Jr., and John W. Vest, for whose education and support the rents, property and proceeds of said one-third part of my estate shall be applied by my said trustees and executors at such times, and in such amounts as they may deem necessary, and when each of the three children shall be twenty-one years of age, the share of such child shall be paid over to her or him.'

"(2) That on or about February 28, 1911, Mrs. Agatha W. McShane, now residing in Centreville, Md., was duly appointed and qualified in the orphans' court of Baltimore county as guardian of the infant children above mentioned; that as such guardian it was her duty to account to the orphans' court, upon request, for all moneys received by her while acting as said guardian, it being further her duty to pay all bills incurred by her on the behalf of said infant wards, out of income received by her for that purpose.

"(3) That on February 28, 1911, said Agatha W. McShane and Fidelity & Deposit Company of Maryland bound themselves jointly and severally unto the state of Maryland in the penalty of \$3,000, for the full and faithful performance by the said Agatha W. McShane, guardian as aforesaid, of all the duties imposed upon her by the laws of the state of Maryland, including the duty to faithfully account with the orphans' court of Baltimore county for the management of the property and estate of the orphans under her care, and further including the duty aforesaid to pay all bills incurred by her on the behalf of the said infant wards out of income received by her for that purpose.

"(4) That on the 15th day of April, 1914, after the filing of a petition on the part of Fidelity & Deposit Company of Maryland, asking to be released from the above bond, and also after the filing of a petition by the guardian herself in the orphans' court of Baltimore county, the following order of court was passed by the said orphans' court: 'Ordered by the orphans' court for Baltimore county this 15th day of April, 1914, upon the foregoing petition and exhibits that Agatha W. McShane is hereby discharged from her position as guardian of the minors and wards named in the foregoing petition, she having failed and refused for reasons

set forth in said petition to file a new bond in accordance with the provisions of the order of this court passed in this cause on the 7th day of October, 1913, upon the petition of the said Fidelity & Deposit Company of Maryland, and as it is represented to this court that no property exists in the state of Maryland which should be taken possession or control of by a guardian for said minors, and as the court knows of no such property, the court refrains from passing any further order at this time on such subject. And the said Fidelity & Deposit Company of Maryland is hereby discharged from further liability as surety on the said bond given by it.'

"(5) That during the period of her guardianship, the said Agatha W. McShane became indebted unto James A. Dunham, of the city of Baltimore, state of Maryland, for the education of two of the infant children above mentioned, to wit, George Graham Vest, Jr., and John W. Vest; that said bill now amounts, including interest, to the sum of \$465.86; and that the said bill has long been outstanding and remains unpaid.

"(6) That this bill was frequently presented to Mrs. Agatha W. McShane for payment; that on or about March 3, 1914, she filed a lengthy account of her guardianship in the orphans' court of Baltimore county, showing that she had received income from the trustees under the will of G. G. Vest aforesaid to the sum of \$5,844.10; that she had disbursed \$6,597.76, the overpayment of \$1,253.66 having been advanced by the husband of the said Agatha W. McShane; that the said guardianship account contains many items, such as amounts paid to the Chesapeake & Potomac Telephone Company of Baltimore City, and other items consisting of a single name such as 'Ridgely' or 'sundry expenses \$35,' which do not tend to show that these disbursements were made for the education and maintenance of the children, to which the guardian was limited by law in the use of such funds; that furthermore no mention at all is made in such guardianship account of the bill which the said guardian well knew was rightfully owing to James A. Dunham, the plaintiff in the above-entitled case.

"(7) That the defendant Fidelity & Deposit Company has its place of business in Baltimore city, in the state of Maryland, and that Agatha W. McShane is a resident of Centreville, in Queen Ann's county, Md.

"And, therefore, the plaintiff claims from the defendant herein named the sum of \$465.86."

The condition of a guardian's bond, as provided by section 155, article 93, of the Code, is that the guardian shall faithfully account with the orphans' court, as directed by law, for the management of the property and estate of the infant under his care, and shall also deliver up the property agreeably to the order of the court or the directions of law, and shall in all respects perform the duty of guardian according to law. It is quite clear that any failure to perform any of the conditions or requirements of the bond, as ordered by the orphans' court, would render the bond liable, and the bond could be, at once, put in suit. By section 181 of article 93 of the Code, it is specially provided that on a guardian's failure to account, as herein directed, his bond shall be liable to be put in suit. By section 165 of article 93 of the Code it is provided:

"Once in each year, or oftener if required by the court, a guardian shall settle an account of his trust with the orphans' court, and the said

court shall ascertain at its discretion the amount of the sum to be annually expended in the maintenance and education of the infant, regard being had to his future situation, prospects and destination; and the said court, if it deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal and sell part of the same under its order; but no part of the real estate shall on account of such maintenance or education be diminished without the approbation of a court of equity as well as of the orphans' court."

[1] While there can be no doubt, under both the statute law and the decisions of this court, that a surety upon a guardian's bond would be liable for a breach of any of the conditions of the bond, yet it is difficult to see, upon the facts and the state of the record now before us, upon what principle or rule of law the surety in this case can be held liable. The declaration avers and the demurrer admits that the guardian has accounted for and paid over all the funds belonging to the ward's estate, and that she had disbursed \$1,253.66 in excess of the income received by her from the trustees under the will. It further states that a lengthy account of her guardianship, was filed, in the orphans' court of Baltimore county, but no allowance was made on account of the plaintiff's claim. It also appears that on the 15th day of April, 1914, by an order of the orphans' court of Baltimore county, the guardian was discharged from her position for failure to file a new bond, and the appellee company was discharged from further liability as surety on the bond. The bond given in this case does not appear in the record, but the condition of a guardian's bond provided by the statute does not require a guardian to pay all bills incurred for the ward out of the income received, but the statute requires that a guardian shall settle an account of his trust with the orphans' court, and that court shall ascertain at its discretion the amount of the sum to be annually expended in the maintenance and education of the infant. The administration of a guardianship trust is to be carried on under the supervision of the orphans' court, and the money received by the guardian is to be expended under the direction of the orphans' court.

In *Tomlinson v. Simpson*, 33 Minn. 446, 23 N. W. 864, the Supreme Court of that state, in dealing with the obligation of a surety on a guardianship bond, said:

"It is a settled rule of law that a surety is not to be held beyond the terms of his contract. The claim against him is *strictissimi juris*. Nothing can be clearer, both upon principle and authority, than that the liability of a surety is not to be extended by implication beyond the precise terms of his bond. To the extent and in the manner pointed out in his obligation, he is bound, and no further. He has a right to stand on the very terms of his contract." 21 Cyc. 115; *McKinnon v. McKinnon*, 81 N. C. 201; *State v. Jones*, 89 Mo. 470, 1 S. W. 355; *Frost v. Redford*, 127 Mo. 492, 30 S. W. 179; *Fidelity & Deposit Co. v. Rich*, 122 Ga. 506, 50 S. E. 338.

In the present case, the guardian appears not only to have settled an account, under the directions of the orphans' court, but to have paid out an amount largely in excess of the income received by her, and the action of the orphans' court in this regard remains unchallenged.

In *Baldwin v. State*, 89 Md. 588, 43 Atl. 857, this court said that it does not necessarily follow that sureties on a guardian's bond are liable because the guardian is. Their responsibility must depend upon the extent of the obligation created by the terms of the bond and the statutes, which can be read into it, and it was further said, in passing upon the questions in that case, that the guardian is entitled to be credited with all sums he properly pays out of the income, or even out of the principal, when duly allowed by the orphans' court.

Whether the order of the orphans' court, of March 3, 1914, approving the guardian's account, and directing the disbursement of the income received by the guardian, from the trustees under the will, was a proper order is not an open question on this appeal. Manifestly, however, parties acting under it would be protected so long as it stands and remains unreversed.

While for the reasons stated, we shall affirm the judgment appealed from, we do not think the appellant should be precluded from applying to the orphans' court to have the account opened and restated, so as he may have an opportunity to have such relief as the facts and circumstances of his case may require and justify.

[2] The orphans' court would have authority to correct any errors in the account of the guardian even after final ratification, and to abrogate and modify their own orders, when necessary to promote the ends of justice. *Malkus v. Richardson*, 124 Md. 228, 92 Atl. 474; *French v. Washington Co.*, 115 Md. 310, 80 Atl. 913; *Geesey v. Geesey et al.*, 94 Md. 371, 51 Atl. 36.

The obligation of the guardian clearly exists to pay for the maintenance and education of the ward out of the property under her control. *Kraft v. Wickey*, 4 Gill & J. 332, 23 Am. Dec. 569; *A. & E. Ency. of Law*, vol. 15, 79.

[3] A refusal to comply with this duty would constitute a breach of the guardianship bond, and the creditor may resort to a suit upon it. *Baldwin v. State*, 89 Md. 587, 43 Atl. 857; *Raymond v. Sawyer*, 37 Me. 406.

[4] It is well settled that it is the duty of the guardian to pay all demands against the ward, having regard to priorities, in full or if the estate is insufficient for that purpose, then to pay them *pari passu*, or *pro rata*. *Frost v. Redford*, 54 Mo. App. 351; *Exeter v. Carr*, 27 R. I. 184, 61 Atl. 171; *State v. Miller*, 3 Gill, 336; *Swan v. Dent*, 2 Md. Ch. 111.

For the reasons stated, the judgment will

be affirmed, but without prejudice as herein stated.

Judgment affirmed, without prejudice, the costs to be paid by the appellant.

(132 Md. 389)

HUESTON v. NATIONAL CITY BANK OF CHICAGO. (No. 11.)

(Court of Appeals of Maryland. April 2, 1918.)

1. CORPORATIONS § 642(7)—FOREIGN CORPORATION—"DOING BUSINESS."

The bringing of an action in Maryland by a National Bank engaged in the banking business in Illinois does not constitute "doing business" in former state under Code Pub. Civ. Laws, art. 23, §§ 93, 94, requiring foreign corporations "doing business" in the state to file certificate with secretary of state; and the bank is not precluded from bringing such action by section 94, providing that failure to file certificate as required by section 93 bars right of corporation to maintain action in state courts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. GUARANTY § 90—ACTION BY CREDITOR—EVIDENCE—ADMISSIBILITY.

In an action on a guaranty of the debt of another, evidence as to the cause of the indebtedness and the manner in which it was incurred is irrelevant, where debt, having been admitted, is not in dispute.

3. EVIDENCE § 271(1)—ADMISSIBILITY—ACTION ON GUARANTY—STATEMENTS BETWEEN DEBTOR AND GUARANTOR.

In an action on a guaranty of the debt of another, statements made by debtor to guarantor before signing of contract of guaranty are inadmissible in evidence, the debtor being no party to such contract.

4. WITNESSES § 240(4) — EXAMINATION — LEADING QUESTIONS.

Question, "Was that the moving thing that led you to the signing of the agreement?" *held* leading.

5. APPEAL AND ERROR § 1058(2)—HARMLESS ERROR—EVIDENCE.

Court's refusal to permit witness to answer a question as to her reason for signing a guaranty, if error, was harmless, where she had already testified, and was subsequently permitted to testify as to her motive and intent in signing the guaranty.

6. FRAUDS, STATUTE OF § 108(3)—PROMISE TO PAY DEBT OF ANOTHER—CONSIDERATION.

Written guaranty to pay debt of another was good, where consideration was expressed in a letter, although guaranty itself did not show consideration, Code Pub. Gen. Laws 1904, art. 35, § 38, providing that consideration for promise to answer for debt of another need not be in writing.

7. FRAUDS, STATUTE OF § 33(3)—PROMISE TO ANSWER FOR DEBT—ORIGINAL PROMISE—FORBEARANCE OF CREDITOR.

Forbearance to sue is a good consideration for a promise to pay the debt of another, although no actual benefit accrues to promisor.

8. TRIAL § 252(1)—REQUESTED INSTRUCTIONS—EVIDENCE.

Requested instructions, unsupported by the evidence, are properly refused.

9. GUARANTY § 25(3)—ACTION BY CREDITOR—DURESS—EVIDENCE—SUFFICIENCY.

In an action on a guaranty, evidence *held* sufficient to show that guarantor did not sign guaranty under duress.

10. COURTS § 13 — JURISDICTION — SERVICE WITHIN STATE ON NONRESIDENT.

Where a nonresident is served within a state in which she has been living off and on for three years, such service is sufficient to give court jurisdiction.

Appeal from Baltimore City Court; Chas. W. Heulsler, Judge.

"To be officially reported."

Action by the National City Bank of Chicago, a corporation, against Grace Hieston. Judgment for plaintiff and defendant appeals. Affirmed.

Plaintiff's second prayer, referred to in the opinion, is as follows:

The plaintiff, National City Bank of Chicago, prays the court to instruct the jury that if they shall find that on or about the 5th day of January, 1914, one Walter Hieston was indebted to the plaintiff, National City Bank of Chicago, in an amount exceeding \$5,000, and that the plaintiff was then about to enforce by suit its claims against the said Walter Hieston, and that on or about the 5th day of January, 1914, the defendant, Grace Hieston, executed the following guaranty:

"Individual or Corporation. I hereby request the National City Bank of Chicago to give and continue to Walter Hieston credit as he may desire from time to time, and in consideration of all and any such credit given him I hereby guarantee prompt payment when due of any and all indebtedness now due or which may hereafter become due from him to said bank, howsoever created, or arising, or evidenced, to the extent of five thousand dollars (\$5,000), and waive notice of the acceptance of this guaranty, and of any and all indebtedness at any time covered by the same. This guaranty shall continue until written notice from me of the discontinuance thereof shall be received by said the National City Bank of Chicago. Grace Hieston.

"Chicago, Ill., Jan'y 5, 1914."

And that upon receipt of said guaranty the plaintiff notified the defendant by letter dated January 5, 1914, that the plaintiff, in consideration of the aforesaid guaranty, agreed that it would start no suit looking toward the recovery of a judgment on the indebtedness due by the said Walter Hieston to the said plaintiff for a period of 30 days from the 5th day of January, 1914; and if the jury shall further find that the plaintiff, National City Bank of Chicago, relying on said guaranty, took no proceedings looking toward the recovery of a judgment on the indebtedness due by the said Walter Hieston to the said plaintiff, for a period of 30 days from the 5th day of January, 1914, and that the said Walter Hieston, after the expiration of said 30 days, did not and has not at the present time paid his said indebtedness, and that said indebtedness exceeds the sum of \$5,000, then the verdict of the jury must be in favor of the plaintiff, National City Bank of Chicago, for the sum of \$5,000, with interest in the discretion of the jury from such time as they shall find the plaintiff made demand upon the defendant to pay said indebtedness to the extent of \$5,000.

(Granted.)

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Herbert B. Stimpson, of Baltimore, for appellant. L. Vernon Miller and George Weems Williams, both of Baltimore, for appellee.

BRISCOE, J. This is a suit upon a contract of guaranty, dated the 5th day of January, 1914, and executed in the city of Chicago, in the state of Illinois, by the defendant to the plaintiff. The appellant, the defendant below, is a married woman, temporarily residing in Baltimore city, in this state, but her husband is a citizen and a resident of the state of Illinois. Service of summons was obtained upon her in this state, where she had been residing, on or about the period of three years, prior to the institution of the suit. The appellee, the plaintiff below, is a nonresident corporation, duly incorporated under the laws of the United States, and carrying on the banking business in the city of Chicago, in the state of Illinois. The contract of guaranty, is attached to and made a part of the declaration, and is as follows:

"Individual or Corporation. I hereby request the National City Bank of Chicago to give and continue to Walter Hieston credit as he may desire from time to time, and in consideration of all and any such credit given him I hereby guarantee prompt payment when due of any and all indebtedness now due or which may hereafter become due from him to said bank, howsoever created, or arising, or evidenced, to the extent of five thousand dollars (\$5,000), and waive notice of the acceptance of this guaranty, and of any and all indebtedness at any time covered by the same. This guaranty shall continue until written notice from me of the discontinuance thereof shall be received by said the National City Bank of Chicago.

"[Signed] Grace Hieston.

"Chicago, Ill., Jan'y 5, 1914."

The declaration contains three counts in assumpsit, and a fourth count declaring upon the guaranty. This count avers, in substance, that Walter Hieston, the husband of the defendant, was indebted to the plaintiff in a large amount, exceeding \$5,000, and the plaintiff was then about to enforce by suit its claim against him, and thereupon the defendant executed the guaranty set out and stated in the declaration. It further avers that upon receipt of the guaranty the plaintiff notified the defendant by letter dated January 5, 1914, which letter was duly received by the defendant, that the plaintiff in consideration of the guaranty agreed that it would start no suit, looking toward the recovery of a judgment on the indebtedness due by the husband to the plaintiff, for a period of 30 days, from the 5th day of January, 1914, that the husband had not paid the whole or any part of the debt due by him, at the time of the execution of the guaranty, and that the debt, exclusive of interest, largely exceeds the sum of \$5,000. And that the plaintiff has notified the defendant of this fact, and has demanded the payment by her, but she has failed and refused to pay the same, in accordance with the guaranty. At the trial of the case, in the Baltimore city court, the defendant reserved four bills of exceptions, to the rulings of the court upon the evidence and prayers. There were also other rulings of the court, upon the pleadings

and upon a motion to postpone or to discontinue the case; but, as we find no reversible error in the last-named rulings, we will first consider the controlling questions which are presented by the record, in their regular order.

[1] The first exception presents the ruling of the court. In refusing the defendant's motion to postpone the case, upon the ground, that the plaintiff bank could not maintain this action because it had not filed with the secretary of state, prior to the trial, the certificate required by article 23, §§ 93, 94, of the Code. The answer to this contention is very obvious, and that is the bringing of a suit by a National Bank in our state courts cannot be held to be "doing business herein," and that article 23, §§ 93, 94, has no application to a case of this kind. There was no error in overruling and refusing the defendant's motion, set out in this exception.

The second, third, and fourth bills of exception contain the rulings upon evidence. The second and third exceptions embrace the ruling of the court in sustaining objections to the following questions asked the witness Walter Hieston, in the course of the trial:

"Q. What was the immediate cause of your getting indebted to the bank? Q. What did you say to Mrs. Hieston, in reference to her signing this (meaning the guaranty)?"

[2] The debt due by the husband to the bank, it will be observed, was admitted and not in dispute. The cause of the indebtedness and the manner in which it was incurred were clearly irrelevant to the issues in the case.

[3] Statements made by the husband, who was not a party to the contract of guaranty, to the defendant, before she signed the guaranty, were inadmissible, and properly excluded by the court.

[4, 5] There was no error in the ruling set out in the fourth exception. The question, "Was that the moving thing that led you to the signing of the agreement?" propounded to the witness, the defendant in the case, was not only leading, but she had testified fully as to her reason for signing the guaranty, and was permitted to repeat in her subsequent examination her motive and intent in executing the guaranty. She could not therefore have been injured by the ruling, in sustaining the objection, in this exception.

This brings us to the rulings upon the prayers. The court below granted the plaintiff's second prayer, but refused all the other prayers presented, on behalf of both the plaintiff and defendant, in the case.

The plaintiff's second prayer, it will be seen (the reporter will set out this prayer, in his report of the case), not only stated the cause of action as set out in the fourth count of the declaration, but all of the necessary facts, if found by the jury, to permit a recovery in the case.

The testimony in the case, upon the main facts, was practically undisputed. The in-

debtedness of the husband of the defendant to the plaintiff, the guaranty of the defendant to pay a portion of this debt, and the failure of the defendant to pay the debt as guaranteed, are admitted, and are also clearly established by the evidence.

[8] While the consideration for the guaranty is not set forth in the guaranty itself, it is sufficiently shown by the other testimony in the case to answer the requirements of the statute.

By section 38 of article 35 of the Code of Public General Laws, it is provided:

"Where an action, suit or * * * proceeding is brought for the purpose of charging any person on a special promise to be answerable for the debt, default or miscarriage of another person, it shall not be necessary to show that the consideration for such promise is in writing."

The guaranty, however, upon which the action in this case is brought is in writing and signed by the party to be charged therewith, and the consideration therefor is set out in a letter by the bank, which was given to the defendant simultaneously with the execution of the guaranty. The letter is as follows:

"Chicago, January 5, 1914.

"Mrs. Grace Hieston, 325 Belden Avenue, Chicago—Dear Madam: In consideration of receipt of your guaranty, \$5,000.00, guaranteeing the indebtedness owing by Walter Hieston to this bank, we hereby agree that we will start no suit looking toward the recovery of a judgment on such indebtedness for a period of thirty days from the date of this letter.

"Very truly yours, W. T. Perkins,
Assistant Cashier."

[7] The law is well settled in this state by a long line of authorities that the forbearance to institute legal proceedings is a good consideration for a promise by a third person to pay the debt of another, even though no actual benefit accrue to the party undertaking. *Thomas v. Delphy*, 83 Md. 373; *Emerick v. Coakley*, 35 Md. 188; *Bowen v. Tipton*, 64 Md. 275, 1 Atl. 861.

The plaintiff's second prayer, we think, correctly stated the propositions of law applicable to the case, and was properly granted.

As the demurrer to the fourth count of the declaration presents the same questions as were raised by the ruling on the second prayer, it was properly sustained, for the reasons we have stated in passing on this prayer.

The defendant's first and second prayers were demurrers to the evidence, and were properly rejected.

[9] The defendant's third, fourth, fifth, and sixth prayers sought to submit propositions not supported by the testimony, and could not have been granted, for the reasons stated, in passing upon the plaintiff's second prayer.

The defendant's seventh and eighth prayers were based upon the theory that the guaranty had been obtained from the defendant by duress and by threats of criminal charges against her husband.

[9] We find no evidence in the record tending to support the propositions sought to be submitted to the jury by these prayers. On the contrary, the defendant testified that she signed the paper of her own free will. The undisputed evidence shows that she executed the guaranty while acting under the advice of counsel, Senator Mason, of the Illinois bar, and that she fully understood the purport of the undertaking and the extent of her liability thereunder. The seventh and eighth prayers were properly refused.

[10] As to the question of jurisdiction raised by the plaintiff's demurrer to the defendant's two pleas in abatement, we need only say, that is clear, under the facts of this case, that the Baltimore city court had jurisdiction to hear and determine the case.

It appears from the record that service of process was not only made upon the defendant while within the state; but, according to her own testimony, she had been absent from the state of Illinois and had been living in a furnished apartment, in the city of Baltimore, in this state, "off and on for three years." In 11 Cyc. 668, the general rule upon this subject, under the title of "actions against nonresidents," is thus stated:

"But if a defendant, who is a nonresident, is found within the state, and service of process is there made upon him, jurisdiction will thereby be acquired."

The policy of the law here announced in this character of case is not only supported by authorities in other states, but by the decisions of the courts of this state. *Mullen v. Sanborn*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421; *Mason v. Union Mills Co.*, 81 Md. 446, 32 Atl. 311, 29 L. R. A. 273, 48 Am. Rep. 524; *Linnville v. Hadden & Co.*, 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222; *Hodgson v. Bldg. Association*, 91 Md. 439, 46 Atl. 971; *McSherry v. McSherry*, 113 Md. 400, 77 Atl. 653, 140 Am. St. Rep. 428; *Hagerstown v. Gates*, 117 Md. 348, 83 Atl. 570.

Finding no error in the rulings of the court below, the judgment will be affirmed.

Judgment affirmed, with costs.

(123 Md. 559)

BROWN et al. v. HOBBS, Sheriff, et al.
(No. 50.)

(Court of Appeals of Maryland. April 3, 1918.)

1. DEEDS §126—CONDITIONAL FEE.

Language of deed "to have and to hold the above-described property unto him, * * * his heirs and assigns, forever in fee simple upon condition," etc., if condition was valid, held to convey property to grantee in fee simple subject to condition that upon conveyance contrary to terms grantors and their heirs would have right to re-enter and terminate estate.

2. DEEDS §149—CONDITION—RESTRAINT OF ALIENATION.

Where under terms of deed property might descend to heirs of grantee who do not bear his name, condition attempting to restrict right of grantee and his heirs to devise or convey to per-

sons named Brown, not being limited in time and not being confined to grantee, was repugnant to fee conveyed to grantee and void.

3. DEEDS — 151—CONDITION—RESTRAINT OF ALIENATION—EFFECT OF INVALIDITY.

Where condition was repugnant to fee conveyed to grantee, grantee took absolute fee and property was subject to be sold under fl. fa. in suit against him.

Appeal from Circuit Court, Howard County, in Equity; Wm. Henry Forsythe, Jr., Judge.

"To be officially reported."

Bill by William Howard Brown and another against James L. Hobbs, Sheriff of Howard County, and another. Decree for defendants, and plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTERSON, URMER, STOCKBRIDGE, and CONSTABLE, JJ.

Isaac Lobe Straus, of Baltimore (Reuben D. Rogers, of Ellicott City, on the brief), for appellants. Richard S. Culbreth, of Baltimore (Joseph L. Donovan, of Ellicott City, on the brief), for appellees.

THOMAS, J. On the 18th of March, 1904, Henry G. Davis and Thomas B. Davis, of West Virginia, in consideration "of the sum of \$1 and other good and valuable considerations," conveyed to William H. Brown, of Howard county, Md., a farm, in that county containing about 170 acres of land. The deed recites:

"Whereas, the farm and property hereinafter conveyed was the home place and residence of Sarah G. Brown, deceased, the grandmother of the grantors in this deed mentioned, and was by the said Sarah G. Brown conveyed to John R. Brown, deceased, the uncle of the said grantors, and has ever since been owned and occupied by a descendant of Sarah G. Brown;

"And whereas, it is the desire and purpose of the grantors herein mentioned that the said farm and property shall remain in the Brown name, within the line of consanguinity or blood relation to the said grantors.

"And whereas, William Howard Brown, the grantee herein mentioned, is a grandson of the said Sarah G. Brown, deceased."

The grant is to William H. Brown, and the habendum clause is as follows:

"To have and to hold the above-described property unto him, the said William H. Brown, his heirs and assigns, forever in fee simple, upon condition, however, that the said William H. Brown, his heirs and assigns, shall not devise or convey the said property to any one other than some person or persons by the name of Brown, within the line of consanguinity or blood relation to the said Henry G. Davis, or Thomas B. Davis, upon further condition and subject to the provision, that if the said William H. Brown, his heirs or assigns, shall undertake to convey or devise the said property to any person or persons other than someone by the name of Brown within the line of consanguinity or blood relationship to the said grantors, the said Henry G. Davis or Thomas B. Davis, their heirs or assigns, shall have the right to re-enter upon the said property, and the said property shall thereupon revert to the said Henry G. Davis and Thomas B. Davis, their heirs and assigns."

The deed also contains the following covenant:

"The said William H. Brown does hereby covenant and agree for himself, his heirs and assigns, that he will not devise or convey the aforesaid property to any one, other than some person or persons of his name within the line of consanguinity or blood relation to the said grantor."

On the 18th of May, 1917, William Howard Brown, the grantee in said deed, and John T. Davis, one of the heirs at law of Henry G. Davis, deceased, and also one of the heirs at law of Thomas B. Davis, deceased, filed a bill of complaint in the circuit court for Howard county against James L. Hobbs, the sheriff of Howard county, and the F. S. Royster Guano Company, a body corporate, in which they allege that by virtue of a writ of fieri facias issued out of the circuit court for Howard county at the suit of F. S. Royster Guano Company "against the goods, chattels, lands, and tenements of William Howard Brown" James L. Hobbs, the sheriff of Howard county, had "seized and taken in execution all the estate, right, title, interest, property, claim, and demand in law and in equity" of the said William Howard Brown in and to the farm conveyed to him by the deed referred to, and had advertised said property for sale. The bill further alleges that a sale of the property by the sheriff under the writ mentioned would be in violation of the deed referred to, and prays for an injunction restraining such sale. A preliminary injunction was granted as prayed. Thereafter the F. S. Royster Guano Company appeared and filed a demurrer to the bill of complaint, and on the 26th of October, 1917, the court below passed the order from which this appeal was taken, sustaining the demurrer, dissolving the preliminary injunction, and dismissing the bill.

The lower court held that the deed conveyed a fee-simple estate, with a condition annexed "that the grantee shall not convey or devise the estate except to a particular class," and that the attempted restriction upon the power of the grantee to alienate the property was repugnant to the estate conveyed and void.

The contention of the appellants is that the language and provisions of the deed show that the grantors did not intend to convey an absolute fee-simple estate to the grantee, and that the effect of the conveyance was to vest in the grantee "only a qualified, determinable, or base fee." They rely upon cases like the cases of *Reed v. Stouffer*, 56 Md. 236, and *Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18, where the property was conveyed to the grantees for the specific purposes mentioned in the deeds, and where the court held that, when it ceased to be used for such purposes, it reverted to the grantor and his heirs. While some writers speak of determinable fees as including fees upon condition, we think this argument of

the appellants, strictly speaking, loses sight of the technical distinction between a "condition" and what is spoken of in the text-books as a "limitation." Mr. Venable, in his *Syllabus* (1st Ed.) p. 117, says:

"The term 'limitation' ordinarily means the conveyance of an estate, or the language which defines the character of the estate conveyed. * * * But in a less usual sense a 'limitation' is an estate which extends to some certain or uncertain event; e. g., an estate to A. until she marries; an estate to B. and his heirs so long as he, or they, continue to dwell on the premises. Limitations therefore include all estates for a term of years, their duration being fixed, determinable (base or qualified) fees, and that class of life estates which are to endure until the happening of some event, but may endure for a life; e. g., an estate during widowhood. A limitation marks the period of the estate's duration by some certain or uncertain event. It is created by such words as 'until,' 'as long as,' 'during,' 'whilst,' etc. In the case of a limitation the estate runs out its existence to a predetermined boundary. A condition designates some event which may cut short the estate before it reaches its termination. It is created by such words as 'on condition' 'provided,' 'so that,' etc. The happening of the event does not constitute the limit, or boundary, of the estate, but it is in derogation of the estate and terminates it before it reaches its regular expiration or predetermined end."

In 1 *Preston on Estates*, star page 442, the learned author, speaking of determinable fees, says:

"The grantee has an estate which may continue forever, though there is a contingency which, when it happens, will determine the estate. This contingency cannot with propriety be called a condition; it is a part of the limitation; and the estate may be termed a fee. *Plowden* uses the phrase, 'a fee simple determinable.'"

See, also, *Arthur v. Cole*, 58 Md. 100, 40 Am. Rep. 409; 2 *Blackstone*, star page 155; 4 *Kent* (14th Ed.) star page 126.

[1] The language of the deed in question is:

"To have and to hold the above-described property unto him, the said William H. Brown, his heirs and assigns, forever in fee simple, upon condition, however," etc.

If the condition is valid, the effect of this language would be to convey the property to the grantee in fee simple, upon condition that he and his heirs shall not convey or devise it except as therein provided, and upon a conveyance or devise of the property by the grantee or his heirs contrary to the terms of the deed the grantors and their heirs would have the right to re-enter and terminate the estate of the grantee. 2 *Blackstone*, supra; 4 *Kent* (14th Ed.) supra.

[2] The real question therefore in this case is: Is the attempted restriction upon the alienation of the property by the grantee and his heirs void? It is said in 1 *Preston on Estates*, star page 477:

"Although as a general proposition it be true that a tenant in fee has an unlimited power of alienation, and cannot be restrained by condition, yet every restriction of this power, annexed to the creation, or to the transfer of an estate in fee, would not be absolutely void."

And in 4 *Kent*, star page 181, it is said:

"Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee, or by devise, that the purchaser or devisee should not alien, is unlawful and void. The restraint is admitted in leases for life or years, but is incompatible with the absolute right appertaining to an estate in tail or in fee. * * * If, however, a restraint upon alienation be confined to an individual named, to whom the grant is not to be made, it is said by very high authority to be a valid condition. But this case falls within the general principle, and it may be very questionable whether such a condition would be good at this day."

In 2 *Blackstone*, star pages 156, 157, we find the statement:

"These express conditions, if they are impossible at the time of their creation, or afterwards become impossible by the act of God, or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In many of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. * * * For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant."

The learned authors referred to cite cases in which slight restrictions upon the power to alienate fee-simple estates have been upheld. But the rule in this state forbidding such restrictions has been strictly applied. In the case of *Clark v. Clark*, 99 Md. 356, 58 Atl. 24, the provision of the will was as follows:

"It is my will and direction that my property hereby given to my said children shall not be sold for the purpose of division of proceeds of sale among them until the end of ten years from the time of my death, unless all of my said children agree that such sale and division shall be made between them before that time, and in case all of them do thus agree in writing to make such sale or division of my property before said period of ten years, then I do authorize them to make said sale or partition of my property, so that each one may receive his or her share, I express the wish that my children shall continue to live together as they now do, and use the income of my property for their support until the expiration of said ten years from my death."

In reference to this clause of the will the court said:

"This provision of the will, if effective, would practically amount to a restraint for ten years of all alienation by any child of its share of the estate. We have no difficulty in arriving at the conclusion that this attempted interposition of restrictions upon the method of alienation and enjoyment of the absolute estate given to the testatrix's children was contrary to the policy of the law, and therefore inoperative and void. The authorities agree that conditions or limitations in restraint of alienation or essential enjoyment of an estate in fee cannot be validly annexed to the deed or devise by which the estate is created, because they are repugnant to the inherent nature and qualities of the estate granted and tend to public inconvenience."

In that case, and the late case of *Gischell v. Ballman*, reported in 131 Md. 260, 101 Atl.

693, the Maryland cases and many others upon the subject are cited.

Under the terms of the deed in question, the property may descend to heirs of the grantee who do not bear his name, while the condition attempts to restrict his right, and the right of his heirs, to devise or convey the property to persons named Brown who are "of blood relation to" the said grantors. As this restriction is not limited as to time, and is not confined to the grantee, it is apparent that it may result in limiting the power of his heir or heirs to sell or devise the property to a single person, or deprive them of that power altogether. Upon the authorities cited it is clear that the condition of the deed must therefore be held void because repugnant to the fee conveyed to the grantee, and it is not necessary in this case to refer to or discuss the numerous cases dealing with what should be regarded as reasonable and valid restrictions upon the power of alienation.

The case of *In re Macleay*, L. R. 20 Eq. 186, relied on by counsel for the appellants, is totally unlike the case at bar and the correctness of that decision has been seriously questioned in the later case of *In re Rosher*, L. R. 28 Ch. D. 801.

[3] The condition being void for the reasons stated, William Howard Brown, the grantee, took an absolute fee (*Starr v. Starr M. P. Church*, 112 Md. 171, 76 Atl. 595), and the property is subject to be sold under a fieri facias (*Warner v. Rice*, 68 Md. 440, 8 Atl. 84; *Baker v. Kelser*, 75 Md. 332, 23 Atl. 735).

In the view we have taken of the case, it is not necessary to discuss the further question presented by the brief of the appellees in regard to the jurisdiction of a court of equity to grant the relief.

Decree affirmed, with costs.

(132 Md. 603)

MCGRAW v. UNION TRUST & DEPOSIT CO. et al. (No. 38.)

(Court of Appeals of Maryland. April 3, 1918.)

1. JUDGMENT — 885 — ASSIGNMENT — SATISFACTION.

Where plaintiff judgment debtor permitted S., through whom judgment was paid with plaintiff's money, to have judgment assigned to use of S., plaintiff waived right to have judgment canceled as against defendant, to whom S. assigned it as additional collateral for an indebtedness; defendant having no knowledge of payment.

2. JUDGMENT — 841 — ASSIGNMENT — CONSIDERATION.

Existence of debt was sufficient consideration for assignment of judgment as additional collateral.

Appeal from Circuit Court, Garrett County; Robert R. Henderson, Judge.

"To be officially reported."

Bill by John T. McGraw against the Union

Trust & Deposit Company and others. From an order dissolving an injunction, which had been previously granted, and dismissing the plaintiff's bill of complaint, with costs, plaintiff appeals. Affirmed.

Argued before **BOYD, C. J.**, and **BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE**, and **CONSTABLE, JJ.**

Renninger & Offutt, of Oakland, and **W. H. Wolfe**, of Parkersburg, Va., for appellant. **Fred A. Thayer** and **Edward H. Sincell**, both of Oakland, for appellees.

BRISCOE, J. This is an appeal from an order of the circuit court for Garrett county, dissolving an injunction which had been previously granted and dismissing the plaintiff's bill of complaint, with costs. The plaintiff is a nonresident of the state, and a resident of the state of West Virginia. The defendants the Union Trust & Deposit Company, a corporation, J. N. Camden, S. D. Camden, and Annie T. Spilman, trustees, under the last will of J. N. Camden, deceased, and Howard W. Showalter, are nonresidents of the state, and reside in the state of West Virginia. The First National Bank of Oakland and Bert O. Scott, the sheriff of Garrett county, the other defendants in the case, are residents of the state, and reside in Garrett county, Md.

The object of the proceeding, as will be seen by the prayer of the bill, is to restrain and enjoin the execution and collection of a judgment held by the First National Bank of Oakland against the plaintiff, John T. McGraw, and to strike out the judgment and the use to which the judgment had been entered, and to enter the judgment "Satisfied in full." The facts of the case, and the basis of the suit, appear to be these: On the 28th of May, 1914, a nonresident attachment was issued out of the circuit court for Garrett county upon the record of a judgment obtained by the Union Trust & Deposit Company and others against John T. McGraw, in the circuit court of Wood county, W. Va., and the sheriff attached certain property of the defendant in Garrett county. Subsequently a judgment in the short note case was obtained in favor of the plaintiff against the defendant for the sum of \$6,110.32, and a judgment of condemnation for the property attached in the attachment case. On December 22, 1914, an execution was issued to enforce the collection of the judgment by a sale of the property, and the property was advertised for sale. On January 18, 1915, the sheriff made the following return upon the execution:

"After making the levy and advertising as per schedule hereto annexed, the within execution and costs were paid by Howard W. Showalter, and the same is hereby returned to be entered to his use by order of the plaintiff's attorney."

On February 9, 1915, the judgment was entered to the use of the First National

Bank of Oakland by order of the attorney of Howard W. Showalter, and on the 13th of October, 1915, a writ of venditioni exponas was issued at the instance of the plaintiff, for whose use the judgment had been entered, commanding the sheriff to complete the execution, which he had begun, by the selling of the property, and it is this sale which the plaintiff seeks to restrain, and also to have the judgment entered satisfied.

The relief sought by the plaintiff's bill is based upon the contention that the judgment in question was paid by his money, and that it should have been entered "Satisfied" upon the records of the court, and not to the use, in the first instance of Howard W. Showalter, and subsequently by Showalter to the use of the First National Bank of Oakland.

The defendant the First National Bank of Oakland in its answer denies the material allegations of the bill, and in the third and fourth paragraphs of the answer, avers as follows:

"(3) This defendant denies that on or about the 6th day of November, 1915, the said McGraw, through his agent, Geo. A. Hechner, paid and satisfied said judgment and costs, or any part thereof, to this defendant, or to any person for the use of this defendant, it being the only party entitled to the payment thereof, and denies that said McGraw supposed, or ever had any reason to suppose, that said judgment had been fully paid and satisfied, and denies that said McGraw was, or ever has been, entitled to have said judgment entered "Satisfied" upon the docket of said court, and further answering said third paragraph, this defendant says that the said McGraw had full knowledge, and that Gilmore S. Hamill, his attorney, of record in said attachment proceedings, also had full knowledge that the said Howard W. Showalter had had said judgment entered to his own use on the 18th day of January, 1915, and that said McGraw and Gilmore S. Hamill, his attorney of record in said case, also had full knowledge that said judgment had been entered to the use of this defendant, the First National Bank of Oakland, Maryland, and this defendant charges and avers that it was not necessary to obtain the consent or authority of the said McGraw to so enter said judgment to the use of either the said Showalter or this defendant.

"(4) This defendant says that the said McGraw and his attorney of record in said case had full knowledge of each and every entry and transaction connected with said judgment and case, and have been fully cognizant of the course of said case ever since the rendition of said judgment and knew full well that the same was entered, first, to the use of the said Showalter, and, second, by his direction entered to the use of this defendant, and knew that this defendant was entitled to have and receive payment thereof; and, further answering said paragraph, this defendant denies that said judgment was fraudulently entered to the use of either the said Showalter or this defendant, but was entered, as hereinbefore shown, to its use, for value, and in good faith, and that it is the owner and holder thereof, and that the said McGraw is not entitled to any relief whatever at the hands of this court."

There can be no doubt as to the law applicable to this character of case, and the questions here involved, it will be seen, are largely those of fact. The court below held, upon a consideration of the testimony, that the

plaintiff so acted with the judgment in question as to preclude now his obtaining the aid of a court of equity to prevent its collection from his property, and denied the relief sought by the bill.

We have examined and considered the testimony set out in the record, and concur in the conclusion reached by the court below. The opinion of Judge Henderson, who decided the case in the court below, fully covered every question of law and of fact involved in the controversy and presented by the record. It is as follows:

"There are two questions which must be decided in this case: (1) Whose money paid the judgment of the Union Trust & Deposit Company v. McGraw? (2) If it be found that John T. McGraw's money paid the judgment, has he so acted as to give the First National Bank of Oakland the right to claim payment of it a second time as against him?

"As to the first question, there seems now to be no doubt, except that which might be inferred from the uncertainty and confusion of both McGraw's and Showalter's testimony as to dates, places, and many of the circumstances surrounding the transactions. The record evidence supplements that of Mr. McGraw and Mr. Showalter, and from this and that together it appears that \$5,000 of the \$6,520.86 which it took to pay the Union Trust Company judgment and costs came from the discounting for McGraw of a note of Frank J. Garvan, loaned him by Garvan, which was afterwards paid by Garvan, and that \$1,395.86 was charged by the First National Bank of Fairmont to McGraw's account, and that McGraw accepted a draft for \$7,081.11 on January 16, 1915, at 80 days' sight, drawn upon him by the bank to cover this and other items set out in Exhibit J. T. M. No. 3. The cashier of the bank to a large extent corroborates this evidence, and there is no contradiction, except certain statements by Showalter and Hechner and McGraw, which, if taken at the strongest against them, might bear upon the question of fraud upon their part, but could not change the fact that McGraw's money paid the judgment, and that at the time of payment he could have required its release and satisfaction upon the dockets and records of the circuit court for Garrett county. But such was the state of accounts between McGraw and Showalter at the time that I do not believe either one of them could have been sure of the title to the money which was used in payment of the judgment.

"But, instead of the judgment being released, it was entered on January 18, 1915, to the use of H. W. Showalter, and by him on February 9, 1915, assigned to the use of the First National Bank of Oakland as additional collateral for Showalter's notes, which were then running at the bank. Let us examine closely the evidence as to how and why this was done, and what knowledge McGraw had of the matter. Mr. McGraw himself says he had no knowledge of this assignment until November, 1915. He was a man of very extensive and complicated business interests, owing a large number of debts, evidenced by judgments, notes, and mortgages, and open accounts. The details of these would be beyond the capacity of any memory to remember. This may explain the uncertainty as to dates and places in his testimony. It is shown to be a fact that Showalter authorized the entering of the Camden judgment to his use, and the subsequent assignment of it by his authority to the First National Bank of Oakland, as additional collateral to some notes of his discounted there. Showalter was the channel through which the judgment was paid, and it was quite natural that the attorney for the

Union Trust Company would inquire if it was to be entered to his use. Showalter's explanation of this, that he supposed it had been entered to his use by Col. McGraw, for reasons of his own (page 15 of the first depositions), but that he was never authorized by McGraw to do this, is contradicted by the evidence of Mr. Sincell, who says that Showalter authorized the entry to his use to be made, and this seems very probable; but the question of Col. McGraw's knowledge and approval of the action is a very different one. The first evidence of this, outside of Col. McGraw, is that of Mr. Showalter (page 19 of the first commission), who says, in answer to the sixteenth interrogatory (page 19 of the evidence of April 25, 1916), that Hechmer knew of the Deer Park property against the creditors of McGraw. Hechmer denies promising in November, 1915, for Mr. McGraw, that the judgment would be paid if a postponement of the sale was granted; but he used language in his admitted conversation and in the letter of November 3, 1915, calculated to make one who was asking about the Camden judgment believe that Mr. McGraw would pay it, and Mr. Sincell and Mr. Sliger both are positive that he made this promise. Hechmer admits that he knew of the assignment to Showalter at the time it was made (page 23 of the first testimony, filed April 25, 1916), but denies knowledge of the subsequent assignment to the bank.

[1] "Now, the relations between these three persons, McGraw, Showalter, and Hechmer, were of such a nature that I think it is fair to assume that what was known to one about so important a matter was known to all. Hechmer says he said he would consult his principal, and doubtless he did. At that time it suited Col. McGraw to have the judgment stand in the name of Showalter. The latter was his close friend and financial backer, and his explanation of the transfer to him of the judgment—to keep the other creditors of McGraw from proceedings against the Deer Park property—seems in all respects probable. Showalter could hardly have invented that reason. Without an understanding with McGraw, he would not have so dealt with the judgment. The other inconsistencies and discrepancies in the testimony of those witnesses show the fallibility of their memory, and the circumstances of each (McGraw being in straits, and Showalter being amply solvent, and Hechmer the confidential and general agent of McGraw) make it extremely probable that the arrangement of the assignment was made for the convenience of McGraw and to save the Deer Park property from other judgment creditors, who would have been apt to proceed against it, if the Camden judgment had been entered satisfied. McGraw, having ample confidence in Showalter, and doubting nothing of his financial ability, was satisfied to let him

have record title to the judgment. McGraw's transfer of the judgment was a waiver of his right to have it canceled. He deliberately paid the judgment, and yet kept it alive for his own purposes. Presently, however, Showalter has need of protection from attaching creditors, and, taking advantage of his possession of the indicia of title of the judgment, he assigns it to the bank as additional collateral for his indebtedness. It is not pretended that the bank, except through Sincell, knew that the judgment had been paid by McGraw's money, and he vigorously denies that he ever knew it. The other evidence, and the letter of Hechmer of November 3, 1915, bear out his denial.

[2] "Sliger and Thayer are not alleged to have known of the claim of McGraw. Under these circumstances the bank took the assignment from Showalter. McGraw, having put Showalter in the position where he could use the judgment for his own purposes, if he wished to do so, cannot complain if he actually did so use it. The existence of the debt from Showalter to the bank is amply sufficient consideration for the turning over of additional collateral. Besides, the threatened attachments against Showalter had somewhat alarmed the bank, and it was demanding cover. Showalter assigned the judgment, and the bank's anxieties seem to have been allayed. It took no proceedings to realize on its collateral or to secure itself by judgment. In the meantime Showalter came to financial grief, and when the bank came to realize on the judgment it was prevented by injunction. A consideration of all the testimony seems to make it reasonably clear that Col. McGraw so acted with the judgment as to preclude now his obtaining the aid of equity to prevent its collection from his property. He is a lawyer and a business man of large and extremely varied experience. It is no hardship upon him to hold that, if he voluntarily or carelessly allowed a third person to hold for many months record title to his property, and especially if that was done to keep his own creditors from getting at it, he cannot now ask a court of equity to extricate him from a position of more than doubtful propriety, into which he allowed his duly authorized agent to place him. There need be no citation of authorities to establish this position, if the facts are correctly found by the court.

"The bill will therefore be dismissed, and the injunction dissolved."

For the reasons we have stated, and upon the principles announced in the opinion of the court below we will affirm the order appealed from.

Order affirmed, with costs to the appellee.

(92 N. J. Law, 1)

McMAHON v. RIKER, County Collector, et al.
(No. 45.)

(Supreme Court of New Jersey. July 8, 1918.)

1. STATUTES §=109—AMENDMENT—CONSTITUTIONALITY.

In determining whether amendment or supplement to statute violates the Constitution as to titles of acts, the amendment or supplement is not to be examined as independent, but to be considered as part of statute upon which it is ingrafted, and if amendment or supplement does not render statute in its altered form unconstitutional, it is valid.

2. STATUTES §=109—TITLE AND OBJECT.

Purposes manifestly cognate to the object expressed in the title of a statute are not required to be expressly mentioned in the title.

3. STATUTES §=125(6)—TITLE—SUBJECT—OFFICERS—CONSTITUTIONALITY.

Act April 2, 1898 (P. L. p. 226), entitled "An act respecting the fees of surrogates, county clerks, and county registers of deeds and mortgages in counties of the first class, and providing salaries for such officers," as amended and supplemented by Acts March 29, 1917 (P. L. pp. 771, 772), to provide the salary shall not exceed the revenue of the particular office, etc., is not unconstitutional, as embracing more than one subject, not expressed in the title.

4. STATUTES §=102(2)—GENERAL LAWS—PAYMENT OF OFFICERS.

It being settled that Act April 2, 1898 (P. L. p. 226), providing for payment of salaries of certain officers in counties of first class and employment of assistants and their payment, is general in character, Acts March 29, 1917 (P. L. pp. 771, 772), amending statute by placing limitation on expenditures and creating fund out of which they shall be paid, is also general, not a local or special law regulating internal affairs of county.

5. STATUTES §=102(2)—SPECIAL OR LOCAL LEGISLATION—COMPENSATION OF OFFICERS.

Act April 2, 1898 (P. L. p. 226), providing salaries for surrogates, county clerks, and county registers of deeds and mortgages in counties of first class, as amended by Acts March 29, 1917 (P. L. pp. 771, 772), providing expense of office shall not exceed its revenue, is not violative of Const. art. 4, § 7, par. 11, as special or local law decreasing percentage or allowance of public officers during term.

6. COUNTIES §=75(1)—OFFICERS—PAYMENT OF SALARY—STATUTE.

Under Act April 2, 1898 (P. L. p. 226), providing salaries for surrogates, county clerks, and county registers of deeds and mortgages in counties of first class, as amended by Acts March 29, 1917 (P. L. pp. 771, 772), if there are not sufficient moneys in any particular month in separate fund for payment of county register of deeds and mortgages, created by fees paid into his office, his full salary of \$625 for the month cannot be presently paid.

Mandamus by John J. McMahon against Frederick Riker, County Collector, the Board of Freeholders of the County of Hudson, and others. On demurrer to the return to the alternative writ. Demurrer overruled, and judgment entered for defendants.

Argued February term, 1918, before GUMMERE, C. J., and KALISCH, J.

J. Emil Walscheld, of Union, for demurrant. Albert C. Wall, of Jersey City, amicus curiæ, in support of return.

GUMMERE, C. J. McMahon holds the office of register of deeds and mortgages in and for the county of Hudson, having been elected thereto in November, 1914. By force of an act entitled "An act respecting the fees of surrogates, county clerks and county registers of deeds and mortgages in counties of the first class, and providing salaries for such officers," approved April 2, 1898 (P. L. p. 226), this office carries with it an annual salary of \$7,500, to be paid in equal monthly installments in full compensation for all services rendered by the incumbent and in lieu of all fees and other compensation whatsoever theretofore provided or allowed by law. The act also authorizes these officers to employ the necessary deputies and assistants, and directs that these employes shall receive such compensation as shall be approved by the board of freeholders, and shall be paid monthly by the proper disbursing officer of the county. These recited provisions appear in section 4 of the statute. Another provision of the statute requires the payment by the various officers affected by the act of all fees, costs, allowances, percentages, and other perquisites of whatever kind which should be received by them, into the county treasury for the sole use of the county. In 1917 section 4 was amended, by adding thereto the following provision:

"That the said salaries, together with the compensation of the aforesaid deputies and assistants for said offices respectively, shall not in any year exceed the revenue of said offices."

This amendment was approved March 29th. P. L. 771. On the same day a supplement to the original act was approved, which provided that:

The "moneys received by the county collector from the surrogates, county clerks and registers of deeds and mortgages, or by any assistant or other person in their office or employment, in counties of the first class in this state, pursuant to the act to which this act is a supplement, shall be placed in separate funds to the credit of the respective offices from which said moneys were received, and out of which said funds the salaries of the said surrogates, county clerks, and said registers of deeds and mortgages, and the compensation of the deputies and assistants for said officers shall be paid, and any surplus thereafter remaining shall be retained in said funds for the use of, and until disposed of by, the boards of chosen freeholders of the respective counties, according to law." P. L. p. 772.

On the 1st of December, 1917, there became due, under the provision of the act of 1898, to Mr. McMahon, as register of Hudson county, the installment of salary for the month of November, 1917, amounting to \$625. Payment of this installment was demanded by him from the county collector and the board of chosen freeholders, but his demand was refused upon the ground that there were no funds in the special account with which to pay him. McMahon thereupon applied to this court for a mandamus compelling such payment. An alternative writ having been allowed, the defendants made return, setting up as a defense lack of funds in the special ac-

count created by the supplement of 1917 with which to pay the installment. The relator demurred, and the sole question submitted to us on the argument was whether such lack of funds in this account at the time the demand was made constituted a legal excuse for the refusal to pay the installment of salary.

Counsel for McMahon contends that both the amendment and the supplement to the act of 1898 are void, because in conflict with the Constitution of the state. He further argues that if this contention is not sound, the payment was improperly refused, "because no full year has yet expired since the said amendment and supplement went into effect, and it is therefore impossible to judge whether the limitations placed upon the register's salary by the enactment of 1917 will prevent the payment of the full salary to the register." The first attack made upon the constitutionality of these statutory provisions is that the original act is, by its title, confined to the fees of the designated officers and the salaries to be paid such officers, and that provisions in the amendment and supplement looking to the operation of these offices, the employment of the necessary assistants, and the compensation to be paid to them, as well as the specific funds out of which such payments are to be made, violate that provision of our state Constitution which provides that every statute shall embrace but one object, which object shall be expressed in the title.

[1] Counsel is clearly in error in asserting that power was granted to sheriffs, county clerks, and county registers, in counties of the first class, to employ deputies and assistants, by the amendment of 1917. That power was granted by the original act of 1898, as is shown by the recitals therefrom already set forth. So, too, the provision relating to the compensation of such employes is contained in the primary statute. This, however, seems not important, for, in determining whether an amendment or a supplement to an existing statute violates constitutional provisions, the amendment or supplement is not to be examined as an independent enactment, but is to be considered in connection with, and as a part of, the statute upon which it is ingrafted; and if the amendment, or the supplement, does not operate to render the statute, in its altered form, unconstitutional, it is valid legislation. *Central R. R. Co. v. State Board of Assessors*, 75 N. J. Law, 120, 67 Atl. 672.

Looking at the legislation now under consideration, in its present shape, the fundamental purpose exhibited therein is to compel the several incumbents of the enumerated offices to so conduct the business thereof that the expenses of operation shall not be larger than the receipts; in other words, that the compensation paid to the incumbent and his subordinates shall not exceed the fees and emoluments paid in to him. What the causes were which brought about the enactment we do not judicially know, although it seems quite prob-

able that the Legislature was unable to perceive any good reason why the receipts of these designated offices, which, ever since the adoption of the Constitution of 1844, and up to 1898, had been ample to meet all expenditures, and to fully compensate the incumbents as well (for it is not publicly known that any of the incumbents during that period were unwillingly forced into offices which they did not desire to hold because of the lack of compensation), should suddenly, after the adoption of the act of 1898, become insufficient for the purpose. Certainly a change in the amount of the business does not explain it; for, as the volume of business increases, the amount of the receipts increases correspondingly, and, when the volume decreases, necessary expenses decrease in a like proportion.

[2] This is not a matter, however, with which we are concerned. The question before us is whether the legislative purpose is expressed in the title of the act, and whether it is single. The title has already been recited. It declares that the legislation relates to the fees of certain enumerated officers in first-class counties. The words in the last clause of the title, "and providing salaries for such officers," neither indicate an additional purpose, nor do they limit or expand that already expressed. The salary of the incumbent, and the compensation to be paid to his assistants, are not foreign to the object expressed in the words "an act respecting the fees of," etc, for it is expressly declared in the body of the act that these fees are to be paid into the county treasury, there to be kept in a separate fund, and to be applied from time to time (as may be necessary) to the payment of the specified expenses. On the contrary, they are manifestly cognate to it, and therefore were not required to be expressly mentioned in the title. *Quigley v. Lehigh Valley R. R. Co.*, 80 N. J. Law, 486, 492, 79 Atl. 458, and cases cited.

[3] It may be, as counsel contends, that the provision in the body of the act conferring upon the incumbents power to appoint deputies and assistants is not expressed in the title. But this is unimportant. The act merely affirms the existence of a power that had already been granted by earlier statutes, and its excision would still leave the legislation intact. Exception the respect just indicated the legislation, as it now stands, embraces a single object, and that object is expressed in the title. The relator, therefore, can take nothing by this particular attack upon its constitutionality.

[4] It is further argued that the amendment and the supplement of 1917 violate that provision of the Constitution which forbids the passing of any local or special law regulating the internal affairs of counties. We consider, however, that this question is not an open one. In the case of *Board of Freeholders of Hudson County v. Clarke*, 65 N. J. Law, p. 271, 47 Atl. 478, the Court of Errors and Appeals de-

clared that the statute of 1896 properly classified counties having a population exceeding 150,000, viz., Hudson and Essex, for the purpose of regulating their internal affairs, and that the fact that the statute applied to these two counties only did not constitute it a local or special law. It being settled, then, that an act which provides for the payment of salaries of certain specified officers in counties of the first class, and the employment of the necessary assistants to transact the business of their offices, and the payment of such assistants for their services, is general in its character, it necessarily follows, we think, that legislation placing a limitation upon the expenditures to be incurred in the running of such offices, and creating a fund out of which those expenses shall be paid, is also general.

[8] It is further argued that the act violates the constitutional provision which prohibits the passing of special or local law decreasing the percentage or allowance of public officers during the term for which said public officers were elected or appointed. Article 4, § 7, par. 11, of the Constitution. What we have already said is dispositive of this contention, for the Constitution does not prohibit a decrease in the salary of a public officer during his term, but only the passing of a special or local law which has that effect. The present legislation being, as we have already declared, general, and not special, the constitutional provision relied on has not been disregarded thereby. We may add that we are not able to appreciate the contention that the effect of this legislation is to decrease the salary of Mr. McMahon. His salary remains intact. He is only required to so operate his office that the expenses incurred therefore shall be kept within the fund appropriated to meet them.

[9] The last contention made on behalf of the relator is that the defendants have no right to withhold the payment of the salary due on the 1st of December, 1917, "because they could not determine whether or not the salary of such register, together with the compensation of his deputies and assistants, would exceed the revenues of his office for a year." This proposition seems to us a conspicuous non sequitur. The sole fact to be ascertained by the fiscal officers of the county, when the demand for payment was made on December 1st, was whether there was then in the separate fund placed to the credit of the office of the register of deeds of the county sufficient money to make the payment. If there was not, then such payment could not be made without violating the supplement of 1917, which, by necessary implication, forbids the payment of the salary of the register out of any funds or moneys of the county, except the separate fund which is to be created by the reception of the fees and other emoluments paid into the register's office. If there are not sufficient moneys in

the fund at the time when payment is demanded, then such payment cannot be presently made. Whether or not it can be made later will depend upon whether or not, at the end of the annual period for which the register is to be paid (or at any earlier date) there are sufficient moneys in the special fund to meet the demand of the register.

We conclude, for the reasons stated, that the demurrer should be overruled, and that judgment should be entered for the defendants.

(92 N. J. Law, 199)

OVERSEER OF POOR OF TOWN OF
MONTCLAIR et al. v. EASON.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. BASTARDS \Leftrightarrow 93—NEW TRIAL—ENTRY OF JUDGMENT.

In a proceeding before a statutory tribunal, as in bastardy cases, when there is a trial *de novo* on appeal with jury before the court of common pleas or quarter sessions, and a verdict requiring the entry of an independent judgment by that court, its failure to enter such judgment will not work a reversal on certiorari, but the record will be remitted to it for the entry of such judgment as was required by law in accordance with the verdict.

2. BASTARDS \Leftrightarrow 65—EVIDENCE—CORROBORATION.

In a bastardy case under our statute, it is not necessary, to a finding against the putative father, that the testimony of the mother of the bastard should be corroborated.

3. BASTARDS \Leftrightarrow 19, 64—NATURE OF ACTION—BURDEN OF PROOF—CHARACTER EVIDENCE—"CIVIL PROCEEDING."

A bastardy case under our statute is not a criminal but a "civil proceeding." The burden of proof does not require proof of paternity beyond a reasonable doubt; and, while the incidental element of criminality involved in the paternity of an illegitimate child entitles the putative father to present evidence of good character, which the jury should consider in connection with the other evidence in the case, the defendant is not entitled to be absolved if the character evidence, either alone or in connection with the other evidence, raises no more than a reasonable doubt that he is the father of the bastard child.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Civil Proceedings.]

Appeal from Supreme Court.

Bastardy proceedings by the Overseer of the Poor of the Town of Montclair and others against Charles W. Eason. From a judgment for plaintiffs, defendant appeals. Affirmed.

William R. Wilson, of Elizabeth, for appellant. Hartshorne, Insley & Leake, of Jersey City, for appellees.

PARKER, J. This is a bastardy case. An order of filiation having been made by the recorder of Montclair, after the usual hearing and before birth of the child, there was an appeal to the Essex quarter sessions and a retrial with a jury. The child had then been born, and was exhibited to the jury;

and, upon their finding that appellant was the father, the sessions gave judgment accordingly, and made an order providing, *inter alia*, that appellant enter into bond conditioned to obey the order of filiation made by the recorder. There was no new order of filiation in the sessions, and, the proceedings having been removed therefrom to the Supreme Court by certiorari, that court affirmed the judgment that appellant was the father, but held that it was the duty of the sessions to make its own order of filiation, and ordered the record remitted for that purpose. This action of the Supreme Court, and matters occurring at the trial in the sessions, are assigned for error.

[1] Taking up first the remission of the record by the Supreme Court, we think its action was clearly right. That a new order of filiation should be made in the sessions is settled. *Hurff v. Overseer, etc.*, 38 N. J. Law, 287, and cases cited. In that case it was held that the matter must go back to the sessions for a retrial, but this was because there had been no jury in that court, and there was consequently no record of the facts found on which to base an order. 38 N. J. Law, 289. At the same time the practice, established in the earlier case of *Doremus v. Howard*, 23 N. J. Law, 390, of remitting a record which exhibited the verdict of a jury, for entry of a judgment in accordance therewith, was recognized in the *Hurff* Case, and followed in the later decision of *Mulcahy v. Traction Co.*, 57 N. J. Law, 345, 30 Atl. 472. The rule may therefore be considered as settled that when there is a trial *de novo* on appeal with jury in the court of common pleas or quarter sessions, and a verdict requiring the entry of an independent judgment by that court, its failure to enter such judgment will not work a reversal on certiorari, but the record will be remitted to it for the entry of such judgment as was required by law in accordance with the verdict.

[2] We proceed therefore to consider the alleged errors at the trial before the quarter sessions, as set forth in the appellant's brief—there was no oral argument. The first point made is that there was no corroboration of the testimony of the complaining witness, the mother of the bastard. There is some contrariety in the decisions of the various states on this point, due no doubt to variance in the respective statutes. The rule as stated in 7 C. J. 994, is that:

"In the absence of a statute requiring corroboration, the jury may find the defendant is the father of the child on the sole testimony of the mother, provided they believe it to be credible."

This seems to be the rule in *Massachusetts* (*Noonan v. Brogan*, 3 Allen [Mass.] 481), and *Indiana* (*Evans v. State*, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 2 L. R. A. [N. S.] 619, 6 Ann. Cas. 813). The English statute was strict in requiring corroboration of the mother in some material particular (*Reg. v. Read*, 9 A. & E. 619), and consequently decisions thereunder are hardly relevant. Our own

act contains no such requirement. O. S. 185, §§ 5, 6, and 187, § 14. The trial on appeal is conducted in the same manner as that before the magistrate, who, if no jury be demanded, shall "examine the mother of such bastard, or the woman so pregnant as aforesaid, on oath, in the presence of the person so charged, touching the father of such child, and shall hear any proofs that may be offered in relation thereto." Section 5. In jury cases the magistrate is to impanel and swear the jury, "and swear the witnesses produced to establish and rebut such accusation, and the said accusation shall thereupon be tried as in cases in courts of common law before such jury." Section 6. There is no intimation in our statute or decisions, pointed out by counsel or discovered by our examination, that the testimony of the mother, who is not merely a competent, but a required, witness, must not be evidential unless corroborated. We think the rule is otherwise.

But if the position taken by counsel were correct, it would not avail the appellant; for, apart from the fact that the point was not raised at the trial in any way, corroboration was supplied in the production of the child before the jury in the presence of appellant, with opportunity of inspection and a determination of resemblance. This was a proper means of proof. *Gaunt v. State*, 50 N. J. Law, 490, 14 Atl. 600.

The next division of the brief, headed "Burden of Proof," points to no judicial action.

The third, fourth, and fifth points may be considered together. They amount to this: That no finding against appellant could be had unless he was shown to be the father beyond a reasonable doubt, and that the court refused to recognize this rule and charged counter to it; and that appellant was entitled to the benefit of any reasonable doubt engendered by evidence of good character given in his behalf. Four requests to charge were submitted and refused. The first is not now pressed; the last was covered in the charge. The other two are as follows:

"(2) That evidence of good character is not a mere make-weight thrown in to assist in the production of a result that would happen at all events, but is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal.

"(3) That evidence of good character may of itself produce a reasonable doubt where otherwise no reasonable doubt would exist."

[3] These requests are manifestly based on the theory that, unless appellant was shown beyond reasonable doubt to be the father of the bastard, no verdict of paternity should go against him. As has been stated, the court declined to recognize such a rule, and told the jury that they could find such a verdict if the town had sustained the burden of proving by a fair preponderance of the testimony that appellant was the father of the child. This instruction was correct. It may be conceded that bastardy proceedings are sometimes characterized as criminal or

quasi criminal in character, but usually they are held to be in the nature of civil proceedings. The views in the various state jurisdictions, with authorities, will be found collected in 7 O. J. 906. In this state it seems to be settled that they are civil or at least quasi civil. In *Hildreth v. Overseers*, 13 N. J. Law (1 J. S. Green) 5, it was said by Chief Justice Ewing, that:

"An order of affiliation and maintenance is not for the punishment or prevention of crime, or for the reformation of morals, but to compel the * * * father to pay for the maintenance of his illegitimate offspring, and thus to protect the township from any charge for its support. The proceeding therefore is strictly of a civil nature."

The question under consideration was whether a commission to take testimony *de bene esse* could be issued in such a case, it being conceded that it could not, if the action were a criminal one. In the later case of *Dally v. Overseers*, 21 N. J. Law, 491, 494, the same court said it was in the nature of a civil action, but as it incidentally charged a criminal offense, the defendant was entitled to put in evidence of good moral character. Still later, in *Leconey v. Overseer*, 43 N. J. Law, 406, Mr. Justice (afterwards Chief Justice and Chancellor) Magie, said:

"The proceeding under the bastardy act, while of statutory character, intended to compel, in a summary way, the putative father to protect the public against the maintenance of his illegitimate children, is not a criminal, but a civil, action" (citing the foregoing cases).

In *Schomp v. Tompkins*, 46 N. J. Law, 608, Chief Justice Beasley speaking for this court, it was held that every intentment should be made in favor of the orders in bastardy proceedings, and that the judgment was to be treated as common-law judgment, to which the action "*omnia præsumentur esse rite acta*" is applicable.

The summary features of the procedure have been greatly mitigated by the Legislature, as will be seen from a comparison of the older and later acts. Elm. Dig. 39; R. S. 1847, p. 903; P. L. 1858, p. 467; Nix. Dig. 1868, 70-73; Rev. 1877, p. 70 et seq. In the present statute (section 6) it is provided that the jury is to be summoned as in a small cause court, which is a court of civil jurisdiction exclusively; that the same right of challenge to jurors shall exist as in civil cases at law; and in section 14 the act says that on appeal to the sessions the "burden of proof" shall be "upon the township as it was before the magistrate." These provisions are plainly consonant with the theory of a civil proceeding and that alone. If so, the doctrine of reasonable doubt does not apply, and the requests predicated thereon were properly refused.

The character evidence proffered by appellant was duly admitted, and the jury were properly charged to consider it with the

other evidence in the case. Appellant was not entitled to more than that.

We find no error either in the Supreme Court or in the trial before the sessions, and the judgment brought up will accordingly be affirmed.

(30 N. J. Eq. 197)

TURNURE v. TURNURE.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

WILLS 684(10) — SPENDTHRIFT TRUST — DISCRETION OF TRUSTEE.

A testatrix gave certain lands to her executors, in trust to hold the same and pay the income to her son during his natural life, with remainder to his lawful issue, and in default to her daughter, the executrix of her will, subject to the condition that if her son should live to the age of 40 years, and at that time be not embarrassed with debt and competent to prudently manage his own affairs, of which her executor should be the sole judge, then she was authorized and empowered to convey the property to the son. When the son reached that age he applied for the conveyance and the executor, or trustee, refused upon the ground that he was not then competent to manage his own affairs. *Held*, that her determination of the question was final if the judgment exercised by her was sound and honest, and that, under the proofs submitted, the exercise of her discretion that the son had not become competent to prudently manage his own affairs, was not unsound, or exercised for selfish and improper motives.

Kalisch, Black, and Gardner, JJ., dissenting.

Appeal from Court of Chancery.

Suit by H. Riker Turnure against Julia Turnure, individually and as executrix of the will of Mary J. Turnure, deceased. From a decree for complainant advised by the advisory master, defendant appeals. Reversed, and bill dismissed.

James S. Erwin, M. T. Rosenberg, and James F. Fielder, all of Jersey City, for appellant. David D. Ackerman, of Closter, for appellee.

BERGEN, J. The complainant filed this bill to compel Julia Turnure, Charles P. Buckley, and William W. Buckley, as executors of the will of Mary J. Turnure, and Julia Turnure individually, to execute a trust contained in the will of Mary J. Turnure. The testatrix devised, among other lands and personal estate, two parcels of land, sufficiently described for the purposes of this suit as the "Closter farm" and "Tenafly residence," to her executors, in trust to permit her son, the complainant, during his life, or so long as he chose to do so, to occupy the same, or, if he ceased to reside there, then to let the property and pay the rent to him during life, and thereafter to convey it to his descendants, or in default to Julia, or her heirs, if she be not living. The will further provided that if her son should live to be 40 years of age, "and at that time shall not be

embarrassed with debt, and competent to prudently manage his own affairs, of which my executors or the survivors of them shall be the sole judges," then they were authorized to convey to the son these lands and other property, and the trust should be terminated. Julia Turnure was named as executrix, and Charles P. Buckley and William W. Buckley to succeed her as executors after her death. She proved the will, qualified as executrix, and is still alive; so that neither of the other nominees have been required or authorized to qualify.

The will further empowers the executors to sell the real estate during the lifetime of her son, or during the minority of any of his descendants, and to invest the proceeds of such sale, which are to be held under the same trust as the land, with the proviso that no sale thereof shall be made while the son resides on the farm without his written consent. The son, claiming to have attained the age of 40 years, not being embarrassed with debt, and competent to prudently manage his own affairs, applied to the executrix and trustee to convey to him the land in controversy, which she refused to do, and thereupon this bill was filed to compel the conveyance, and the advisory master, to whom the case was referred by the Chancellor for his advice, found that the defendant, in refusing to execute the deed to her brother, exercised a discretion confided in her, for selfish and improper motives and mala fide, and advised a decree that she make the conveyance, from which she has appealed.

The latest deliverance by this court on the legal aspect of the right of a court of equity to compel a trustee to exercise a discretion favorable to the cestui que trust, is to be found in *O'Gorman v. Crowley*, 81 N. J. Eq. 520, 86 Atl. 442, where the execution of the trust was authorized whenever, in the opinion of the executrix, the mental and physical condition of the legatee was such that he was competent to attend to his affairs, without the additional words, as in this case, "of which my executors or the survivors of them shall be the sole judges." In that case this court said:

"Whether the son's mental and physical condition should improve to the extent indicated was a matter which required an exercise of judgment on the part of some one. The testator, as he had a right to do, selected the executors named in his will as the persons who should exercise that judgment. Their determination of that question was final if the judgment exercised by them was a sound and honest one."

Therefore in the case under consideration the only question remaining is whether the advisory master properly determined the facts to which this rule of law should be applied.

At the time of the mother's death the defendant was living with her brother on the farm, and within a few months thereafter he married and brought his wife Ida Turnure, to the farm, and shortly thereafter the

defendant left her brother's residence and since that time has resided elsewhere. The executrix settled her account in the orphans' court as executrix and also filed an intermediate account of the rent from the Tenafly house and of other property held in trust, and no dispute is raised as to the accounting.

The mother died November 24, 1901, and the will was dated October 4, 1898. In 1904, nearly three years after the mother's death, the complainant filed his petition with the orphans' court of Bergen county, praying the appointment of a suitable person, in the place of the defendant, Julia Turnure, "to execute the trust declared in the will," and on the 8th day of August, 1904, the orphans' court appointed William C. Herring in the place of Julia Turnure, she consenting thereto, to execute and complete the trust created and declared in the said will, which appointment was accepted by the appointee, who executed the trust until the 20th day of December, 1905, on which date the orphans' court discharged him from all further duties as trustee, and appointed Ida Turnure, the wife of the complainant, as trustee in his place. On the 9th day of December, 1916, Ida Turnure, "as substituted trustee," conveyed the lands in question to Ethel H. Cosgrove, the consideration stated being \$25,000. The grantee was a stenographer in the office of the counsel of the complainant. She testified that she paid the consideration by a check on a bank, but that the money was given to her by the counsel who was making this transfer, from which it is quite apparent that the grantee paid nothing out of her own funds for the transfer to her, and her part in the transaction was that of a conduit to transfer the title, for on the same day she executed a deed for the same lands to the complainant and Ida, his wife.

Whether these conveyances passed the legal title to the complainant and his wife, in view of the fact that the power of sale contained in the will is given to the executrix, in the exercise of a special trust and confidence, the gift in the will being to them, or whether a substituted trustee, who was not appointed executor, could convey the legal title, it is not necessary to determine. What the parties have attempted to do is, not to transfer the title to the son as directed by the will, but to the son and his wife, so that if the conveyance be good the son's ultimate acquisition of the entire title to the property depends upon his surviving his wife. When this will was made the son was about 28 years of age, and it is quite apparent from the testimony, and the act of the testatrix in putting this land in trust for the use of her son, she did not then consider him a competent person to prudently manage his own affairs, and it was also apparent that, not having changed her will in the meantime, she continued of the same opinion until her death, and that it was her intention to

provide a trust fund for the maintenance of her son during his life which he should not be able to dissipate.

It is not necessary in this opinion to repeat the testimony, but we are quite satisfied from it that the conduct of the son up to the time of his mother's death justified her apprehension that he was not then competent to manage his own affairs with prudence, and for that reason she intended to leave his share of her property in such a condition as to provide him a maintenance during life. What the son is undertaking to do, possibly under the influence of his wife, is immediately to put one-half of his property beyond his control, and perhaps deprive his children, if he should have any, of their reversionary right under the will, and, if he leave no children, to pass the estate out of the blood of the testatrix. There is not a particle of evidence in the case which would justify any inference that the habits or prudence of the complainant is any different from what it was when his mother died; on the contrary, an inference is permissible that his wife is the stronger character of the two, and that she has induced him to join in a scheme to presently deprive himself of one-half of the property, and possibly the whole.

We do not think that, with these conditions present, the defendant's exercise of her discretion not to convey, she being made sole judge whether she should or not, was unsound or dishonest; for, as was said in *O'Gorman v. Crowley*, supra:

"The fact that the judgment of others upon the question of the mental and physical condition of the son differed from that of the executors is quite immaterial, for it was not upon their judgment, but upon that of the executors, that the testator saw fit to rely."

In addition to the fact that, apparently, the ability of the son to act with prudence as to his property has not been altered since his mother's death, which would be a strong reason why the defendant should preserve the property for the use of the son as his mother intended, is the additional one that his present intention as to the disposition of the property, contrary to the manifest wish of the mother to protect him against just such acts, is a strong indication that he is not yet qualified "to prudently manage his own affairs." We do not think that the advisory master was justified by the proofs in the case in finding that the defendant refused to exercise her discretion, as committed to her by the will, "for selfish and improper motives and mala fide."

The fact that if, in case the complainant should die without issue, the defendant or her heirs will take the property, is not of itself sufficient to sustain a charge of unsound or dishonest motive, for the discretion was committed to her by the mother with full knowledge of all the circumstances. She trusted the defendant to see that the property was held for the benefit of her son,

and to prevent its being taken from him unless she, the defendant, was satisfied that he had so improved as to manage it prudently. She had confidence in her daughter, and made her the sole judge, and that confidence ought not to be usurped by the court, unless the evidence preponderantly shows that it is being abused. This case is almost, if not entirely, a question of fact, and we conclude that under the testimony the daughter is acting in good faith and not mala fide.

The decree below will be reversed, and the bill dismissed, with costs.

KALISCH, BLACK, and GARDNER, JJ., dissent.

(39 N. J. Eq. 163)

In re ROEBLING'S ESTATE.

(Prerogative Court of New Jersey. June 21, 1918.)

(Syllabus by the Court.)

TAXATION \S 895(7)—TRANSFER INHERITANCE TAXES—FEDERAL DUTIES—DEDUCTIONS.

The death duty imposed by War Revenue Act Sept. 8, 1916, is a tax upon decedents' estates, and in assessing the state transfer inheritance tax is to be deducted from the value of the estate, in ascertaining the clear market value of the property transferred.

Proceeding to assess the transfer inheritance tax on the estate of Ferdinand W. Roebling, deceased. Appeal from assessment of the Comptroller of the Treasury. Assessment reduced.

Scott Scammell, of Trenton, for appellants. Herbert W. Boggs, Asst. Atty. Gen., of Newark, for the State.

BAOKES, Vice Ordinary. The problem presented on this appeal is whether the death duty imposed by the War Revenue Act of Congress approved September 8, 1916 (39 Stat. 756, 777, c. 463), is to be deducted from the value of the estates of decedents, in assessing the transfer inheritance tax of 1909. P. L. 1909, p. 325, as amended in 1914 (P. L. 267). Ferdinand W. Roebling, a resident of Trenton, died March 16, 1917, testate, leaving an estate appraised, for taxing purposes, at \$10,000,000 plus. The federal tax amounts to over \$1,000,000, and the question is whether this sum should have been deducted from the appraisal, and the state tax levied on the transfer of the remaining \$9,000,000. The Comptroller of the Treasury refused to grant the allowance, and this appeal is from his ruling.

The point does not involve the power of Congress to levy the tax, nor is the question one of precedence as between the two governments, nor yet whether a double tax is lawful; but the decision turns upon the nature of the tax levied by the national government, and the construction to be given to the state statute in respect of it. The power of Con-

gress to levy death duties, and the constitutionality of such legislation, was settled by the United States Supreme Court in the cases of *Scholey v. Rew*, 90 U. S. 831, 23 L. Ed. 99, and *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. In the elaborate opinion of Mr. Justice White in the last-named case, the history of death duties and their fundamental basis are interestingly and instructively discussed. There the learned present Chief Justice declared that, although different modes of assessing such duties prevail, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested; that all courts and all governments concede that the transmission of property, occasioned by death, is a usual subject of taxation; and that, while the transmission of property by death is exclusively subject to the regulating authority of the several states, the thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest, is the transmission or receipt of property, occasioned by death, and not the right to regulate its devolution. In adverting to the view, commonly accepted, that the tax rests on the privilege enjoyed by states to regulate succession, he indicated that the doctrine of taxation upon the privileges, as adopted by the courts, is merely a qualification of the fundamental right to levy duties upon the power to transmit or the transmission or the receipt of property by death, and is in harmony with the principle he laid down, and subordinately affords a legitimate and defensible basis of taxation. That both state and nation have the right to levy, at the same time, the same class of death duties—double taxation—is also settled by *Knowlton v. Moore*, supra; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *Hopper v. Edwards*, 88 N. J. Law, 471, 96 Atl. 667.

This brings us, then, to inquire into the character of the tax levied under the federal statute. Section 201 of the act of Congress provides that:

"A tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or non-resident of the United States." U. S. Comp. St. 1916, § 6336½b.

Then follows a graduated increase of percentage upon increased amounts of the net estate up to "ten per centum of the amount by which such net estate exceeds \$5,000,000." The net estate is to be determined by deducting from the gross estate funeral and ad-

ministration expenses, debts, certain losses incurred during the settlement of the estate, and such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered, and a flat exemption of \$50,000. The subtitle of the act, "Estate Tax," is significantly descriptive, and a persuasive indication, of the class of death duties Congress was dealing with, and upon looking into the 12 sections comprising the legislation all doubt vanishes regarding the particular transfer upon which the tax is imposed.

The value of the net estate is the unit of taxation. This includes the real estate devised or descending, as well as the personal property passing to the executor. A return, in duplicate, under oath, is to be made by the executor of the value of the gross estate, of the deductions, of the value of the net estate, and of the tax payable thereon. The tax is to be paid by him out of the personal estate before distribution, and a receipt for it entitled him to credit and allowance therefor upon the settlement of his account. There is no apportionment of it among the various transferees, nor is the real estate, devised or descending, liable to contribution. On the contrary, the collector may recover the tax by a sale of the land, and in that event the devisee, or heir at law, shall be reimbursed out of any part of the personal estate unadministered, or by an equitable contribution by those whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate. The concluding words of section 208 (U. S. Comp. St. 1916, § 6336¾), "It being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution," are unmistakable in their purport that the death duty is imposed upon the estate and payable out of the residue. To be more precise, it is imposed upon the estate transferred by death, and not upon the succession resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The federal tax resembles the probate duty of act July 1, 1862, c. 119, 12 U. S. Stat. p. 483, which was payable by the executor out of the estate, while the legacy duty therein provided for (page 485) was payable by the beneficiaries. The tax occupies the same field of death duty as does the "estate tax" in England.

By the Finance Act of 1894 (P. L. p. 318) an estate duty is levied upon the principal value of all property real or personal, which passes on the death of a person, and is imposed upon the estate, and is payable by the executor as an administration expense. In addition to this tax, there is also a legacy tax, and a succession duty upon the realty,

payable by the recipients. Speaking of the death duty, Mr. Hanson, in his opening chapter (Hanson's Death Duties, 6th Ed.), says:

"The new duty imposed by the Finance Act, 1894, and called estate duty, supersedes probate duty; but the key to the construction of the Finance Act, 1894, and the amending acts, lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is, not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of the death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty, which have no real connection with the subject."

The specie of death duty of the federal tax determined, we come next to consider the character and scope of the Transfer Inheritance Tax Act and its application to situations like the present one. The part with which we are concerned reads:

"1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying, seized or possessed of the property while a resident of the state. All taxes imposed by this act shall be at the rate of five per centum upon the clear market value of such property," except as hereinafter provided.

The tax, it will be observed, is not imposed upon the immediate transfer of property occasioned by death, but upon the transfer to any person or corporation, when the transfer is the subject of a legacy or devise, of distribution or descent. In other words, it is not on the transitory succession of the executor or administrator, but upon the separate successions of the transferees, whether the succession be of the whole of the estate—a universal succession—or of the singular succession of a legatee or devisee. It is not on the amount that goes into their pockets, but upon the clear market value of the estate transferred to them, at the decedent's death, by the instrumentalities enumerated in the act. The tax is not upon the aggregate value of the estate transferred, apportioned among the transferees, but is assessed upon the value of the several interests, and is levied upon kindred at varying rates, depending upon the relationship of the transferees to the decedent. Each transferee is liable for the tax upon his share of the estate, which is to be deducted from the legacies or distributive shares, by the executor, and for the payment of which he is personally liable.

The settled construction of the act is that it imposes a tax upon the right of succession to the property of the testator or intestate which vested in the successors severally and in their respective shares or propor-

tions, and not upon the property or estate of the decedent. *Matter of Hoffman*, 143 N. Y. 327, 88 N. E. 311; *Matter of Westurn*, 152 N. Y. 93, 46 N. E. 315; *Matter of Gibbon*, 169 N. Y. 443, 62 N. E. 561; *In re Sherman Estate*, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed 222 N. Y. 540, 113 N. E. 1078; *Dixon v. Russell*, 79 N. J. Law, 490, 78 Atl. 982; *Carr v. Edwards*, 84 N. J. Law, 667, 87 Atl. 132; *Christie's Estate*, 87 N. J. Eq. 303, 101 Atl. 64.

Conceiving, then, the state of the law to be that the federal tax is imposed upon the estate, and that the transfer inheritance tax is levied upon the succession, it becomes at once apparent that the clear market value of the property transferred from the dead to the living is the value of the estate after all lawful charges against it, including taxes, are satisfied. In the case in hand, the beneficiaries succeeded to \$9,000,000, and upon this sum, as apportioned by the testator, the state tax should have been assessed. While the practical result is a financial loss to the state, it is not brought about by an assumed supremacy in the United States; nor is the exercise of the taxing power by the national government an interference with state rights, as some judges have intimated. The statutes do not clash, albeit the operation of the federal act effects a reduction of the state ratable. They function in entirely different taxing zones. Relief lies in appropriate legislation. It is undoubtedly within the power of the Legislature to impose an estate death duty, coextensive with the federal act, a tax on the power to transfer at death, for instance, and which may coexist with the Transfer Inheritance Tax Act, which, as we have seen, levies on the power to receive at death.

The highest courts in two of the states have recently decided the question, reaching opposite conclusions. The Minnesota Supreme Court held that the federal tax should be deducted. *State v. Probate Court of Hennepin County* (Minn.) 166 N. W. 125. The Court of Appeals of New York held to the contrary view. *In re Sherman Estate*, supra. The New York Supreme Court allows that its transfer tax is based upon the amounts passing to the respective transferees, but holds to the view that the conditions of transfer, as embodied in its Transfer Tax Act, comprehend the clear market value of the property at the time of the transfer, exclusive of federal tax, and expressed the opinion that if the federal government may impose an inheritance tax, which is entitled to be deducted from the estate prior to the assessment of the estate transfer tax, it has interfered with such conditions, and that the constitutionality of a federal act entitled to such a construction and effect might well be doubted. If the court had acknowledged the federal tax as levied upon the estate

transferred, doubtless a different result would have been reached.

In the earlier case, *Matter of Gihon*, supra, the Court of Appeals had before it the question whether the federal legacy tax of 1898 should be allowed as a deduction, and it held, and I quote from the *Sherman Case*:

"Neither the amount of the state tax, nor the amount of the federal inheritance tax imposed under the War Revenue Act of 1898, was deductible, because each was a tax, not upon property, but upon succession—that is, a tax on a legatee for the privilege of succeeding to the property—and was payable out of his legacy, not out of the estate"

—a tacit evincement that if the federal tax had been upon the estate, and not upon the legacies, it would have been deductible from the assets of the estate before computing the state transfer tax. Previous to the decision in the *Gihon Case*, the Supreme Court of Massachusetts, in *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361, decided that the legacy tax of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, should be deducted in ascertaining the state's succession tax. In view of the fact that both federal and state taxes were imposed upon the same successions and were payable by the beneficiaries, it is difficult to reconcile the deliverance in that case to the principles of the *Gihon Case*.

The appraisement upon which the tax was assessed will be reduced by the sum of the federal tax.

P. S.—Since writing the above, my attention has been called to the case of *Corbin v. Townshend*, 103 Atl. 647, in which the Supreme Court of Connecticut decided that the federal tax is to be deducted from the appraisement in computing the state's succession tax.

(39 N. J. Eq. 171)

In re *PIERCE'S ESTATE*

(Prerogative Court of New Jersey. June 21, 1918.)

(Syllabus by the Court.)

TAXATION §—900(1, 5)—INHERITANCE TAXES—APPRAISEMENT—APPEAL.

On appeal from an assessment of inheritance tax, testimony will not be let in to revise the appraisement. Motion for that purpose may be made to the comptroller, and from his refusal an appeal lies.

In the matter of the assessment of an inheritance tax against the estate of John P. Pierce, deceased. On appeal from assessment. Assessment corrected.

Gilbert Collins and J. Stanley Griffin, both of Jersey City, for appellants. Herbert W. Boggs, Asst. Atty. Gen., for the State.

BACKES, Vice Ordinary. This appeal is from an assessment of an inheritance tax upon the succession of a foreign decedent's estate, and in respect of so much as attacks the refusal of reduction in the appraisal to

the extent of the federal war tax under Act Sept. 8, 1916, c. 463, § 201, 39 Stat. 777 (U. S. Comp. St. 1916, § 6336½b) amended March 3, 1917 (39 Stat. 1002, c. 159), is controlled by *Estate of Ferdinand W. Roebbling*, 104 Atl. 295, and the deduction will be allowed.

An appeal was also taken from an appraisement at \$280 per share of 15,961 shares of the common capital stock of the American Radiator Company, on the ground that it was excessive. At the hearing on the appeal, testimony was offered of elements of value which had not been previously submitted to the Comptroller, and thereupon the assessment was remanded for further consideration by him. The additional factors moved the Comptroller to reduce the appraisement to \$260 per share and to revise the assessment accordingly, and by agreement the appeal stands against the assessment as revised.

It is not the duty nor the privilege of this court, on appeal, to weigh the evidence, or to substitute its judgment as to values for that of the Comptroller, and assessments will be upheld, if legal principles have been correctly applied and the appraisement is supported by the evidence. The presumption is in favor of the correctness of the assessment, and the burden is upon the appellant to point out and establish wherein it is wrong, and as the valuation, fixed by the Comptroller, is amply sustained by the proofs, it is affirmed.

The practice which has grown up of introducing testimony, on appeal, on questions of values, is indefensible, and unfair to the Comptroller. Jurisdiction is broadly conferred upon the court "to hear and determine all questions in relation to any tax levied under the provisions of this act," but it certainly was not the intention of the Legislature to burden the court with the labor of appraising estates de novo. That function is committed to the Comptroller, and on appeal his judgment is to be reviewed in the light of the facts upon which it is founded. Hereafter appeals will be heard upon the record made before that official, and certified to the court. Applications to open and revise assessments, and for that purpose to let in additional testimony, will be made to the Comptroller, and from his refusal an appeal may be taken.

The assessment will be corrected as indicated.

(39 N. J. Eq. 170)

Appeal of *TYLER*

(Prerogative Court of New Jersey. June 21, 1918.)

TAXATION §—895(7)—TRANSFER INHERITANCE TAXES—FEDERAL DUTIES—DEDUCTION—INTESTACY.

Proceeding to assess transfer inheritance tax on intestate estate is not distinguishable from proceeding in cases of testacy, on the ground that in intestacy the federal estate tax

falls upon all the transferees uniformly, and not upon the residuary estate.

Proceeding to assess the transfer inheritance tax on the estate of Michael Allen, deceased. From the assessment of the Comptroller of the Treasury, Joseph Beck Tyler, administrator, appeals. Assessment reduced.

Joseph Beck Tyler, of Camden, in pro. per. Herbert W. Boggs, Asst. Atty. Gen., for the State.

BACKES, Vice Ordinary. Michael Allen, a resident of Woodstown, Salem county, died January 14, 1917, intestate, leaving a net estate for distribution of \$300,000, in round figures, at which sum the Comptroller of the Treasury appraised the estate, and upon which he levied a transfer inheritance tax. The appellant, the administrator of the estate, claimed a reduction from the assessment to the amount of \$5,217, paid by him to the United States government for "estate tax," which the Comptroller refused to allow, and from his ruling this appeal was taken.

The judgment is controlled by the decision in *Estate of Ferdinand W. Roebbling*, 104 Atl. 295. The case is not distinguishable, on the ground that in intestacy the federal estate tax falls upon all of the transferees uniformly, and not upon the residuary estate, as in cases of testacy. The same principles govern.

(93 N. J. Law, 53)

STATE v. AGNESI.

(Supreme Court of New Jersey. June 17, 1918.)

1. HOMICIDE \S 112(1)—SELF-DEFENSE—NECESSITY.

The necessity for self-defense must not be of the slayer's own creation.

2. HOMICIDE \S 112(1)—SELF-DEFENSE—AGGRESSION.

While it is not the rule that an aggressor can never justify himself by acting in self-defense, *prima facie* it is his adversary who has that right.

3. HOMICIDE \S 110—SELF-DEFENSE—NATURE OF ATTACK—"DISORDERLY PERSON."

Where accused, living apart from his wife and knowing that she and decedent were occupying the same apartment, bought a revolver and at 1 o'clock at night quietly entered the apartment through a window, which he pried open, and roused deceased from sleep and shot him as he made a motion towards an axe, self-defense was not available to accused, since, under section 2 of the act concerning disorderly persons (2 Comp. St. 1910, p. 1947), he was such a person whom deceased had the right, under section 86 of the act (page 1937), to arrest without a warrant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disorderly Person.]

4. HOMICIDE \S 215(3) — DYING DECLARATIONS.

A signed declaration, made by a foreigner who spoke English imperfectly and taken down by a police magistrate, who was aided in understanding in part by an interpreter, was admissible, although subject to criticism as to its accuracy.

5. HOMICIDE \S 215(1)—DYING DECLARATIONS—IMPENDING DEATH.

That a dying declaration taken down by a police magistrate contained the magistrate's own statement tending to show declarant realized that death was impending did not vitiate the statement of declarant himself, although the remarks of the magistrate were no evidence of the fact.

6. CRIMINAL LAW \S 1158(4) — REVIEW — COURT FINDING—DYING DECLARATIONS.

Finding of trial judge as to dying declarant's realization of impending death is conclusive.

7. HOMICIDE \S 47—"MANSLAUGHTER"—SUDDEN PASSION.

The rule is not that homicide is always reduced to "manslaughter" when a husband kills the paramour of his wife in the act of adultery, but only when the circumstances are such that the husband may be supposed to have acted in a sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

8. HOMICIDE \S 40—"MANSLAUGHTER"—SUDDEN PASSION.

The provocation must be of such character and so close upon the act of killing that accused for the moment could be considered as not master of his own understanding, for, if such an interval of time elapses between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the act is not mitigated to manslaughter.

9. HOMICIDE \S 213—DYING DECLARATIONS—RELIGIOUS BELIEF OF DECLARANT.

Dying declarations are not inadmissible without proof that declarant believed in a Supreme Being or in a future state of punishment and reward.

10. HOMICIDE \S 190(2) — EVIDENCE OF THREATS.

Evidence of deceased's threats was properly excluded, where accused armed himself and sought decedent notwithstanding his knowledge of the threats.

Salvatore Agnesi was convicted of crime, and appeals. Affirmed.

The prisoner was living in a state of separation from his wife under articles which provided that he would not sue, molest, disturb, or trouble any other person whomsoever for receiving, entertaining, or harboring her; that he would not without her consent visit her or knowingly enter any house or place where she should dwell, reside, or be, or send or cause to be sent any letter or message to her. The wife and the decedent, as the prisoner knew, were occupying the same apartments which had been rented by the wife. The prisoner says he was afraid of the decedent, who was known to him as a man of violence and had made threats to kill the prisoner. On a Saturday, the prisoner bought a revolver because, as he says, of the decedent's threats. The other essential facts are thus stated by the prisoner:

"Then on Monday night I again saw my wife. I used to see her almost every night, and then I thought that my wife wanted me, and I also wanted my wife back, because we were 22 years married and we have property together. I did not know myself what to do. Then on Tuesday I went to work again, always sick, I couldn't work. I couldn't rest, and I could not eat be-

cause I was always thinking about my wife and my son, and that me and my son did not have no home. On Tuesday I went to work again. On Tuesday night I came home at 6 o'clock. I couldn't eat when I got in the house, and then I went to a moving picture show, and I came home at 9 o'clock, and I sat on the stoop there smoking, and I had a watch and I looked at it, and it was 6 o'clock, and then after that I looked at the watch again, and I looked again. I laid down in the bed and could not get to sleep because I was always thinking of my wife and son. Then I got up again from the bed, and I started to smoke a pipe on the porch. Then I looked at the watch and it was 11 o'clock. Then I went back to bed and I couldn't sleep. I looked at the watch again and it was 12 o'clock. Then I laid down and couldn't get to sleep because I was always thinking about my wife and my son and I could not get to sleep. Then right away I thought what my son had told me, to go to his mother, and to talk to her and say to her that she should come back to me. I was afraid to go there that night because it was 12 o'clock and because I was afraid of Gallizio because he was always there in that house. Then I looked at the watch again and it was 1 o'clock in the morning. Then it came into my head again to go there, and I was afraid to go there; right away then it was 1 o'clock. I don't know. It must have been my Lord Jesus Christ or the Mother of the Lord that says to me, 'Go there, go there,' but I was afraid. It was raining very hard, and again it was in my head, 'Go, go.' All at once, I don't know if it was the devil or the Mother of God that said to me, 'Go, go,' and I took my coat and put it on and put on my shoes without lacing them, and I went. I had the revolver right here. I always carried a revolver because I was afraid of him, because he was going to kill me any place. As I got in the yard, because they lived in the rear, I took my shoes off. I then went into the yard in my stocking feet. Then I saw where the window was where they were living. Then I listened by the window to see if they were sleeping or not. And I took this putty knife and I went to the first window and tried to open it, and that was locked. Then I went to the second window and went this way with the putty knife. That window opened. The window opened, not much, but a little bit, a little bit at a time. Then I laid down this knife on the ground and I raised the window nice and easy a little bit at a time, and I had always had my ear to the window to listen, because if they were awake, why then they would have to cut my head off, see, because I cannot go in through the door, because the door was locked, and I went through the window. I went nice and easy. Then I put my foot into the house first, and then a hand, and I went in. It was dark. There was no light there. I saw a bed there. There was nobody in that bed, in the first room. * * * Then nice and easy I found my way out into the kitchen because the kitchen is near to this room, because I never was in that house. I never had been in there before, and I went nice and quietly looking for me way. Then I entered another room. I looked into the dark, and I saw a bed. I did not see anything. I looked and I did not see nothing, because it was dark in that room. Because I smoke and I carry matches in my pocket, I took out a match and lit a match. I lit a match and threw the light like this, and I held it up, and then I see Gaetano Galizio and my wife in bed. Gaetano Galizio in bed. He got up right away and he made a motion down this way to take a axe. As he raised the axe, of course I don't think, I don't think, I don't know what it is. I shoot, I don't know how many times, one, two, three, four, five times."

The trial judge charged that the defense of self-defense had no application to the facts of the case, and that the jury were not to consider it.

Argued February term, 1918, before SWAYZE, TRENCHARD, and MINTURN, JJ.

Ward & McGinnis, of Paterson, for appellant. Michael Dunn, of Paterson, for the State.

SWAYZE, J. (after stating the facts as above). [1-3] The principle on which the right of self-defense rests and the limitations of that right have been settled by the decision of the Court of Errors and Appeals in *Brown v. State*, 62 N. J. Law, 686, 702, 42 Atl. 811, 823. The court there said:

"The foundation of the right to take life by the way of self-defense is necessity. There must exist a necessity for resorting to violence for self-protection and necessity for using the means that were used to secure the defense of the person. An accused is justified in using force to defend his person only when force is necessary to accomplish that end. If the injury apprehended could be otherwise avoided, the prisoner was bound to avoid the danger without resorting to violence, and, even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of necessity. The danger must be immediate, and must be actual or else apprehended on reasonable grounds, of which the jury is to judge."

Underlying this rule is the assumption that the necessity must not be of the defendant's own creation. It would be contrary to the fundamental principles of the law if a man could justify, what would otherwise subject him to legal liability, by his own act. The prisoner was under no necessity of breaking in the apartment occupied by Gallizio, and that in the dead of night, after assuring himself that Gallizio was asleep. Even if we assume in his favor that the apartment was rented by his wife, and that he had the right to break into that apartment at the hour he did notwithstanding his agreement not to enter any house or place where she should dwell, reside, or be, and if we assume further that he supposed Gallizio was there and might be caught in the act of adultery, he was under no necessity of breaking in as he did. He confessedly knew Gallizio's violent character and the threats made by Gallizio against his life, and the illicit relations with his wife. He must have known that his own appearance at that hour, armed with a revolver would provoke a combat. His entry at such a time, in such a manner, so armed, was in any aspect of the case an act of aggression. It would, of course, be too much to say that an aggressor can never justify himself by acting in self-defense, but *prima facie* it is his adversary who has that right. That is particularly so in a case like the present, where the situation was such that the decedent probably had the right to kill the prisoner. For it is well settled that a person under a reasonable apprehension of death or great

bodily harm may kill his adversary in self-defense. This rule to which the prisoner himself appeals would have justified the decedent. A jury could hardly find otherwise than that the appearance of an armed man with whom he had had differences, in the bedroom of the deceased at that hour of the night and the rousing of the deceased from sleep, was a situation to cause a reasonable apprehension of death or great bodily harm and to justify him in slaying the prisoner. There were other circumstances which would have justified the deceased in arresting the prisoner. Section 2 of the act concerning disorderly persons enacts that any person who shall be apprehended having upon him or her any pick-lock, key, crow, jack, bit, or other implement with an intent to break and enter any building, shall be deemed and adjudged to be a disorderly person. The prisoner by his own evidence had a putty knife, adapted for prying up a window sash, and commonly used by glaziers for removing the putty that secures panes of glass in place. He had provided himself with it for the purpose of breaking in the apartments where the deceased was shot, and had actually used it for the purpose. He was clearly a "disorderly person" within the meaning of the act. Section 36 makes it the duty of police officers, and lawful for any other person, to apprehend without warrant or process any disorderly person, and take him before a magistrate. In *Brown v. State*, 62 N. J. Law, 666, at page 697, 42 Atl. 811, Justice Depue called attention to the importance of this statute, which the trial judge had excluded from the consideration of the jury, in order to say that it was not to be excluded. The court in that case was dealing with the justification of an officer, but under section 36 the right of any person is the same as the right of an officer; the difference between the two being that the officer is under a duty to make the arrest. The distinction between the right of an officer and the right of one not an officer to arrest in case of felony and misdemeanor, considered in the same case, has no application to the case of a disorderly person.

The situation then is this: The decedent had the right to slay in self-defense if in reasonable apprehension for his own life, as he must have been, and he had the right to arrest the prisoner as a disorderly person. Whatever he did by way of assaulting the prisoner would have been legal unless he used excessive force. The prisoner could not justify resistance to lawful force. In the *Brown Case* the court said:

"If the arrest was a lawful one, the officer had the right to use the force necessary to render the arrest effective, and if the prisoner, by his resistance to the arrest, brought violence upon himself, which put his body in danger, that cannot be made justification for killing the officer."

The basis of the rule is the lawfulness of the arrest, not the character of the person making it, and the same rule applies to a

person other than an officer, when he has the lawful right to arrest. The only question then is whether there was any evidence that the decedent used excessive force. It would be superfluous to add anything on this subject, since the prisoner was armed with a deadly weapon effective at some distance, the decedent unarmed, except (if the prisoner is to be believed, as he must be for the present purpose) with an axe hastily seized as he woke from sleep. The prisoner neither said nor did anything to allay the apprehension which the decedent could not have avoided feeling, nor did he retreat as he might readily have done; he does not even say that the way by which he had entered was not open for retreat, and he had the advantage of a weapon which made it possible for him to "cover" his adversary. We think the trial judge was right in taking the question of self-defense from the jury. We have dealt with the question as presented by the charge rather than as presented by the rulings on evidence, for the reason that the remarks made by the judge on the original offer of evidence became harmless when the prisoner, the only possible witness, was subsequently permitted to tell his story in full without interruption.

[4-8] The judge allowed in evidence a dying declaration under circumstances that require some comment. The declaration was made by an Italian who spoke English imperfectly, and was taken down in narrative form by the police magistrate. The magistrate says:

"When I asked him questions he would say in English, some part of it I possibly did not understand, and I would have the same question repeated by De Luccia, who would explain to me in Italian what he said."

De Luccia was an interpreter, who was not produced as a witness at the trial. The statement as written out by the magistrate was signed by the deceased. A statement so taken is subject to criticism as to its accuracy, but we see no reason why it is not admissible. It is like any other signed statement when it is once established as a dying declaration. The fact that it also contained the magistrate's own statement tending to show that the declarant realized that death was impending does not vitiate the statement of the decedent himself. While these remarks of the magistrate were no evidence of the fact, that was established by proper evidence, and the finding of the trial judge on the point is conclusive. *State v. Monich*, 74 N. J. Law, 522, 64 Atl. 1016. Nor did the prisoner in fact suffer any manifest wrong or injury by the admission of the declaration. In material matters it agreed with the testimony of the prisoner, except in the statement that the prisoner's wife was in another room. This might have been harmful if the defendant was entitled to have the jury consider whether his offense was not reduced to manslaughter. But the rule is not that the

offense is always reduced to manslaughter when a husband kills the paramour of his wife, in the act of adultery, but only when the circumstances are such that the husband may be supposed to have acted in a sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice. The provocation must be of such a character and so close upon the act of killing that for the moment he could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the act is not mitigated to manslaughter. 1 Russell on Crimes, 786; Brown v. State, supra, 62 N. J. Law, at pages 710, 711, and 713, 42 Atl. 811. The rule is not applicable to a case like the present, where the husband kills the adulterer deliberately and upon revenge after the fact and sufficient cooling time. Russell, 724. In this case the defendant knew of the adulterous relations, as he says, between his wife and the decedent and, armed with a deadly weapon, was seeking him out in the hope and expectation of catching him in the act. Rules applicable to conduct due to a transport of passion cannot apply to so deliberate an act.

[9] The objection that there was no proof that the deceased believed in a Supreme Being or in a future state of punishment and reward is unsubstantial. The law is settled for us by what this court said in Donnelly v. State, 26 N. J. Law, 601, 620.

[10] The evidence of threats, so far as it was excluded, was properly excluded; the prisoner sought the decedent notwithstanding his knowledge of the threats. In fact, he was allowed to testify to the threats himself.

The trial judge charged the jury that, if they took the prisoner's version of the case, they must find him guilty of manslaughter at least. This was favorable to the prisoner if self-defense was excluded. The prisoner's own claim was, either that he acted in self-defense, or in a transport of passion caused by finding the deceased in bed with the prisoner's wife. The first claim being inadmissible, the second only is to be considered, and that, on the prisoner's own claim, merely reduced the crime from murder to manslaughter. The judge might well have told the jury that under the circumstances of this case the grade of crime was not reduced to manslaughter.

Let the judgment be affirmed.

(91 N. J. Law, 481)

TRAPP v. BROWN.

(Supreme Court of New Jersey. June 6, 1918.)

1. EXECUTION \Leftrightarrow 420½, New, vol. 10 Key-No. Series—VACATING ORDER.

Where execution is returned unsatisfied and upon ex parte application of the judgment credi-

tor one of the Justices of the Supreme Court makes an order, based on Act March 16, 1916 (P. L. p. 242), that execution shall issue against certain rents, due the judgment debtor, the order can be brought before the Supreme Court for review upon motion by judgment debtor to vacate it.

2. EXECUTION \Leftrightarrow 420½, New, vol. 10 Key-No. Series—STATUTORY PROVISIONS.

Act March 16, 1916 (P. L. p. 242), authorizing issuing of execution by order of court or judge, when execution has been returned unsatisfied, upon application of judgment creditor without notice to judgment debtor, being in derogation of the procedure at common law, all proceedings thereunder must be in strict compliance with express statutory requirements, and no intendment will be made to enable the court or judge to assume jurisdiction, in the absence of jurisdictional facts properly evidenced.

3. EXECUTION \Leftrightarrow 420½, New, vol. 10 Key-No. Series—PROCEEDINGS.

Under Act March 16, 1916 (P. L. p. 242), authorizing issuing of execution by order of court or judge, when execution has been returned unsatisfied against wages, debts, earnings, salary, income from trust funds, or profits due or owing to judgment debtor, a petition for an order for execution against certain rents is insufficient to authorize making of order, where petition does not show bona fide effort to collect by execution, or give reason why judgment cannot be satisfied by execution upon proper levy against building producing the rents.

4. EXECUTION \Leftrightarrow 359—STATUTES—CONSTRUCTION.

Act March 16, 1916 (P. L. p. 242), being an act pertaining to execution, will be construed in connection with other acts on subject of execution.

5. EXECUTION \Leftrightarrow 420½, New, vol. 10 Key-No. Series—STATUTES—CONSTRUCTION.

Act March 16, 1916 (P. L. p. 242), authorizing issuing of execution "where wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor," does not authorize such order against rents.

Action by Susanna B. Trapp against Mildred J. Brown. Judgment for plaintiff, and upon the return of execution unsatisfied plaintiff petitioned for order that execution issue against certain rents. Order issued, and defendant moves to vacate the order. Vacated, and execution issued thereunder set aside.

Argued November term, 1917, before SWAYZE, TRENCHARD, and MINTURN, JJ.

Martin V. Bergen, of Camden, for plaintiff. Bourgeois & Coulomb, of Atlantic City, for defendant.

MINTURN, J. The plaintiff having obtained a judgment against defendant for \$710 damages, besides costs, and having issued execution against the defendant, presented a petition to one of the Justices of this court, alleging the recovery of the judgment and the issuing of execution, which was returned unsatisfied. It further alleged that defendant is owner of a certain hotel property at Atlantic City, from which she receives at stated times the sum of \$4,250 annually; that the installment of rent due June 15, 1917, has not been paid, and she

prays for an order, directing the issuing of an execution against any sum in the hands of the agents collecting the rents due to defendant from the tenant in possession of the premises. The order was made that such an execution issue, and providing that it be levied against "the debts and rents now due or hereafter to become due" from the said property "to the full amount thereof, until the amount of said judgment, with costs of this motion to be taxed, are paid, and also against the debts, if any, due [by the real estate agents] to the defendant, to the full amount thereof until the amount of said judgment with costs are paid." Thereafter notice was given in behalf of defendant for a vacation of the order, which motion now presents the proceedings to this court.

[1] We think under *Key v. Paul*, 61 N. J. Law, 133, 38 Atl. 823, the matter is properly before us on this motion. The act which presents the basis for the proceeding is P. L. 1916, p. 242, c. 113, the title of which is anomalous. It provides (section 1) for the issuing of an execution, by order of a judge or court, upon an unsatisfied judgment, after the return of an execution unsatisfied, "where any wages, debts, earnings, salary, income from trust funds, or profits are due and owing to the judgment debtor," or "shall thereafter become due and owing to him to the amount of eighteen dollars or more per week."

[2] The act itself is in derogation of the procedure at common law, and takes from a debtor and his creditors, regardless of priorities, property in invitum, and without hearing or a notice thereof to creditors. The procedure therefore must be in strict compliance with the express requirements of the statute, and no intendment will be made to enable the court or a judge to assume jurisdiction, in the absence of the jurisdictional facts properly evidenced. *Sinnickson v. Johnson*, 17 N. J. Law, 129, 34 Am. Dec. 184; *Eayre v. Earl*, 8 N. J. Law, 359; *Adler v. Turnbull Co.*, 57 N. J. Law, 62, 30 Atl. 319; *Westfall v. Dunning*, 50 N. J. Law, 459, 14 Atl. 486.

[3] It is doubtful, to say the least, whether the act in question was intended to apply to a situation such as is presented here. While the petition alleges the return of the execution unsatisfied, the inquiry nevertheless arises why, where the real estate from which this alleged revenue is derivable, is the property of the defendant, the writ of execution upon a proper levy should not produce the amount of the execution. No explanation of that jurisdictional fact is obtainable from the petition. So that upon its face the defendant is seised of real property which is subject to execution, and which, for some reason not explained by the record, is not subjected to a levy. The mere formality of issuing an execution and having it returned pro forma unsatisfied is not the jurisdictional fact which the statute requires as

sine qua non to a resort to this exceptional method of procedure. There must appear from the petition, as a jurisdictional fact, that a bona fide effort to collect by execution had been made, and failed, before resort can be had to the provisions of this legislation. The petition in this instance leaves it inexplicable why a defendant, confessedly seised of a valuable parcel of real estate, at Atlantic City, from which an income of \$4,250 annually is derived, should not, upon execution and levy thereunder, be forced to satisfy the judgment from the real estate.

[4] The act under consideration must, as an act dealing with a cognate subject, be construed in pari materia with other acts dealing with the subject of executions. *Newark Bank v. Assessor*, 30 N. J. Law, 13; *Farrell v. State*, 54 N. J. Law, 421, 24 Atl. 725. Therefore the proof required for the making of the order in question must, in the language of the act, be "satisfactory proof of such facts by affidavits or otherwise."

In *Githens v. Mount*, 64 N. J. Law, 166, 44 Atl. 851, this court held that to warrant the making of an order of this character, in proceedings supplementary to execution, the petition must be supported by legal evidence. The present Chief Justice, writing the opinion, says:

"The act requires proof of the facts upon which the application for the injunction is based, and 'proof,' when used in a legislative enactment, means legal evidence upon which judicial action may be rested."

The cogent force of this requirement becomes particularly apparent upon the meager facts presented by the petition, because while it becomes manifest that the defendant is the owner of property amply capable of satisfying an execution, for the amount involved, it is nowhere explained whether the property is incumbered, or what the equity of the defendant therein may be. Nor is it made apparent whether other and prior lienors to this judgment creditor may not be entitled to a preference over this plaintiff as to that particular fund. The result may be that upon a mere ex parte application of this nature, without notice or hearing to any party in interest, the vested rights of prior lienors may be eliminated and in effect subverted. In such a situation, a party whose interests would be injuriously affected might well insist that there was an absence of due process of law, and successfully invoke that provision of the Fourteenth Amendment of the federal Constitution as a barrier to the deprivation of his rights. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. Ed. 1027. A proceeding in discovery in aid of execution in accordance with section 23 of the execution act (2 C. S. p. 2249) would obviate those contingencies and difficulties, and furnish the "satisfactory proofs" required by the act of 1916, as a basis for the order in question, in accordance

with the determination in *Githens v. Mount*, supra.

[5] We think also that fundamentally the proceeding is not warranted by the provisions of the act of 1916. As has been observed, it specifies the character of income, an order may be issued to reach, as "wages, debts, earnings, salary, income from trust funds, or profits." This enumeration manifestly confines the assets reachable by such process within a designation or classification which is limited to the personal earnings, trust funds, and profits of the debtor. In no part of the act does it refer to real estate of the debtor, or rents therefrom, which terms at all times have borne a distinctive legal status and characteristic, and have been subject to the application of different legal principles, from those rules applicable to personal property; for, notwithstanding judicial refinements and statutory innovations, the basic conceptions incident to *jus in rem* and *jus in personam* of the civil, feudal, and common law still subsist as the fundamental characteristics of jurisprudence. It will be presumed, therefore, that, where the Legislature in its enactment distinctly classifies one species of property, peculiarly personal to the debtor, and fails to enumerate another species, non ejusdem generis, and not distinctively personal to the debtor, its omission of the latter species was due to an intent to eliminate it from the purview of the act. *Livermore v. Freeholders*, 29 N. J. Law, 245.

A rule equally cogent since the days of Lord Hale, is that of "*noscitur a sociis*," which construes the specific language employed with reference to its subject associates, so that when a subject-matter of distinctive characteristics is specifically mentioned, to the exclusion of another species of equally well-defined characteristics, in the absence of some general provision sufficiently comprehensive to include it, the latter class will not be included in the generic designation. *Hay v. Coventry*, 3 T. R. 87; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287.

For these reasons we have concluded that the petition is defective; that the rule granted must be vacated, and the execution issued thereunder be set aside, with costs.

(33 N. J. Law, 244)

MURPHY v. BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY.

(No. 61.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. CERTIORARI §=25—REMOVAL OF OFFICER.

A public officer in the occupation or possession of his office may maintain certiorari to remove from his way a proceeding, which he apprehends may be used unlawfully, to eject him or disturb him in the tenure of his office. *Moore v. Borough of Bradley Beach*, 87 N. J. Law, 391, 94 Atl. 316, followed and approved.

2. OFFICERS §=69, 71—REMOVAL—AUTHORITY.

A county counsel, whose term of office is fixed by law, cannot be removed by a board of chosen freeholders in this state. There is no statute in New Jersey authorizing the board to make such a removal. A power of removal cannot be implied, as an incident to the power of appointment. No such power of removal exists, where the term of office is fixed by law, unless expressly given by the statute.

Appeal from Supreme Court.

Certiorari by James J. Murphy against the Board of Chosen Freeholders of the County of Hudson. From a dismissal of the writ (102 Atl. 896), the prosecutor appeals. Reversed.

Gilbert Collins, of Jersey City, for appellant. John J. Fallon, of Hoboken, for appellee.

BLACK, J. The board of chosen freeholders of Hudson county on the 7th day of January, 1918, by a resolution dismissed James J. Murphy, the prosecutor, as county counsel. The legality of this resolution is drawn in question by the certiorari issued out of the Supreme Court. The Supreme Court dismissed the writ of certiorari. The prosecutor appeals to this court to review that judgment.

The resolution is in these words:

"Resolved that the services of James J. Murphy as county counsel be dispensed with from and after the passage of this resolution; and he is hereby relieved of further duties. Be it further resolved, that he be and he is hereby dismissed and deposed as such."

The record reveals these pertinent facts: Mr. Murphy was in the occupation or possession of the office of county counsel, under previous appointments, when on December 4, 1916, he was reappointed by the board, as then constituted, under the Act of P. L. 1900, p. 168, for the term prescribed by law, which under paragraph 11 was for a term of two years. He filed a bond as required by law. On January 7, 1918, at 11 o'clock in the morning of that day, he took, subscribed, and filed an official oath, as county counsel, as required by the act of Legislature, P. L. 1906, p. 13, c. 3. He did not file such oath before the commencement of his term of office, December 4, 1916. The resolution of dismissal was adopted some time after, but on the same day that the official oath was filed, without notice to or an opportunity by Mr. Murphy to be heard, and so far as the record discloses without cause, six members of the board who were in office when the prosecutor was appointed had retired, and six others, elected in their stead, participated in the meeting, at which the resolution of dismissal was adopted on January 7, 1918. There is no statute of this state authorizing a removal of an officer, whose term of office is fixed by law, by the board of chosen freeholders; although by the

Act P. L. 1885, p. 185, 1 Comp. Sta. p. 504, par. 109, the board has power to remove from office any person who holds office, in subordination to or by appointment from such board, in all cases where the term of such office is not fixed by a statute of this state. But this statute is subject to the provisions of the Civil Service Act, 3 Comp. Sta. of N. J. p. 3795, § 57, P. L. 1908, p. 235, which was adopted by the county of Hudson on November 7, 1911.

[1] At the outset a preliminary question is raised and argued, viz. whether a writ of certiorari is the proper remedy for the prosecutor to pursue. Our answer to this question is that it is the settled law and practice of the state to issue the writ of certiorari to review proceedings of this nature. In an opinion by Mr. Justice Parker, in the well-considered case of *Moore v. Borough Bradley Beach*, 87 N. J. Law, 291, 94 Atl. 316, following and approving *Bradshaw v. City Counsel of Camden*, 89 N. J. Law, 416, it was said that a public officer in possession of his office may maintain certiorari to remove from his way a proceeding, which he apprehends may be used unlawfully, to eject him or disturb him in the tenure of his office.

[2] This brings us to the meritorious question involved in this case, which is: Can a county counsel, whose term of office is fixed by law, be removed from office by a board of chosen freeholders in this state, in the absence of a statute authorizing such removal? Our answer to this question must be no, both on principle and authority. It is a well-established principle in the law of municipal corporations that they have only such powers of government as are expressly granted to them, or such as are necessary to carry into effect those that are granted. No powers can be implied, except such as are essential to the objects and purposes of the corporation, as created and established. *Ottawa v. Carey* 108 U. S. 121, 2 Sup. Ct. 361, 27 L. Ed. 669.

A power to remove officers having a fixed term is not incident to the power of appointment. *People v. Healy*, 231 Ill. 629, 83 N. E. 453. A power of removal is an incident to the power of appointment, only to those cases, where the officer is held at the pleasure of the appointing power. *Collins v. Tracy*, 38 Tex. 548. No such power of removal exists unless expressly given by the Legislature. *Danforth v. Kuehn*, 34 Wis. 229, 233. Removal of an officer of a municipal corporation appointed for a fixed term can be exercised legally only by virtue of express power. 2 *McQuillan, Municip. Corp.* par. 554, p. 1213. The Supreme Court of Michigan said: We have not found any case where an officer, who was appointed for a fixed term and when the power of removal was not expressly declared by law to be discretionary, has been held to be removed,

except for cause, and, wherever cause must be assigned for the removal of the officer, he is entitled to notice and a chance to defend. *Hallgren v. Campbell*, 82 Mich. 255, 46 N. W. 381, 9 L. R. A. 408, 21 Am. St. Rep. 557.

This principle, as applied to the removal of public officers, has been discussed and recognized in a long line of cases; thus in our own courts: *Clark v. Ennis*, 45 N. J. Law, 69; *State v. Pritchard*, 36 N. J. Law, 101, 111; *Haight v. Love*, 39 N. J. Law, 14, 21, affirmed 39 N. J. Law, 476, 23 Am. Rep. 284. In other states: *Townsend v. Kurtz*, 83 Md. 331, 34 Atl. 1123; *Fleld v. Malster*, 88 Md. 691, 697, 41 Atl. 1087; *State ex rel. Redfield v. Chatburn*, 63 Iowa, 859, 19 N. W. 816, 50 Am. Rep. 760; *Fleld v. Commonwealth*, 32 Pa. 479; *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648; *Richards v. Clarksburg*, 30 W. Va. 491, 501, 4 S. E. 774 (in that case, however, it was said that the power to remove a corporate officer from his office is one of the common-law incidents of all corporations); *Wright v. Gamble*, 136 Ga. 376, 71 S. E. 795, Ann. Cas. 1912C, 372, 35 L. R. A. (N. S.) 866, note; 11 Cyc. p. 428; 29 Cyc. p. 1409; *Mechem. Pub. Officers*, par. 454; 2 *Dill. on Municipal Corp.* (5th Ed.) par. 473, p. 791.

Without extending this discussion, it may not be amiss to say that the resolution is particularly vicious in the present case, because it is based upon the assumed power of the board of chosen freeholders to dismiss a man from office who is apparently in the possession of it for a fixed term; and that without any charges laid against him, without any opportunity afforded to him to be heard, and without any suggestion of the basis upon which the action of the board was rested. As was said by Mr. Justice Van Syckel in the case of *Clark v. Ennis*, 45 N. J. Law, 69, 78:

"The necessity for the interposition of some tribunal to declare the default is inherent. * * * In the absence of statutory provision, the only mode in which an office can be deemed and taken to be vacant is by proceedings in the nature of quo warranto." *Bumsted v. Blair*, 73 N. J. Law, 378, 64 Atl. 691.

This renders a discussion of the other points argued unnecessary. The resolution of the 7th day of January, 1918, is set aside as null and void.

The judgment of the Supreme Court dismissing the writ of certiorari is reversed, with costs.

(32 N. J. Law, 125)

STATE v. SAMAHA.

(Supreme Court of New Jersey. July 31, 1918.)

1. FALSE PRETENSES — 12 — ELEMENTS OF OFFENSE—OWNERSHIP.

In prosecution for obtaining money by false pretenses, it is no defense that, as the pretenses as to value of a stone were made and acted upon, and the sale made on Sunday, title to the stone and to the money paid therefor did

not pass, because the false pretense, and not the contract, is the basis of the prosecution, and actual ownership is immaterial.

2. INDICTMENT AND INFORMATION \S 139 — **MOTION—TIME.**

Since the criminal procedure act requires motion directed against validity of the indictment to be made before the jury is sworn, such a motion, at the conclusion of prosecuting witness' testimony, is properly overruled.

3. CRIMINAL LAW \S 753(2)—**DIRECTION OF VERDICT—VARIANCE.**

Accused, if he desires to take advantage of a variance between the indictment and the proof, or of the insufficiency of the evidence, should do so by motion to direct verdict at the close of the state's case, or of the entire case.

4. FALSE PRETENSES \S 49(1) — **EVIDENCE — SUFFICIENCY.**

Evidence held to sustain conviction of obtaining money by false pretenses.

5. CRIMINAL LAW \S 1056(1)—**PRESERVATION OF EXCEPTIONS—INSTRUCTIONS.**

Where no general exception nor exception to the portion of the charge complained of was taken, alleged error in the charge is not properly before the court on writ of error.

6. FALSE PRETENSES \S 52—**INSTRUCTIONS.**

In prosecution for obtaining money by false pretenses in sale of "Kunzite" stone, aided by circular containing extracts from "Prof. Kunz's Book on Mineralogy," descriptive of the stone, where a witness testified that Prof. Kunz had written no such book, and accused's counsel admitted that the circular was not a copy, but a condensation, and accused's wife testified that she did not think the circular was copied from the book, accused was not entitled to instruction that there was no evidence on the subject of the circular.

7. CRIMINAL LAW \S 1173(2)—**HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.**

In prosecution for obtaining money by false pretenses in sale of "Kunzite" stone, aided by circular containing extracts from "Prof. Kunz's Book on Mineralogy," where a witness testified that Prof. Kunz had written no such book, and accused's counsel admitted that circular was not a copy, but a condensation, and accused's wife testified that she did not think the circular was copied from the book, accused was not harmed by refusal of instruction that "it was important for the state to show that the circular did not correspond with the book."

8. CRIMINAL LAW \S 1129(1) — **ASSIGNMENT OF ERROR.**

If accused desires to take advantage of the irregularity of the court's going to the jury room to instruct on reasonable doubt, he should make it the subject of an assignment of error.

9. CRIMINAL LAW \S 855(8) — **CONDUCT OF COURT—GOING TO JURY ROOM.**

It is highly improper and irregular for the judge, having omitted to charge upon reasonable doubt, to go into the jury room and give such a charge, notwithstanding it was favorable to defendant.

Error to Court of Quarter Sessions, Atlantic County.

Abraham Samaha was convicted of obtaining money under false pretenses, and he brings error. Affirmed.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

John J. Orandall, of Atlantic City, for plaintiff in error. Charles S. Moore, of Atlantic City, for the State.

KALISCH, J. The judgment of the court below is before us on a strict writ of error and bills of exceptions. The defendant below was convicted of obtaining money under false pretenses upon an indictment based on section 186 of the Crimes Act (2 Comp. Stats. p. 1800), which statute provides as follows:

"Any person who, knowingly or designedly, by color of any false token, counterfeit letter or writing, or false pretense or pretenses, shall obtain from any person money, wares, merchandise goods or chattels, or other valuable thing with intent to cheat or defraud any person, body politic or corporate of the same shall be guilty of a misdemeanor."

The transaction in which the alleged false pretense was made, by the defendant, occurred on a Sunday. The defendant kept posted a placard in the show window of his store, situate on the boardwalk, in Atlantic City, advertising the sale of Kunzite stones. According to the testimony a Kunzite is a natural stone, lilac in color, and is classed among the semiprecious stones. Its value varies in proportion to its brilliancy, ranging from \$2 to \$50 a carat. The prosecutor entered the defendant's store to make a purchase, and asked for a Kunzite stone. The defendant showed him a stone, and represented it to be a genuine Kunzite worth \$2 a carat, and during the negotiations of sale handed the prosecutor a printed description of its qualities. The stone weighed one carat and a half, and the prosecutor relying upon the defendant's representations that it was genuine Kunzite and of the value of \$2 a carat, bought it, and paid the defendant \$3 therefore. The stone, subsequently, proved upon test, to be common glass, artificially made to represent Kunzite, and was worth only a few cents.

[1] First, it is argued that, the transaction between the parties having taken place on Sunday, "the defendant did not obtain title and proprietary right to the \$3, and the complainant did not become the owner of the gem, and that, in order to constitute the offense of obtaining money or goods under false pretenses, it must appear that the complainant was induced to part with property, actual ownership," and that this does not appear. The fallacy of this proposition is manifest. "Actual ownership" of the money or goods by the person upon whom the cheat is practiced is not essential. It is sufficient if he had lawful possession and dominion of the same. If the cheat had occurred on Monday the legal title to the money or goods parted with would not have passed. The fact, therefore, of the cheat being perpetrated on Sunday adds no force to the situation.

The unsoundness of the position taken by counsel of plaintiff in error on the legal effect of the Sunday transaction upon the cheat which was the inducement to the sale is due, first, to the attempt to apply in a criminal prosecution legal rules, governing contracts made and completed on a Sunday, which are

only applicable to civil actions inter partes; secondly, in assuming that the unlawful contract is the basis of the indictment, whereas the underlying foundation is the false pretense, with intent to cheat, and the carrying of that intent into execution which the Legislature has denounced as a misdemeanor, regardless of the day on which it takes place; thirdly, in utterly ignoring the prime fact that the offense committed is against the public, in the prosecution of which the state is the sole party in interest.

The second assignment of error is that the court ruled that the evidence of the complaining witness supported the indictment. The legal propriety of this ruling is assailed by counsel of defendant upon two grounds: (1) That the complaining witness did not testify that he relied on the statements of defendant that the stone was Kunzite; (2) that the witness did not testify that he relied upon the verity of the correspondence of the terms used in Exhibit S2, hereinafter referred to, with the language of any book whatever. An examination of the record shows that this assignment is not well founded. It appears from the record that, after the complaining witness had finished his testimony, counsel of defendant made the following statement:

"If your honor please, under the indictment, it shows that the thing that influenced him was the reason that the advertisement was not fulfilled; that the stone did not fulfill the description in the advertisement. Now the witness himself says that he was not influenced by it at all. (A colloquy then ensued between court and counsel, but it nowhere appears that any motion was pending before the court calling for a ruling.)

"The Court: I think, Mr. Crandall that the testimony so far is in accord with the indictment. I can't see that there is any difference.

"Mr. Crandall: But he don't say he was influenced by this at all, and the indictment says that was his sole influence. (Motion overruled.)"

[2, 3] To this an exception was sealed by the court. What the overruled motion was does not appear, except from the language used by the court that the objection to the indictment came too late. If it was the overruling of a motion directed against the validity of the indictment, the action of the trial judge in disposing of the motion was proper. The Criminal Procedure Act directs that such a motion must be made before the jury is sworn. If, on the other hand, the object of the motion was to take advantage of a variance between the proof and the allegations in the indictment, or because of the insufficiency of the proof to sustain the indictment, then the proper course to pursue was to move for a direction of a verdict for the defendant at the close of the state's or the entire case, upon the grounds specified. But, assuming that what was said by counsel during the colloquy with the court properly raised the question of the sufficiency and variance of the proof to sustain the indictment,

and examination of the testimony shows that the motion was without merit, and hence was properly overruled.

[4] The indictment sets out three separate and distinct false pretenses, with intent to cheat, the proof of any one of which with the intent specified was sufficient to sustain the indictment and conviction thereon. The complaining witness testified that the defendant represented the stone to be Kunzite and of the value of \$2 a carat, and tested the stone with acid in the presence of the witness, and, immediately after the test, made a remark to the witness to the effect that the stone showed the proper acid test, and when on cross-examination the witness was asked, "Well, then, the only thing that influenced you to part with your \$3 was the representation that it was a Kunzite stone?" he replied, "Yes, and that—" In addition to the testimony of the complaining witness the state introduced ample testimony tending to establish a cheat perpetrated by the defendant.

[5] The third assignment of error challenges the legal propriety of a comment made by the trial judge in his charge to the jury, but, as there was no general exception taken to the charge, nor any exception taken to the portion of the charge complained of, as erroneous, the matter is not properly before us. We have, however, examined the portion of the charge complained of, and find no legal impropriety in what the court said regarding the interest the state had in prosecuting offenses of the kind alleged against the defendant.

The fourth assignment of error is based upon the refusal of the court to charge the following request:

"The court is asked to instruct the jury that it is important for the state to show that the bulletin in the indictment does not correspond with the text of the authority of the book that it was taken from. They have especially alleged that that is not like what the author authorized them to put in, and they have not introduced any evidence on that subject at all. Therefore I ask that the court will instruct the jury to that effect."

The bulletin referred to is the exhibit designated Exhibit S2, and was the circular handed to the complaining witness while purchasing the stone. This circular contained a caption, as follows: "Copied from Prof. Kunz's Book on Mineralogy." Then followed a florid description of the qualities of the Kunzite. A witness for the state testified that there was no work on mineralogy by Prof. Kunz. There appears to a work by Prof. Kunz on "Curious Lore of Precious Stones." Counsel for defendant claimed to have such a book in his possession at the trial, but when challenged by the prosecutor of the pleas to point out the page in the book from which the bulletin was copied, he conceded that the circular was not an exact copy, but was condensed and diluted. All this took place while the defendant's wife

was on the witness stand, and she testified that she did not think the circular was copied from the book. It further appears that the court refused to receive the book in evidence upon two grounds: First, that it was not a work on mineralogy, and therefore not the book from which the circular alleges it was copied; and, second, because there is no such matter in the book as is contained in the circular. Although counsel of defendant took an exception to the ruling of the court, no error was assigned upon this exception.

[8-9] In this situation the defendant was not legally entitled to an instruction to the jury that there was no evidence at all before the court on the subject of the circular. Nor does it appear that the defendant sustained any harm from the refusal of the court to tell the jury "that it was important for the state to show that the bulletin in the indictment does not correspond with the text of the authority of the book it was taken from," in face of the admission of counsel that it did not correspond with the text of the book he had in his possession, and the testimony on part of the state that Prof. Kuns never wrote any book on mineralogy.

The fifth assignment of error has no exception to support it. There was no motion made to direct a verdict of acquittal upon the ground that the evidence did not tend to establish the offense charged in the indictment. The matter argued under this assignment, in the brief of counsel for defendant, relates to the following episode. After the jury retired from the bar, the court said:

"I have overlooked charging the jury on reasonable doubt. Shall I have the jury brought back or go to the jury room?"

"Mr. Orandall: You better go to the jury room, I guess."

Whereupon the judge went to the jury room, and charged the jury that the defendant was entitled to the benefit of a reasonable doubt. This irregularity is not properly before the court for review, under this assignment, as it is not embraced within the scope of the error alleged therein. If advantage of the irregularity complained of was intended to be taken, by counsel of defendant, it should have been made the subject of an assignment of error, which was not done. But since it appears on the face of the record that the judge did go into the jury room after the jury had retired thereto, to deliberate upon their verdict, it seems well for us to state here that the action of the court was highly improper and irregular, and is not palliated by the fact that what he said to the jury was favorable to the defendant; and were it not for the circumstance that the act of the court in going into the jury room was at the suggestion and with the consent of counsel of defendant, it might have resulted in vitiating the verdict of the jury.

The judgment is affirmed.

(31 N. J. Law, 517)

BUCKALEW v. BOARD OF CHOSEN FREEHOLDERS OF MIDDLESEX COUNTY.

(Court of Errors and Appeals of New Jersey. June 17, 1918.)

(Syllabus by the Court.)

1. COUNTIES \S 141 — PRIVATE ACTION AGAINST PUBLIC CORPORATION.

In the absence of a statute imposing liability, an action will not lie in behalf of an individual who has sustained a private injury by reason of the neglect of a public corporation to perform a public duty.

2. COUNTIES \S 141 — PRIVATE ACTION FOR PUBLIC WRONG—SPECIAL DAMAGE.

In the absence of a statute imposing liability, a public corporation, charged with the performance of a public duty, is not liable to an individual either for neglect to perform, or negligence in the performance of, such duty, whereby a public wrong has been done for which indictment will lie, although such individual has suffered special damage.

3. COUNTIES \S 141—LIABILITY FOR PRIVATE INJURY—NOTICE.

When a public corporation is not liable for private injury to an individual, previous notice to the municipal authorities of the condition which caused the injury will not operate to impose liability.

4. HIGHWAYS \S 187(1) — PERSONAL INJURIES—LIABILITY.

As the plaintiff's injury did not result from any active wrongdoing of the defendant, a public corporation, he cannot recover.

Appeal from Supreme Court.

Action by John P. Buckalew against the board of Chosen Freeholders of Middlesex County. From a judgment for defendant, plaintiff appeals. Affirmed.

Edmund Hayes, of Atlantic City, and Russell B. Watson, of New Brunswick, for appellant. Frederick F. Richardson, of New Brunswick, for appellee.

WALKER, C. Plaintiff was injured on the night of February 1, 1915, as the result of an accident caused by an automobile, which he was driving, running into a hole in the road known as the Woodbridge and New Brunswick turnpike in Middlesex county, a county road.

The director of the board of chosen freeholders of Middlesex had been notified about a month before the accident of the condition of the highway at the point where it happened, and had received three notices of such condition during that month. Each rain caused a washout, and it was the practice of the board of freeholders to repair the holes thus made by filling them up with sand, which would be washed out by the next storm. The board of freeholders had been requested by a person living in the vicinity to erect a retaining wall to prevent these washouts. After the accident to the plaintiff, the highway, at the point of the accident, was cemented, after which the road remained firm, and there were no further washouts.

At the conclusion of plaintiff's case, the court directed a nonsuit, to which plaintiff excepted. The contention of the plaintiff is that the conduct of the board of freeholders in repairing this road in the manner in which it did, so that a washout occurred with each successive rain storm, and with knowledge that such washouts would occur, amounted to active wrongdoing. Unless the facts in the case at bar bring it within the authorities which hold municipal corporations liable for damages to those suffering injury from the active wrongdoing of their agents, the plaintiff cannot prevail, and the nonsuit was right.

[1] In *Livermore v. Board of Freeholders of Camden*, 81 N. J. Law, 507, Chief Justice Beasley, speaking for this court, said at page 508:

"That an action will not lie in behalf of an individual who has sustained special damage by reason of the neglect of a public corporation to perform a public duty I consider the settled law of this state. This was the doctrine approved of by the Supreme Court, after much research and a careful consideration of the authorities, in the case of *Strader v. Board of Freeholders of Sussex*, 3 Harr. 108, and the same principle was reaffirmed in the case of *Cooley v. Freeholders of Essex*, 3 Dutcher [27 N. J. Law] 415. These decisions, in my judgment, rest upon the solid foundations of ancient precedent and public policy."

This doctrine has been repeatedly reaffirmed.

[2] In *Hart v. Freeholders of Union*, 57 N. J. Law, 90, 29 Atl. 490, Mr. Justice Magie, afterwards Chief Justice and Chancellor, speaking for the Supreme Court, remarked that it has been uniformly held by our courts that in the absence of a statutory provision a municipal corporation charged with the performance of a public duty is not liable to an individual for neglect to perform it or negligence in the performance of such duty, whereby a public wrong has been done for which indictment will lie, although such individual has suffered special damage, and also said that Mr. Justice Garrison had collected all the cases in *Waters v. Newark*, 56 N. J. Law, 861, 28 Atl. 717, in which it was held:

"The neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect. In such a case the circumstance that an individual specially injured gave notice to the municipal authorities is of no avail, if the special injury was, in fact, part of an indictable offense."

And Mr. Justice Magie observed in *Hart v. Freeholders*, 57 N. J. Law, at page 92, 29 Atl. 490:

"The exemption of municipal corporations from liability to such actions has been put by our courts on the ground of ancient precedent and public policy. *Livermore v. Freeholders*, 5 Dutcher [29 N. J. Law] 245; *s. c.*, 2 Vroom [81 N. J. Law] 507. That public interest is deemed to be conserved by this exemption from liability seems apparent from the fact that the

Legislature may at any time impose such liability on municipal corporations, and has failed to do so except in a few instances. The legislation giving to boards of chosen freeholders the right to acquire and maintain public highways out of which the public duty charged in this count must arise, if at all, does not impose on such boards any liability to such actions."

In *Jersey City v. Kiernan*, 50 N. J. Law, 248, 18 Atl. 170, it was held that the rule that when a public sewer breaks from faulty construction, and private property is injured thereby, an action will not lie, but if the city be notified of such break it then owes a duty to the individual injured and for the breach of which an action will lie, but only when the break in the sewer occasions a private nuisance, for if a public nuisance be the result the only remedy is by indictment. In the case at bar the plaintiff suffered a private injury, but only as one of the public, for the nuisance was public, and as such was remediable by indictment.

The plaintiff appellant contends that the case at bar is within the doctrine of *Hart v. Freeholders of Union*, supra, *Kehoe v. Rutherford*, 74 N. J. Law, 659, 65 Atl. 1046, 122 Am. St. Rep. 411, and *Bailey v. Osborn*, 80 N. J. Law, 333, 78 Atl. 9, Ann. Cas. 1912A, 454, and that these cases sustain his contention and right to recover. The doctrine of *Hart v. Freeholders of Union* does not aid the plaintiff, but is an authority the other way, as above pointed out. *Kehoe v. Rutherford*, in this court, opinion by Mr. Justice Trenchard, is an authority of the same kind for there the exemption of a municipality from actions by individuals suffering special damage from its neglect to perform, or its negligence in performing, public duties, was expressly recognized and reaffirmed, while it was held, on the particular facts of that case, that an action lay for the diversion of surface water by a municipality from the course it would otherwise take, and casting it in a body large enough to do substantial injury on land, where, but for an artificial drain, it would not go. The lands and property damaged were those of the plaintiff, *Kehoe*; they were not public property in any sense, and the damage, consequently, was that suffered by the owner alone, dissociated from his membership in the general public.

In *Bailey v. Osborn*, after certain drainage work had been done by commissioners appointed under the statute, the defendants cleaned out a ditch that had been dug and threw the refuse upon the plaintiff's land. Mr. Justice Swayze, speaking for this court (80 N. J. Law at page 334, 78 Atl. 9, Ann. Cas. 1912A, 454), observed that there was nothing to show that the borough of Atlantic Highlands had in any way acquired a right to throw refuse from a ditch upon the plaintiff's land, that the parties committing the trespass must answer in damages, and that a municipal corporation is liable for such

misconduct is settled in this state, citing *Hart v. Freeholders of Union and Kehoe v. Rutherford*, supra.

[3] The highway in question was a public road, the duty of constructing and maintaining which is imposed upon the board of chosen freeholders; but there is no statute imposing upon the board liability for damages incident to the road falling out of repair, and that is this case. Not only the plaintiff, but every one else using the highway, was liable to suffer the same injury at the same place by reason of the depression caused by the washout resulting from rain. It is true that a person living in the vicinity repeatedly notified the director of the board of freeholders of these washouts, and on at least one occasion requested that a retaining wall be placed there to prevent them. After the accident the road was actually repaired with cement in the wash-out area, and has not since given way; but those things do not operate to impose a liability, which can only be created by statute.

It is not suggested that the board of freeholders were required by law, statutory or otherwise, to repair the road with any particular kind of material; but even if the board were so required, and it were shown that other material was used, the plaintiff would have to go further and rest upon a statute which enacted that liability for damages would be visited upon the board for failure to repair with the given material, and, admittedly, there is no such statute. If the repairs were made with material which in and of itself would cause injury, a different question would doubtless be presented; but there is neither proof nor suggestion of anything of that kind in the case. Unless and until the Legislature interferes, if it ever sees fit to do so, liability in the class of cases in which that under consideration is one will not attach to public corporations for the result of accidents growing out of a want of repair of public highways.

[4] As the plaintiff's injury did not result from any active wrongdoing of the defendant corporation, he cannot recover. It follows that the nonsuit was right, and the judgment under review should therefore be affirmed, with costs.

(39 N. J. Eq. 121)

ATWATER v. BASKERVILLE et al.*
(No. 44/233.)

(Court of Chancery of New Jersey. May 16, 1918.)

1. JUDGMENT \Leftarrow 326 — AMENDMENT NUNC PRO TUNC.

Where the court adjudicated a corporation insolvent, but by oversight such adjudication does not appear in its order appointing the receiver for the corporation, such order may be amended nunc pro tunc.

2. CORPORATIONS \Leftarrow 684 — FOREIGN — RECEIVERS—JURISDICTION TO APPOINT.

Under Corporation Act (2 Comp. St. 1910, p. 1640) §§ 65 and 66, providing for adjudication of corporate insolvency and appointment of receivers, and section 96, providing that foreign corporations doing business in the state shall be subject to the act so far as it can be applied, a receiver may be appointed for the property in this state belonging to an insolvent foreign corporation.

3. CORPORATIONS \Leftarrow 684 — FOREIGN CORPORATIONS — RECEIVERS — APPOINTMENT AT DOMICILE.

The jurisdiction to appoint a receiver of the property of an insolvent foreign corporation does not depend upon whether or not a receiver has been appointed in the state of the corporation's domicile nor its being there adjudicated insolvent.

4. CORPORATIONS \Leftarrow 687 — JURISDICTION — PARTIES — PROPERTY — FOREIGN CORPORATIONS.

Where the bill brought by the receiver of a foreign corporation is one which could have been brought by the corporation to set aside a fraudulent conveyance, and all defendants could be served in the state, and the property to be affected is all in this state, the jurisdiction lies here.

Suit by Edward S. Atwater, Jr., as receiver of a New York corporation, against the Jersey Co-operative Realty Company, Marwood R. Baskerville, and others. Order to show cause why, pending determination of the suit, a sale under mortgage foreclosure should not be stayed upon equitable terms. Order made absolute, and injunction continued to final hearing upon securing payment of mortgage judgment.

Foster M. Voorhees, of Elizabeth, for the motion. Clarke McK. Whittemore, of Elizabeth, and Abram H. Cornish, of Newark, opposed.

LANE, V. C. The suit is brought by the receiver of a New York corporation, appointed by this court on November 5, 1917, against the Jersey Co-operative Realty Company, Marwood R. Baskerville, William J. Shearer, Carrie M. Shearer, his wife, Elizabeth Heights Realty Company, Benjamin A. Vall, as trustee in bankruptcy of said William J. Shearer, and the sheriff of the county of Union. It charges that on December 11, 1915, the Jersey Co-operative Realty Company was the owner in fee of certain premises; that on such day the company was insolvent, and had suspended its ordinary business; that for the purpose of hindering, delaying, and defrauding creditors and stockholders, and without consideration, defendant William J. Shearer, who was the president of the company and one of its directors, the other directors being William J. Shearer, Jr., and Armwell W. Lassell, caused the company to transfer the said premises to him; that on December 24, 1915, William J. Shearer and wife conveyed the premises to the Elizabeth Heights Realty Company, a corporation of New Jersey; that the Elizabeth Heights Realty Company was a mere

\Leftarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* For supplemental opinion, see 104 Atl. 647.

dummy for William J. Shearer, the directors being William J. Shearer and William J. Shearer, Jr., William J. Shearer being president, and William J. Shearer, Jr., treasurer and secretary, William J. Shearer owning all of the issued and outstanding capital stock; that at the time of the transfer the Elizabeth Heights Realty Company had full knowledge of the insolvent condition of the Jersey Co-operative Realty Company; that the conveyance to the Elizabeth Heights Realty Company was made without consideration and with intent to hinder, delay, and defraud the creditors of the Jersey Co-operative Realty Company; that on March 7, 1916, the Elizabeth Heights Realty Company conveyed the lands and premises, without consideration, to William J. Shearer; that on March 7, 1916, William J. Shearer and wife executed a mortgage to the defendant, Marwood R. Baskerville, to secure the payment of the sum of \$20,000 in five years, without interest; that Marwood R. Baskerville was a stockholder of the Jersey Co-operative Realty Company, and had full knowledge of its insolvency and of the fraudulent nature of the transaction; that on August 28, 1916, a mortgage theretofore held by the Mutual Life Insurance Company of New York for \$3,000 was assigned to Marwood R. Baskerville; that on October 12, 1916, Baskerville instituted proceedings in this court to foreclose the last-mentioned mortgage, with the result that a final decree was obtained, a writ of fieri facias issued, and sale advertised for November 14, 1917; that William J. Shearer on October 19, 1916, was adjudicated a bankrupt in this district, and a trustee appointed; that the complainant recognizes the validity of the mortgage previously held by the Mutual Life Insurance Company of New York; and that the creditors of the Jersey Co-operative Realty Company are able and willing to pay the amount due on the decree with all legal expenses, and will agree not to enforce the decree until the validity of the conveyances and the second mortgage shall have been determined. The bill challenges the validity of the conveyances and of the mortgage for \$20,000, and seeks a decree setting them aside. The bill charges that, if defendant Baskerville is permitted to proceed with his sale pending determination as to the validity of the conveyances and mortgage, the property will be sacrificed, and the creditors and stockholders of the Jersey Co-operative Realty Company injured. Upon the filing of the bill an order to show cause was allowed requiring defendants to show cause why, pending the determination of the suit, the sale under the decree for foreclosure should not be stayed upon equitable terms. Upon the return of the order there was no appearance except by the defendant Baskerville. There was no answer upon the facts. The defendant contends: (1) That the order appointing the receiver contains no adjudication of insol-

veny, and is therefore void upon its face; (2) that the court had no jurisdiction to appoint a statutory receiver for the foreign corporation in the original proceedings; (3) that the court has no jurisdiction of the subject-matter of the action, because it would result in an interference with the internal affairs of a foreign corporation.

[1] First. An examination of the order appointing the receiver discloses that there does not appear therein an adjudication of insolvency. The court did, in fact, adjudicate the corporation insolvent. The omission in the order was an oversight. It may be corrected by the entry of an order nunc pro tunc, amending the order appointing the receiver, by including therein an adjudication of insolvency.

[2] Second. Sections 65 and 66 of the act concerning corporations, Revision of 1896 (2 Comp. Stat. N. J. p. 1640), provides for the adjudication of corporations insolvent and the appointment of receivers. Section 96 provides that foreign corporations doing business in this state shall be subject to the provisions of the act so far as the same can be applied. 2 Comp. Stat. p. 1657.

Prior to the deliverance of the opinion of the Court of Errors and Appeals in the case of *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375, it appears not to have been doubted but that this court had power to appoint a receiver of a foreign corporation under sections 65 and 66 upon a finding of insolvency, nor but that the procedure was substantially the same as upon an application for the appointment of a receiver of a domestic corporation.

In *Albert v. Clarendon, etc., Co.*, 53 N. J. Eq. 623, 28 Atl. 8, the question was squarely presented. There the bill was filed against a corporation incorporated in England. The allegation was insolvency. A motion was made to dismiss. Van Fleet, Vice Chancellor, said:

"The defendant is a foreign corporation. Our statute concerning corporations declares that foreign corporations doing business in this state shall be subject to its provisions so far as the same can be applied to them. * * * The meaning of that section of the statute which I have quoted seems to me to be clear. It was enacted to give this court the same jurisdiction over foreign corporations doing business in this state, when they become insolvent and have property here, that it exercises over insolvent domestic corporations, so far, at least, as should be necessary for the sequestration of their property here, and converting the same into money. To authorize this court to appoint a receiver of an insolvent foreign corporation, it is not necessary that the corporation should be engaged in carrying on its business in this state on the very day when the bill or petition is filed, but this court may take jurisdiction in any case where it is made to appear that the corporation has done business here, and still has property here, although at the time when the bill or petition was filed its business here is entirely suspended. The obvious design of the statute is to give the creditors of any foreign corporation which, having done business in this state, becomes insolvent and has property here which should be administered for the benefit of its

creditors, the same remedy against the corporation, in respect to its property here that it gives to the creditors of an insolvent domestic corporation. Any other construction would, as it seems to me, defeat the main object of the statute and render it worthless."

In *National Trust Co. v. Miller*, 33 N. J. Eq. 155, at page 159, the same learned judge had made practically the same pronouncement. He had said:

"The legislative design was, unquestionably, to confer upon this court the same powers, in respect to insolvent corporations, created by foreign jurisdictions, having property in this state, that it exercised over insolvent domestic corporations, so far, at least, as the exercise of such powers was necessary to the recovery of any assets, whether legal or equitable, which should go in discharge of debts."

In *Irwin v. Granite State Provident Association*, 56 N. J. Eq. 244, 38 Atl. 680, where it appeared that prior to the filing of the bill in this court there had been a receiver or an assignee appointed in the state of the domicile of the corporation, Vice Chancellor Reed pointed out that the receiver in this state was amenable to the direction of the Court of Chancery of this state, and not to the direction of the domiciliary receiver. In *Minchin v. Second National Bank*, 36 N. J. Eq. 436, the Chancellor, Runyon, after referring to the statutory provisions subjecting foreign corporations to the provisions of the act, so far as they could be applied, said:

"Obviously, there are provisions of the act which cannot be applied to such corporations; for example, this court cannot hinder such corporations from exercising their franchises, except as it may enjoin them from exercising them in this state. It can sequester their property here and administer it for the benefit of creditors and stockholders, but it can do but little more. * * * In the language of the New York Supreme Court, in *De Bemer v. Drew*, 57 Barb. [N. Y.] 438, this court cannot regulate the internal affairs of foreign corporations, nor enforce any remedy beyond the limits of this state; it cannot annul or forfeit their charters; but it can and ought to provide for the collection of debts against them, when they or their property are brought within the jurisdiction of the courts of this state. The foreign corporation doing business here is subject to the provisions of our statute, so far as its property in this state is concerned. The proceeding is, practically, merely a proceeding in rem, and as such must be subject to prior liens, created by prior proceedings in attachment, and the vigilant creditor who obtains such prior lien at law ought not to be, and cannot be, deprived of his advantage."

In that case the Chancellor did not doubt the power of the court to appoint a receiver of an insolvent foreign corporation under the statute.

In *Low, Receiver, v. R. P. K. Pressed Metal Company*, 91 Conn. 91, 99 Atl. 1, L. R. A. 1917D, 291, in an original proceeding, a receiver had been appointed of a New York corporation. Subsequently a receiver was appointed in the state of the domicile of the company. Application was then made for the appointment of an ancillary receiver. It was insisted that the court was without jurisdiction in the original proceeding to appoint a receiver. The court held that the

original appointment was proper. The court said:

"When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice requires. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464."

An illuminating note upon the power to appoint receivers for foreign corporations where no domiciliary receiver has been appointed follows in L. R. A. 1917D, at page 295. And see page 303, of L. R. A. 1917D, where the right to appoint under statutes similar to that of this state is considered. Also see Beale on Foreign Corporations, § 791.

It is an established practice now for federal District Courts to appoint receivers of corporations foreign to the district and the state in which the district is situated at the suit of a nonresident creditor, where the corporation can be served and does not object to the jurisdiction, or where it consents. In such suits all of the assets of the corporation are liquidated, and the proceeds distributed. If necessary, suits ancillary to the first are brought in other districts. The receivers are permitted to assert any right of the corporation or its creditors. The authority of a state court to appoint a receiver for a foreign corporation which has entered into business in the state under a statute providing, "Such corporation shall be deemed and taken to be corporations of the state," was not questioned in the case of *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.

[3] The law seems to be well settled that a court of equity has jurisdiction under its inherent power, and where statutes exist similar to that in this state, then under such statutes to appoint a receiver of a foreign corporation upon the ground of insolvency or upon any other ground which would warrant the appointment of a receiver, to conserve and gather in the assets, either legal or equitable, within the state, and to enforce the rights of the corporation, either legal or equitable, which may be enforced against those over whom jurisdiction can be obtained, within the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. The jurisdiction of the court does not depend upon whether or not a receiver has been appointed in the state of the domicile of the corporation nor upon whether it has been there adjudicated insolvent. The question is one not of jurisdiction but of discretion in the exercise of jurisdiction. It is insisted, however, that this is not

now, if it ever was, the law in this state since the opinion of the Court of Errors and Appeals in *McDermott v. Woodhouse*, supra. In that case a bill had been brought by a receiver of a New York corporation appointed by this court to hold stockholders for liability for stock issued for property purchased, as was said, at a gross overvaluation. The suit was brought to enforce liability arising under the provisions of the New York statute. *McDermott v. Woodhouse*, 87 N. J. Eq. 124, 99 Atl. 103. The Court of Errors and Appeals held that such a suit could not be brought either at law or in equity until the amount of the assessment had been determined, and that the only forum in which such a determination could be had was that of the domicile of the corporation. This is as far (for the purposes of the present case) as the case can be said to have any binding authority. In the opinion the court used this language:

"There is nothing to show that a receiver has ever been appointed in New York, the domicile of the corporation. Nothing is averred in the bill which would justify our courts in appointing a receiver in insolvency of a New York corporation. The draftsman seems to have conceived the notion that under our statute a receiver in insolvency can be appointed for a foreign corporation by the same procedure that is authorized in the case of a New Jersey corporation. We mention these difficulties because they are of so fundamental a character that we ought not to pass them unnoticed, and thereby appear to justify what seems by the averments of the bill to have been an unwarranted interference by our courts in the internal affairs of a foreign corporation. Probably the proceedings for a receiver were ex parte, and the attention of the court was never called to the fact that the corporation was not a New Jersey corporation. The matter is important. The bill seeks to do what can only be done by a receiver in case he possesses all the powers of a statutory receiver in insolvency, and shows on its face that the utmost powers he could have would be those of a mere ancillary receiver to gather in the assets in this state."

It will be at once observed that the language used indicates merely an expression of the refusal of the court to approve the practice pursued in the appointment of a receiver of a foreign corporation. If it had been intended to definitely overthrow the doctrine of the case of *Albert v. Clarendon*, etc., supra, that case and others which I have referred to would undoubtedly have been mentioned, nor do I think that the use of the words "ancillary" implied that the court deemed that it was a necessary prerequisite to the appointment of a receiver in this jurisdiction that a receiver should have been appointed in the jurisdiction of the domicile of the corporation. Rather the term "ancillary" is employed in the sense used by Vice Chancellor Reed in *Irwin v. Granite State Provident Association*, supra. To hold that a necessary prerequisite to the appointment of a receiver is the appointment of a receiver in the state of the domicile would, in a great many instances, where all of the business of the corporation is conducted in this state,

all of its property is in this state, all of its creditors or a majority of them, in this state, deprive residents of this state of any remedy or force them to proceed to a foreign jurisdiction which would have control of nothing but the corporate entity. *Summit Silk Co. v. Kingston Spinning Co.*, 154 N. O. 421, 70 S. E. 820, Ann. Cas. 1912A, 897. In that case the court, reiterating its remarks in *Holshouser v. Copper Co.*, 138 N. O. at page 248, 50 S. E. 650, 70 L. R. A. 183, on appeal of the state of New Jersey, held that the courts of North Carolina had jurisdiction to appoint a receiver of a New Jersey corporation on the ground of insolvency under a statute giving the court power to appoint receivers of corporations generally.

In 12 *Ruling Case Law*, § 85, the rule is stated:

"It is well settled that the courts of one state may, at the instance of resident or domestic creditors, or even at the instance of a nonresident creditor, appoint a receiver for a foreign corporation doing business therein and having property there, notwithstanding the appointment of a receiver at the domicile of the corporation where the general requisites for a receivership are shown, as in other cases"—citing cases from many jurisdictions including the Supreme Court of the United States; the case of *Albert v. Clarendon*, etc., cited with approval.

I conclude, therefore, that the appointment of the receiver was properly made.

[4] Third. The last contention made by the defendants is that the relief sought by the receiver is such an interference with the internal affairs of the corporation as that relief cannot be obtained within this state. And again reliance is placed upon *McDermott v. Woodhouse*, supra. I do not think that the principle of that case applies to this. The property alleged to have been fraudulently transferred is within this state. The alleged fraud-doer is here in bankruptcy. The defendant Baskerville has appeared. The Elizabeth Heights Realty Company is a New Jersey corporation. It is fair to assume that the wife of Shearer is a resident of this state. The Jersey Co-operative Realty Company is made a party defendant, and may be served here. The bill is one which might have been brought by the corporation, or a stockholder in its right if the directors refused to proceed, and if a receivership had not intervened, to set aside a conveyance alleged to have been fraudulently made by its directors for their own use and benefit, without consideration. If such suit were brought by the corporation, or by any one in its behalf it would necessarily have to be brought in a state where jurisdiction could be acquired over the persons of the defendants or over the property. Relief could not be obtained in the jurisdiction of the domicile of the corporation unless the parties defendant voluntarily appeared. The New York courts have no control over the property, nor over the foreclosure proceedings pending in this court. No relief could be granted which would main-

tain the status until final hearing unless personal service could be made upon the defendants.

A case directly in point is that of the National Trust Company v. Miller, *supra*. There had been a receiver appointed in the jurisdiction of the domicile of the corporation. Subsequently, upon a petition by certain of its creditors representing that all of its property was located in this state, that it had suspended its business and become insolvent, and that a receiver had been duly appointed in New York for the purpose of winding up and making equal distribution, a receiver of the corporation was appointed in this state. A foreclosure suit had been started against the company before the receiver was appointed. The receiver was let in as party defendant and attacked the validity of the mortgage. The nature of the defense is illustrated by the following excerpts from the opinion of Vice Chancellor Van Fleet:

"The validity of this mortgage is indefensible except on the theory that it was within the scope of the powers of the paper company to donate the half or the whole of its property to the railroad company, regardless of the rights of its creditors or the public. It is clear it possessed no such power, and if it had attempted to do so, by open and direct means, its act would have been so conspicuously ultra vires as to strip it of the least appearance of validity. * * * There is another important principle which I think it is my duty to enforce in deciding this case. Equity regards the property of a corporation as a fund held in trust for the payment of its debts, and if others than bona fide creditors of the corporation, or purchasers, possess themselves of it, they take it charged with this trust, which a court of equity will enforce against them."

The result was that the mortgage was set aside. If what was attempted to be accomplished in National Trust Company v. Miller did not involve an interference with the internal affairs of the corporation, then it would seem that what is attempted to be accomplished in the case sub judice certainly does not. The Vice Chancellor held that the defense could be set up by the receiver appointed by this court, and said:

"There can be no doubt, under the rule established by this adjudication (referring to Miller v. Mackenzie, 29 N. J. Eq. [2 Stew. Eq.] 291), that it would be competent for the receiver in this case, in his official character, to bring a suit in equity to nullify the mortgage in question. He holds the title to the mortgaged premises; he alone has a right to their possession, and he alone can sell and convey them. Adopting an argument very forcibly put in the case just cited, we may say it cannot be pretended, if the mortgagees were in possession, that this receiver could not maintain an action of ejectment against them, and if he established the fact that the mortgage was a fraud upon creditors, that he would not be entitled to recover. Why, if this be so, is he to be confined to such action, and to be excluded from taking his case before a tribunal that is competent not only to adjudge with regard to his right to the property, but also to remove from it a fraudulent and pretended claim, which, so long as it exists, renders it unsalable in his hands? His right of action and his right

of defense are, in this instance, in my apprehension, reciprocal, and if he has produced sufficient evidence of the invalidity of the mortgage to entitle him, if he were complainant, to a decree so adjudging, he is, upon the same evidence, entitled to a decree of dismissal. * * * In my judgment, the receiver stands before the court invested with the rights and equities of the creditors of the paper company, and has therefore a right to ask judgment against this mortgage, if he has shown that it was executed in fraud of their rights."

If I am right that a receiver of a foreign corporation can be appointed under the statute without a receiver having first been appointed in the jurisdiction of the domicile of the corporation, I think the fact that such a receiver has been appointed is immaterial with respect to the powers of the receiver appointed here. The case of National Trust Company v. Miller is cited with approval in Beale on Foreign Corporations, § 791, and in many cases in this jurisdiction.

In Summit Silk Co. v. Kingston Spinning Co., 154 N. O. 421, 70 S. E. 820, Ann. Cas. 1912A, 897, the court said:

"The property of the Spinning Company is in this state, and the laws of New Jersey should not be permitted to effect its status or prejudice the rights of creditors of the corporation in respect of it. They must all come into this jurisdiction in order to have its assets administered for their benefit, and cannot get relief in the courts of New Jersey because the property is situated here. If we should deny the remedies of our laws to them for the reason assigned by the defendant, the assets in this state would be practically exempt from the claims of creditors."

In Minchin v. Second National Bank, 36 N. J. Eq. 436, a receiver had been appointed of a foreign corporation, under the statute. There had not been an appointment in the jurisdiction of the domicile of the company. It appeared that certain attachments had been levied upon the property of the corporation pending the hearing on the order to show cause. The party applying for the appointment of the receiver attacked the attachments. It was held by the Chancellor that the proper party to make the attack was the receiver.

Without attempting to enumerate all of the powers possessed by a receiver of a foreign corporation, it seems to me to be clear that he has the power to institute such actions as may be necessary to recover, for the creditors and stockholders, assets, legal or equitable, within this state, and to enforce such obligations of persons over whom jurisdiction can be obtained in this state which the corporation or its creditors might have enforced. I do not think that the suit will affect the internal management of the affairs of the corporation within the sense used by the Court of Errors and Appeals in McDermott v. Woodhouse, *supra*, or in Jackson v. Hopper, 76 N. J. Eq. 604, 75 Atl. 568, 27 L. R. A. (N. S.) 658.

It is extremely difficult, and I think almost impossible, to formulate a test as to what constitutes an interference with the in-

ternal affairs of the corporation which can be applied in every case. The Court of Errors and Appeals in *Jackson v. Hopper*, *supra*, while approving the definition contained in the case of the *North State Mining Company v. Field*, 64 Md. 151, 20 Atl. 1039, confined it to the class of cases of which that then before the court was one.

The subject is treated in 12 *Ruling Case Law*, title "Foreign Corporations," §§ 20, 21, and 22. It is there stated that the test: "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as corporation, stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and in the case of a foreign corporation courts of another state will not take jurisdiction even though the visible tangible property of the foreign corporation is situate therein. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then a domestic court will take jurisdiction"—has been adopted by courts of several jurisdictions; yet it appears that it has not been by any means uniformly approved. It has been held that there are cases where, although the rights of a party grow out of his membership in the corporation, yet, as the matter affects only his individual rights, under the contract by which the stock was issued, therefore an enforcement of those rights will not be an interference with the internal management of the corporate affairs within the meaning of the rule. The author says that the difference between the two tests is as follows:

"Those courts which apply the first-mentioned test, in determining whether they will take jurisdiction of an action against a foreign corporation, inquire whether the right sought to be enforced accrues to the plaintiff as an individual, independent of his relationship to the corporation, while with those which have adopted the latter the question is: Does the right, though growing out of his status as a stockholder, belong to the plaintiff individually, and not as one of a class? Irrespective of the question as to the proper test to be applied in determining what are the internal affairs of a corporation, the view has been expressed by some courts that in the case of corporations which are nonresident only in that they were created in another state, the officers, agents, stockholders, business, and property all being within the jurisdiction of the court, they will not deny relief in a proper case on the ground that the 'internal affairs' of the corporation will be affected."

It has been held (*Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 187 Am. St. Rep. 284, 19 Ann. Cas. 74, and note, a well-reasoned case) that, where minority stockholders in a foreign corporation seek by suit in equity to have restored to the corporation property

fraudulently appropriated to their own use by directors who, together with the corporation itself, are personally subject to the jurisdiction of the court, the court should exercise its jurisdiction for the determination of the controversy. And in *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574, it was held that a fraudulent transfer of the personalty of a foreign corporation situate within the state would be set aside and this notwithstanding that the corporation could not be served with process. These latter cases are direct authorities in the case at bar.

If it had not been for the strenuous insistence on the part of the defendant that the opinion of the Court of Errors and Appeals in *McDermott v. Woodhouse* required a determination directly contrary to which I have arrived, I would have contented myself in disposing of this case with a mere reference to *Albert v. Clarendon, Trust Company v. Miller*, *Minchin v. Second National Bank*, and *Irwin v. Granite State Provident Association*.

Whether the objections sought to be raised by the defendant as to the validity of the order appointing the receiver and the jurisdiction of the court to appoint a receiver can be raised by him in this suit I have not considered and express no opinion thereon.

The result is that the order to show cause will be made absolute, and the injunction will be continued to final hearing upon condition that the defendants secure, or cause to be secured, the payment of the amount due upon the decree of the defendant *Baskerville*. Other equitable provisions may also be made in favor of other defendants if they appear. Before the signing of any order, an order amending the order appointing receiver should be taken as indicated in the fore part of this opinion.

Settle order on two days' notice.

(89 N. J. Eq. 139)

KSIAZEK v. KSIAZEK. (No. 42/133.)

(Court of Chancery of New Jersey. June 12, 1913.)

(Syllabus by the Court.)

1. NE EXEAT §=14—BOND—EXONERATION OF SURETIES.

Sureties on a bond given to secure release from arrest on a writ of ne exeat may not surrender their principal and thus secure exoneration.

2. NE EXEAT §=14—BOND—DISCHARGE—FINAL DECREE—CUSTODY OF DEFENDANT.

A bond in ne exeat, conditioned that defendant will not depart the state without leave, is not discharged by the entry of final decree, nor by the fact that the defendant is in custody for failure to comply with final decree.

3. NE EXEAT §=14—BOND—DISCHARGE—COMPLIANCE WITH FINAL DECREE.

A bond in ne exeat, with condition that defendant will not depart the state without leave, is not discharged after final decree, providing for

the payment of alimony, by the fact that the defendant has complied with the final decree to date of application for discharge.

4. *Ne Exeat* § 90, 14 — *New Writ* — *Discharge of Sureties*.

The court may, in its discretion, after final decree and while the defendant is in custody for failure to comply with final decree, discharge the sureties on a bond given to secure release from arrest by virtue of a writ of *ne exeat* upon terms, and may, while the defendant be so in custody, direct the issuance of a new or alias writ of *ne exeat* upon a showing that there is danger if the defendant be released of his departing the jurisdiction.

Suit by Sophie Ksiazek against Alexander Ksiazek, pending which a writ of *ne exeat* issued, and defendant gave bond with sureties and the sureties' application for leave to surrender him after final decree was denied, and defendant was thereafter adjudged guilty of contempt and imprisoned, and the sureties apply for their discharge. Order discharging the sureties advised on terms.

Frey & Vanecek, of Newark (John Q. Frey, of Newark, of counsel), for the motion. Pomerehne & Laible, of Newark, opposed.

LANE, V. C. Pending the suit a writ of *ne exeat* issued. Defendant gave bond with sureties, the condition of which was in the old form that he would not depart the jurisdiction without leave. Subsequent to final decree, an application was made by his sureties for leave to surrender him. This application was denied. Thereafter an application was made to punish him for contempt; he was adjudged guilty and incarcerated.

[1] The sureties now apply for their discharge. That the sureties cannot surrender their principal is the law of this state. *Schreiber v. Schreiber*, 85 N. J. Eq. 303, 96 Atl. 85. Vice Chancellor, at page 306, affirmed without criticism. 86 N. J. Eq. 437, 99 Atl. 117. See, also, *In re Griswold*, Petitioner, 13 R. I. 125.

The statement in *Tothill*, reported in 21 English Reprint, 110, that bail in chancery is discharged upon bringing in the principal, as at common law, does not express our law. It was this statement upon which the Vice Chancellor acted who accepted a surrender of the principal in *Marino v. Marino*, hereafter noted.

[2-4] The question is whether the principal being in custody for contempt for failure to obey the final decree, the sureties are entitled to their discharge.

In *Le Clea v. Trot*, Prec. in Chanc. C. & H. 230 (1704) 24 English Reprint, 112, the Lord Keeper held that the sureties should not be discharged after answer put in by the defendant, nor even after decree against him, and commitment for £19,000 decreed against him. In *Debazin v. Debazin*, 21 English Reprint, 204 (1743), it appeared that, a writ of *ne exeat* sued out, the defendant entered into a bond

with two sureties, for his not departing the kingdom. The cause was afterwards heard, and there was a decree against the defendant for the same matter for which the *ne exeat* issued. The defendant being in contempt and in custody for not performing the decree, the sureties applied and obtained an order that they should be discharged, and the bond as to them canceled. In *Stapylton v. Peill*, 19 Ves. Jun. 615, 34 English Reprint, 644 (1816), application was made to discharge the sureties prior to final decree, where the defendant was in custody for contempt for failure to put in an answer, and Lord Chancellor Eldon refused to make the order, observing that he did not recollect such a motion except once, and then it was refused, and the editor contributes the following note:

"See *Beames on Ne Ex. Reg.* 53, In *Le Clea v. Trot*, Prec. Ch. 230, where this application was refused, and in *Debazin v. Debazin*, 1 Dick. 95, where it was granted, the commitment was for not obeying the decree to pay the money, for which the writ was granted."

Upon the authority of *Debazin v. Debazin*, the Court of Appeals of Maryland in *Johnson v. Clendenin*, 5 Gill & J. 463, affirmed an order discharging the sureties in a case where the defendant had been committed to jail for not complying with the final decree and afterwards had escaped from custody. The arguments of counsel in this case are very instructive.

In *Wauters v. Van Vorst*, 28 N. J. Eq. 103, the Chancellor approved *Debazin v. Debazin*. That case cannot be considered an authority, however, that the court must discharge the bail; the Chancellor merely holding that it has the power. In *Elliott v. Elliott*, 36 Atl. 951, Vice Chancellor Reed held, where the condition of the bond was in the form provided for by the rules, that after final decree, and even after a bond given to comply with the final decree, the bond on *ne exeat* was not superseded, and suit might be brought upon it. Vice Chancellor Howell, in *Marino v. Marino*, in an unreported memorandum, which case, by the way, was the one in which there was the irregular surrender of the principal referred to by Vice Chancellor Stevenson in *Schreiber v. Schreiber*, says:

"Prior to 1871 it was the practice in this state for the defendant so arrested to give bond in what was known as the common form, viz. that he would not depart from or leave this state without the permission of the court. This was considered to be practically a bond for appearance, although not so in terms, and if the defendant remained within the state until final decree, the condition of the bond was held to be satisfied."

He cites no authority for the dictum. It seems to be opposed to the English cases. In *Le Clea v. Trot*, application was made by the sureties after final decree. So in *Debazin v. Debazin*. It would seem as if, had it been considered that the exigency of the writ had been satisfied by the final decree,

the applications would have been based upon that ground. The condition of the bond in the common form is broken if the defendant without leave of court at any time leaves the state. Upon a breach of the condition the money may be directed to be brought into court. The court may, however, if the defendant leave the state, without permission, and thereafter return and subject himself to the jurisdiction of the court, remit the forfeiture. *In re Appel*, 163 Fed. 1002, 90 C. C. A. 172, 20 L. R. A. (N. S.) 76.

The condition of the bond is "that the defendant shall not depart from or leave this state without permission of the said Court of Chancery." It is unlimited as to time. The bond which may be given under the 216th rule is conditioned that the defendant shall cause his appearance to be entered in the suit, continue his appearance, and render himself amenable to the orders and process of the court, and to such process as shall be issued to compel the performance of the final decree and to appear before the court when required. The purpose of the rule was to permit the giving of a bond which would not be as rigorous in its condition as the bond in the common form. If the bond be in the common form, a single departure from the state will breach its condition. The defendant may still insist upon giving a bond in the common form. I think that if he does, he and his sureties assume all of the obligations which he would be under if he gave a bond under the 216th rule plus the additional obligation of continuously remaining within the state. The cases dealing with the effect of a bond given under the 216th rule are therefore direct authority with respect to the effect of a bond given in the common form.

The Vice Chancellor in *Marino v. Marino* after final decree refused to vacate a bond with condition as provided for by the rule, although the defendant was within the state and was complying with the final decree, and I think the same result would have been reached had the bond been in the common form. He further held that, notwithstanding the surrender and the fact that the defendant had been rearrested on an alias writ, and a new bond given, the old bond was still outstanding, and reduced the amount of the new bond so as to make the aggregate bail \$5,000.

The writ is not discharged by the entry of judgment, but continues until security is given, or the judgment is satisfied. *McNamara v. Dwyer*, 7 Paige (N. Y.) 239, 32 Am. Dec. 627; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; *Lewis v. Shainwald* (C. C.) 48 Fed. 492. Incarceration for contempt is not in any sense a satisfaction of the judgment or compliance with the decree.

The cases of *Debazin v. Debazin* and *Le Clea v. Trot* are not in conflict. The utmost effect of *Debazin v. Debazin* is, as stated by

the Chancellor in *Wauters v. Van Vorst*, that the court may, where the defendant is in custody for failure to comply with the final decree, discharge the sureties, but it is not obliged to. An entirely different question arises as to whether or not the court ought, in the exercise of its discretion, the defendant being in custody, release the sureties. The fact that the final decree has been entered and that the defendant is in custody does not vitiate the writ of *ne exeat*, nor does it prevent the issuance of an alias or new writ. So long as the defendant is in custody for a contempt for his failure to pay certain arrears of alimony he cannot depart the state, and the complainant is not injured, but he may satisfy the amount of arrears to date, and then depart the state and the complainant be left remediless.

I will advise an order discharging the sureties, provided the defendant give bond to perform the final decree, or if, within a time to be fixed, the complainant does not apply for an alias or new writ upon proper moving papers, indicating that if the defendant be released he may depart the state.

The reasons which induce me to grant the relief which I have above indicated are that the defendant is now incarcerated within the state, and may be held within the jurisdiction unless he shall give a new bond on the writ of *ne exeat*, and the sureties represent that the bond has been recorded in the county of Essex among bonds to sheriffs, and that a title company refused to guarantee title to property owned by them which they desire to transfer. Whether a bond so recorded constitutes an incumbrance upon their land, I cannot determine in this proceeding and can give them relief only in the manner above indicated.

Settle order on two days' notice.

(91 N. J. Law, 491)

Appeal of VERDON.

(Supreme Court of New Jersey. June 7, 1918.)

1. CONTEMPT §60(3)—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to sustain an order adjudging defendant guilty of criminal contempt.

2. CONTEMPT §66(7) — REVIEW — TRIAL DE NOVO.

Inferences below arising from failure of one adjudged guilty of contempt to testify have no weight on appeal in the Supreme Court where the case is tried *de novo*, at which time the defendant testifies fully.

3. CONTEMPT §60(1) — PRESUMPTION OF INNOCENCE.

One accused of criminal contempt is entitled to the presumption of innocence, which remains throughout the trial as in any criminal prosecution.

4. CONTEMPT §60(3) — DEGREE OF PROOF — PRESUMPTION OF INNOCENCE.

One accused of criminal contempt must be proved guilty beyond a reasonable doubt as in any criminal prosecution.

William P. Verdon was adjudged guilty of criminal contempt in the county court of

quarter sessions, and defendant appealed to Supreme Court (89 N. J. Law, 16, 97 Atl. 783), which reversed conviction, whereupon writ of error was sued out of Court of Errors and Appeals (90 N. J. Law, 494, 102 Atl. 66), which reversed judgment of Supreme Court and remitted record to that court for trial de novo. Defendant found not guilty, and judgment below reversed.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

George T. Vickers, of Jersey City, and Robert H. McCarter, of Newark, for the State. Arthur B. Archibald and Alexander Simpson, both of Jersey City, for defendant.

KALISCH, J. William P. Verdon was found guilty of contempt of the court of quarter sessions of the county of Hudson, and that court upon such conviction sentenced him to pay a fine of \$250 and to be committed to the county jail for 30 days. From that judgment an appeal was taken, under the Act of 1884 (2 Comp. St. 1910, p. 1736), to the Supreme Court, where it was held that the procedure adopted by the court below to punish Verdon for contempt was unauthorized in law, and without rehearing the matter of contempt of which he stood convicted, upon the law and upon the facts, the Supreme Court reversed the conviction. In re Verdon, 89 N. J. Law, 16, 97 Atl. 783. Thereupon the Attorney General sued out a writ of error in the Court of Errors and Appeals, which tribunal reversed the judgment of the Supreme Court and remitted the record to that court in order that it may rehear the matter of contempt upon which the conviction was founded, both upon the law and upon the facts, in the manner directed by the statute. Attorney General v. Verdon, 90 N. J. Law, 494, 498, 102 Atl. 66, 157.

From the history of the proceedings against Verdon, as revealed by the record before us, it appears that his conviction of contempt in the court below necessarily and solely rested upon testimony introduced by the prosecution, as a result of an attack made by Verdon upon the validity of the procedure taken against him, and in consequence of which he remained mute and offered no testimony in exculpation of the charge laid against him. The Court of Errors and Appeals declared, in Attorney General v. Verdon, *supra*, that the legal effect of the statute of 1884 is to afford a person convicted of contempt in the court of first instance, upon an appeal to this court, a trial de novo. In this posture the appeal has been heard and considered by us. Leave was given to either side to take depositions to be used upon the rehearing. By stipulation of counsel the testimony, taken in the court below, in the original proceedings, was made part of the record to be used upon the rehearing. The only additional testimony taken by the

prosecution was that of Mr. Ivins, editor of the Hudson Dispatch.

For the alleged contemner testimony was introduced, for the first time, on this hearing. His defense was a denial that he gave the information contained in the article upon which the proceeding for contempt against him was founded; and he furthermore insists that he neither inspired the article nor participated in its publication. The article was published in the Hudson Dispatch, on Monday, January 17, 1916, and was made the basis of the rule to show cause issued by the court below why Verdon should not be adjudged guilty as of contempt of the court of general quarter sessions of the county of Hudson. It appears that one Byrne, a newspaper reporter, testified that he had written the article in question, and that he obtained the information therein contained from Verdon, on Saturday, January 15, 1916, either in the afternoon or evening, at the latter's residence, in the presence of a man by the name of Taylor.

Verdon, testifying in his own behalf, while admitting that Byrne called and sought an interview with him relating to the case of one Smith, then pending in the court below, and which case became and was the subject-matter of the contumelious article, states with positiveness that he told Byrne that he had no interview to give out and that he had nothing to say. Verdon further testified that, during the time that Byrne remained, the latter talked about his work for various newspapers in Hudson county.

James Taylor, the person referred to by Byrne as being present when Verdon gave the information contained in the article in question, was called as a witness by the defendant, and testified that he was present when Byrne called at Verdon's residence for an interview, and remained until Byrne went away, the witness accompanying him; that Byrne remained about 20 minutes; that at no time during the presence of the witness did Verdon give an interview to Byrne pertaining to a proposed impeachment of Judge Tennant, in connection with the case of Samuel Smith; that the witness heard Byrne say, "I came to get an interview on the impeachment," and Verdon's reply, "I have nothing at all to say, absolutely nothing at all to say;" that Byrne asked Verdon whether he was going to Trenton on Monday, and the latter replied that he had nothing at all to say.

Byrne was dead when the rehearing was ordered, but his testimony taken in the original proceedings in the court below was read into the present record. Byrne testified that his interview with Verdon lasted for more than two hours. It further appears from his testimony that he attended the Smith trial and gathered impressions from what was said and occurred there. It does not appear that he took any notes in writing of the

interview, and the inference to be gathered from his testimony is that he relied upon his memory of what had been said when he wrote the article; for, when he was asked by counsel of the state to point out any part of the article which he identified as emanating from him and not from Verdon, he said:

"I say it is a very difficult thing to do, because I go there and put questions to the man and he answers me, and I gather my impressions from that. Wherein I quote him directly, with quotation marks, it is to be assumed, of course, that he said everything that is said there. But in the other part of the article to say that every idea, every thought contained in this article, was obtained from Mr. Verdon—it is impossible to say that, because something might be retained in my mind from the Smith trial. It does not purport to quote Mr. Verdon from beginning to end."

This witness further testified that the article, however, represented truthfully the substance of the interview.

In this posture of the evidence, we are called upon to determine whether the state has sustained the burden of proof which the law casts upon it.

The sole object of the proceeding instituted against the defendant is to punish him for having inspired and participated in the publication of an article, in a newspaper, reflecting upon the dignity of the court below, and tending to obstruct the proper administration of law.

In *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 108, 21 Atl. 183, Vice Chancellor Pitney said:

"Proceedings in contempt are of two classes, namely, first, those instituted solely for the purpose of vindicating the dignity and preserving the power of the court. These are criminal and punitive in their nature, and are usually instituted by the court in the interest of the general public and not of any particular individual or suitor."

The learned Vice Chancellor cites in support of this legal proposition *Dodd v. Una*, 40 N. J. Eq. at page 714, 5 Atl. 155, per Depue, J.; *People v. Oyer & Terminer*, 101 N. Y. 245, 4 N. E. 259, 54 Am. Rep. 691; *Rap. Contempt*, 21.

The present proceeding being in its very nature a criminal one, it must be governed by the legal rules applicable to the trial of criminal causes.

In *Barnett Foundry Co. v. Crowe*, 80 N. J. Eq. 109, on pages 110, 111, 74 Atl. 984, which was a proceeding for contempt for the violation of an injunction order, Vice Chancellor Howell, in discussing the nature of the proceeding and the legal rules controlling the same, stated them to be as follows:

"It is a well-known principle in contempt proceedings that a respondent shall not be adjudged guilty of contempt if there is a reasonable doubt on the facts and on the law as to his guilt. The proceeding is quasi criminal, and, in so far as it is so, it must carry with it the usual and ordinary presumptions that would affect the proceeding if it were being conducted in the criminal court."

And even in cases where the proceedings were inter partes and resorted to for reme-

dial purposes, it was held that, the proceedings being quasi criminal in character, the proof must clearly establish the delinquency charged. *Magennis v. Parkhurst*, 4 N. J. Eq. 428; *McClure v. Gulick*, 17 N. J. Law, 348.

In *Staley v. South Jersey Realty Co.*, 83 N. J. Eq. 300, 307, 90 Atl. 1042, L. R. A. 1917B, 113, Ann. Cas. 1916E, 955, Mr. Justice Garrison, speaking for the Court of Errors and Appeals, in an instructive and illuminating opinion, discusses civil and criminal contempts and their essential characteristics and differences, and in commenting upon the case of *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 84 L. R. A. (N. S.) 874, and quoting therefrom, says:

"There are some differences," said the court in that case, "between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempts, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself—citing a large number of cases. It is hardly necessary to add that among these substantial rights is that the defendant's guilt must be proved by judicial evidence, i. e., by testimony to which the ordinary rules of evidence are applied."

[1, 2] Subjecting the evidence before us to the test of these legal rules, we are forced to the conclusion that the state failed to establish the guilt of the defendant beyond a reasonable doubt. We have not reached this result without having carefully and duly considered all the matters urged by the state as establishing clear proof of the defendant's guilt. First, it is argued by counsel for the state that since it appears that in the original proceeding in the court below Verdon was present when Byrne testified that he received the information contained in the published article from the former, and because Verdon did not take the witness stand to deny the statement, but remained silent, it was such conduct on Verdon's part as to give rise to the inference that what Byrne said as to the former's connection with the article was true. While the law recognizes such a salutary rule of circumstantial evidence, and under ordinary circumstances it would have lent great force to the contention made, in so far as the action of the court below was concerned, it loses its cogency here, for two reasons, namely: First, because it appears that the cause of the defendant's silence in the court below arose from the fact that he challenged the validity of the proceedings which involved the jurisdiction of that court; and, secondly, because the proceedings here being de novo and the defendant having under oath, in this court, made a complete denial of his connection with the origin and publication of the article, it becomes the duty of the court to consider and

decide the case upon the law and upon the facts as presented to us on this appeal.

Secondly, for the state it is further argued that Byrne's testimony is corroborated by Mr. Ivings, the editor of the Dispatch, in that the latter testified that he directed Byrne to interview the defendant in regard to the subject-matter of the article; and is further corroborated, in that the interview did take place on Saturday, and that the article published on the succeeding Monday contained a statement that the defendant was going to Trenton on Monday and have certain court officials impeached, and that the defendant did go to Trenton on that Monday and made some effort to start proceedings for impeachment against certain public officials, and that he instigated a resolution to be offered to that effect in the Legislature, and that these facts could not possibly have been known to Byrne, unless communicated to him by Verdon. Giving full force and effect to this contention, nevertheless, in contemplation of law, the evidence relied on fails to satisfy the burden cast upon the state to establish the defendant's guilt beyond a reasonable doubt, since it appears that Verdon, on oath, denied that he made the contumacious statements attributed to him, and in this denial he is fully corroborated by Taylor, a disinterested witness, who was present during the entire time of the interview between Byrne and Verdon. It is also to be observed that the credibility of neither of these witnesses was impeached.

[3, 4] To sum up, it must be borne in mind that this is a criminal or quasi criminal proceeding, in which the presumption of innocence remains with the defendant throughout the entire case, and that the burden of establishing his guilt beyond a reasonable doubt rests upon the state. In this respect we think the state has failed, and for this reason must find, upon the law and upon the facts as developed before us, the defendant not guilty, and order that the judgment below be reversed and for nothing holden.

(33 N. J. Law, 20)

STATE v. RUDNER. (No. 3.)

(Supreme Court of New Jersey. July 9, 1918.)

1. CRIMINAL LAW §149 — LIMITATIONS — TAMPERING WITH WATER METER.

The offense of tampering with a water meter with intent to defraud, under 2 Comp. St. 1910, p. 1794, § 164, is complete when the tampering is done, though water be afterward stolen, and prosecution therefor is barred after two years from the act of tampering, by 2 Comp. St. 1910, p. 1870, § 152.

2. CRIMINAL LAW §878(1)—VERDICT.

Where indictment in separate counts charged misdemeanor, under 2 Comp. St. 1910, p. 1794, § 164, of tampering with water meter with intent to defraud, and the offense made a high misdemeanor by 2 Comp. St. 1910, p. 1798, § 158, of grand larceny by stealing water of the value of \$576, a verdict of "guilty of the mis-

demeanor" was not general, but specific to the lesser offense, which was barred by the statute of limitation and without force.

Error to Court of Quarter Sessions, Mercer County.

Morris Rudner was convicted of unlawfully tampering with a water meter and stealing water, and he brings error. Reversed.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Aaron V. Dawes, of Hightstown (John A. Montgomery, of Trenton, on the brief), for plaintiff in error. Martin P. Devlin, Prosecutor of Pleas, of Trenton, for the State.

GUMMERE, C. J. The indictment in the present case contained four counts. The averment of the first count was that Rudner, the plaintiff in error, together with one Charles H. Speck, did unlawfully tamper with a water meter which had been installed by the water department of the city of Trenton in the premises of Rudner, for the purpose of measuring and registering the amount of water used therein, and that this was done with the intent to defraud the municipality by causing the meter to register much less than the actual flow of water through it. The second count charged that Rudner unlawfully aided, assisted, and abetted Speck in tampering with this meter, for the purpose of causing it to register much less than the actual flow of the water through it. The third and fourth counts charged the defendants, Rudner and Speck, with unlawfully and feloniously stealing, taking, and carrying away 640,400 cubic feet of stored filtered water of the value of \$576.86 of the goods and chattels of the city of Trenton. The trial of the indictment proceeded against Rudner alone, and the jury returned the following verdict against him:

"The said Morris Rudner is guilty of the misdemeanor aforesaid of him above charged in the form aforesaid, and as by the indictment aforesaid is above supposed against him."

Rudner thereupon sued out the present writ of error to review the judgment entered upon that verdict.

[1] The first assignment of error challenges the refusal of the trial court to direct a verdict in favor of the plaintiff in error on the first and second counts of the indictment, upon the ground that the offense alleged in each of these counts, if committed at all, had been committed more than two years before the finding of the indictment, and was therefore outlawed. The motion to direct was based upon section 152 of our Criminal Procedure Act (Comp. Stat. p. 1870), which declares that no person shall be prosecuted, tried, or punished for any offense not punishable with death, unless the indictment shall be found within two years from the time of committing the offense. The record shows

that the indictment was presented at the January term, A. D. 1917. The proof on the part of the state was that the illegal tampering with the water meter installed in Rudner's premises occurred some time during the year 1914, and there was no evidence that it occurred at any subsequent date. The question, therefore, whether the refusal of the motion to direct a verdict upon the first and second counts of the indictment was proper, or not, depends upon the true construction of the statutory provision upon which these two counts were based. That provision is contained in section 164 of our Crimes Act (Comp. Stat. p. 1794), and, so far as pertinent to the present case, is as follows:

"Any person who shall without permission * * * connect or disconnect the meters * * * of any * * * water company, or in any other manner, without such permission, tamper or interfere with such meters * * * for the * * * purpose of obtaining * * * water with intent to defraud such company, shall be guilty of a misdemeanor."

The contention on the part of the plaintiff in error is that the crime declared in the statute is a specific one, and becomes complete when the work of tampering or interfering with the meter is entirely finished; while, on the other hand, it is argued by the state that the crime is not complete unless the purpose which was sought to be accomplished by the tampering with the meter has, in fact, been consummated, that is unless water has been actually abstracted in excess of the quantity registered and that therefore so long as the water continues to be unlawfully abstracted, the crime remains a continuing one. It is conceded that the abstraction of the water was persisted in until a period well within the two-year limitation, and so we are called upon to determine the soundness of the one contention or the other.

A careful reading of the statute leads us to the conclusion that the purpose of the Legislature as expressed therein is so plain as not to call for judicial interpretation. It declares that any person who shall without permission tamper or interfere with the meter of any water company, for the purpose of fraudulently obtaining water from such company, shall be guilty of a misdemeanor. There is nothing in the statute to suggest the idea that a person who has been guilty of such tampering, and whose intent was to defraud the water company, should escape punishment, if his intent is prevented from being carried into execution by a prompt discovery of what he has done, or in any other way. The object of the Legislature was, not the punishment of one who feloniously abstracts water which is the property of one of these companies—for that crime, like any other felonious taking, is dealt with in other provisions of the statute—but the protection of these companies against the fraudulent abstraction of water by methods so insidious and secret as not to be readily

discoverable. And in order to effect that object the Legislature created an entirely separate and distinct offense, which it made punishable without regard to whether the larcenous purpose which led to the tampering with the meter was accomplished, or not.

We have not overlooked the contention of counsel for the state that the situation here presented is quite similar, in its legal essence, to the criminal offense of obtaining moneys by false pretenses, and that the decisions upon that branch of the law should control us in the present case. We fail, however, to perceive the similarity. The wrong which is made criminal by the statute in the class of cases appealed to is not the making of the false pretense, but the wrongful obtaining of money by reason thereof. *State v. Crowley*, 39 N. J. Law, 264. Determining, as we do, that the crime struck at by the 164th section is complete when the work of tampering with the meter has been finished, we conclude that the motion to direct a verdict of acquittal on the first and second counts should have been granted, and that its refusal was error.

[2] It is insisted on behalf of the state that this error should not result in a reversal of the conviction, for the reason that the verdict returned by the jury was a general one; and it is said to be the settled law of this state that where there are several counts in an indictment, each charging a distinct crime, a general verdict of guilty amounts to a conviction of each separate offense, and, even if the verdict cannot be supported as to one or more of the crimes charged, it will be upheld as to the offense described in a single good count. That this is the law of the state is not disputed. It was so declared by the Court of Errors and Appeals in the case of *State v. Huggins*, 84 N. J. Law, 254, 87 Atl. 630. And so, if each of the several counts in the present indictment had charged a simple misdemeanor, the verdict rendered by the jury, "guilty of the misdemeanor aforesaid," etc., would include all the counts, and the rule in the *Huggins* case would be applicable. Upon examination, however, the contrary is clearly shown to be the fact. The first count charges a violation of the 164th section, and that section makes a person who shall be convicted under it "guilty of a misdemeanor." The second count, in its legal effect, charges the same offense. It charges Rudner with aiding and abetting Speck in his tampering with the meter, and since the decision of *Engeman v. State*, 54 N. J. Law, 247, 23 Atl. 676, it has been considered to be settled that in misdemeanors all who aid, abet, or participate are principals, and all equally guilty. *State v. Hess*, 65 N. J. Law, 544, 47 Atl. 806; *State v. Wilson*, 80 N. J. Law, 467, 78 Atl. 144; *State v. Spence*, 81 N. J. Law, 265, 79 Atl. 1029. The third and fourth counts, however, each of them, charge the plaintiff in error with the crime of grand larceny, and this crime, by the 158th section

of the Crimes Act (Comp. Stat. 1793), is made a high misdemeanor. The great difference between the two grades of criminality is demonstrated by the punishment which each carries with it. A misdemeanor is punished by a fine not exceeding \$1,000, or by imprisonment not exceeding three years, or both, while a high misdemeanor is punishable by a fine not exceeding \$2,000, and by imprisonment not exceeding seven years, or both. See Crimes Act, §§ 217, 218; Comp. Stat. p. 1812.

The verdict in the present case, therefore, is a specific and not a general one. It has declared the plaintiff in error to be guilty of the misdemeanor charged in the indictment, that is, of the crime set out in the first and second counts of that pleading, and carries with it a liability to the punishment declared against misdemeanors by the statute, viz., a fine, not exceeding \$1,000, and imprisonment, not exceeding three years, either or both. To transmute the finding of the jury into a declaration that plaintiff in error was guilty of the high misdemeanor charged in the indictment would be to impose upon him a liability to a fine not exceeding \$2,000 and to imprisonment not exceeding seven years. The rule in the Huggins Case, as we read the opinion, was not intended to, and does not, produce so unfortunate a result.

Looking at the whole case, therefore, the situation disclosed is this: The plaintiff in error having been charged in the same indictment with the commission of an ordinary misdemeanor, and also with the commission of a high misdemeanor, the jury convicted him of the lesser offense. That offense was outlawed at the time the indictment was presented, and, consequently, the verdict is without force. The jury, although the question was submitted to it, failed to pass upon his guilt or innocence of the crime charged in the third and fourth counts of the indictment. In this situation the trial court was without legal power to pass sentence upon the plaintiff in error, and consequently the judgment under review must be reversed.

(92 N. J. Law, 131)

STATE v. SAMUELS.

(Supreme Court of New Jersey. July 31, 1918.)

1. CRIMINAL LAW — 785(16)—INSTRUCTIONS — "FALSE STATEMENT" — "UNTRUE STATEMENT."

It is error to instruct that, if the jury believes any witness has made a false statement as to material fact bearing on the issues, it may disregard all or the false part of his testimony; the words "false statement" and "untrue statement" being synonymous, and neither implying willfulness.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Statement.]

2. WITNESSES — 817(2) — CREDIBILITY — FALSUS IN UNO.

The rule, "*falsus in uno, falsus in omnibus*," is applicable only when there is willful falsehood.

Error to Court of Quarter Sessions, Atlantic County.

Jesse Samuels was convicted of obtaining money under false pretenses, and he brings error. Reversed, and venire de novo awarded.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Bourgeois & Coulomb, of Atlantic City, for plaintiff in error. Charles S. Moore, of Atlantic City, for the State.

KALISCH, J. The plaintiff in error was convicted in the Atlantic county quarter sessions upon an indictment charging him with having obtained money under false pretenses. From the judgment on this conviction he has appealed to this court. The case is before us on assignments of errors, and under section 136 of the Criminal Procedure Act (Act June 14, 1898 [P. L. p. 915]).

[1] This judgment must be reversed for an error in the judge's charge prejudicial to the defendant. The fifth assignment of error is founded on an exception taken, by counsel of defendant, to that portion of the charge wherein the judge instructed the jury, as follows:

"If you believe that any witness has made a false statement with respect to any material fact bearing on the issue involved in this case, you may disregard all of the testimony of such witness, or you may disregard such portion of the testimony as you believe to be untrue, and accept as truthful that which remains."

This was clearly an erroneous and harmful declaration of the rule, and was condemned by this court in *State v. Dugan*, 84 N. J. Law, 606, 607, 89 Atl. 691, affirmed by Court of Errors and Appeals, 85 N. J. Law, 730, 89 Atl. 1135.

Counsel of the state attempts to defend the legal accuracy of this instruction by insisting that the present case is to be distinguished from the *Dugan Case*, supra, in that, in the case at bar, the court did not use the word "untrue," which was the term used in the *Dugan Case*, but used the term "false statement." This latter declaration is but partially accurate. While it is true that the trial judge used the term "false statement," he defined what he meant thereby when in immediate connection therewith he told the jury:

"You may disregard all of the testimony of such witness, or you may disregard such portion of the testimony as you believe to be untrue and accept as truthful that which remains."

For the state it is further insisted that the term "false statement" is entirely different in meaning from the words "untrue state-

ment"; that the word "false" as here used generally imports willfulness. No reason is advanced for this assertion. We find no such distinction recognized by lexicographers. "False" and "untrue," as adjectives, are stated by them to be synonymous terms. The standard dictionaries give to these words, as adjectives, the same signification. Whether or not in common usage of the term "false statement" or "untrue statement" connotes "willfully and knowingly" is unimportant. If there is such an implication there can be no substantial differentiation arising from the terms used, because it requires the same conjunction of will to make a conscious untrue statement as it does a conscious false statement. In either case, however, willfulness is not inherent, but a condition or state of mind preceding the making of the conscious false or untrue statement. It is therefore of the utmost importance when using the term "false statement" in a legal proceeding not to permit the phrase to bear the import of willfully false, because whether or not it was willfully false becomes a question of fact for the jury to decide in passing upon the credibility of the witness regarding his entire testimony.

[2] Prof. Wigmore, in discussing the maxim, "*Falsus in uno, falsus in omnibus*," in volume 2, par. 1013, of his excellent treatise on the Law of Evidence, says:

"The notion behind the maxim is that though a person may err in memory or observation or skill upon one point, and yet be competent upon others, yet a person who once deliberately misstates, one who goes contrary to his own knowledge or belief, is equally likely to do the same thing repeatedly, and is not to be reckoned with at all; hence it is essential to the application of the maxim that there should have been a conscious falsehood."

On this same subject the text in 40 Cyc. 2588, 2589, reads as follows:

"The fact that a witness has sworn falsely to a material fact does not authorize the disregarding of the rest of his testimony where the falsehood is due to mistake and not to willfulness. The mere falsity of the statement does not warrant an imputation of willful perjury, where it might reasonably have been the result of a mistake."

The cases seem to be in harmony on the point that the application of the rule, "*falsus in uno, falsus in omnibus*," can only be properly invoked when the false testimony or statement is willfully or knowingly or intentionally given or made, concerning a material fact in the case, and that an instruction to a jury that, if a witness has made a false statement or testified falsely, without qualifying it by willfully, knowingly, or unintentionally relating to a material fact in the case,

the jury may reject all or any portion of the testimony given by such witness is erroneous. *Ducharme v. Holyoke St. Ry. Co.*, 203 Mass. 384, 89 N. E. 561; *Chicago & S. L. R. R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229; *Prater v. State*, 85 N. Y. 373; *Panton v. People*, 114 Ill. 505, 2 N. E. 411; *Childs v. State*, 76 Ala. 93; *Prater v. State*, 107 Ala. 26, 18 South. 238; *Smith v. State* (Ala. App.) 75 South. 627.

The case of *State v. Martin*, 77 N. J. Law, p. 658, 73 Atl. 548, 24 L. R. A. (N. S.) 507, 134 Am. St. Rep. 814, 18 Ann. Cas. 986, Court of Errors and Appeals, relied on by counsel of the state, as supporting his contention, does not lay down a rule contrary to that which is expressed in the text-books and cases above cited. An examination of the case last referred to shows that the question here discussed was not raised, and that, when Mr. Chief Justice Gummere, in speaking for the court, in the course of his opinion said that, the jury having found "they had testified falsely, upon this material part of the case, it was justified in disbelieving their statement that Clara H. Woodward was the person whose money was loaned," he was giving a simple description of what the jury found upon the evidence, and not attempting to formulate any rule for the guidance of a jury. Besides, the expression used does not exclude the notion that the jury, in finding that the witnesses testified falsely, was controlled by the fact that the witnesses did so consciously.

The California cases, to which allusion has been made as holding the contrary view to that adopted here, by us, are, in the first place controlled by a statute peculiar to the state of California; and, secondly, the construction placed upon the word "false" by the courts of that state, when applying the rule of the statute, appears to us to be against the decided weight of the judicial opinion of the courts of this country. But we need pursue this subject no farther. We have already sufficiently pointed out that, even if the term "false statement" connotes "willfully false," the same cannot be said of the term "untrue," yet, nevertheless, the trial judge, in plain words, instructed the jury that it could disregard such portion of the testimony as it believed to be untrue, and accept as truthful that which remains. Having reached the result that the judgment under review must be reversed for the error in the judge's charge, we find it unnecessary to express any opinion upon the other matters, assigned as errors.

The judgment is reversed, and a venire de novo awarded.

(22 N. J. Law, 221)

**CRUCIBLE STEEL CO. OF AMERICA v.
POLACK TYRE & RUBBER CO.**
(No. 46.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

**1. CONSTITUTIONAL LAW §300 — LIVERY
STABLE AND GARAGE KEEPERS §2—RE-
PAIRS TO MOTOR VEHICLES — LIEN—DUE
PROCESS.**

Act April 14, 1915 (P. L. p. 556) §§ 1, 2, Comp. St. Supp. p. 898, §§ 7, 8, providing that a garage keeper has a lien on a motor vehicle for storage, repairs, etc., even after it has left his possession and that he can retake it at any time, do not contravene the due process clause of Const. U. S. Amend. 14, § 1.

**2. LIVERY STABLE AND GARAGE KEEPERS §
8(3)—REPAIRS FOR MOTOR VEHICLES—LIENS.**

Act April 14, 1915 (P. L. p. 556) §§ 1, 2, Comp. St. Supp. p. 898, §§ 7, 8, clearly authorizes a garage keeper to retake a motor vehicle which he has allowed to go out of his possession under his lien.

**3. BAILMENT §18(3)—REPAIRS ON CHATELS
—LIEN—POSSESSION.**

At common law one who made repairs on chattels lost his right of lien if he permitted the property to go out of his possession.

**4. CONSTITUTIONAL LAW §300—LIENS—DUE
PROCESS—REPAIRS TO MOTOR VEHICLES.**

Act April 14, 1915 (P. L. p. 557) § 2, Comp. St. Supp. p. 898, § 8, does not deprive the owner of a motor vehicle of property without due process of law in violation of Const. U. S. art. 14, § 1, in that it does not provide the time within which one having a lien for repairs, etc., shall sell.

**5. CONSTITUTIONAL LAW §300—LIENS—DUE
PROCESS—MOTOR VEHICLE.**

Act April 14, 1915 (P. L. p. 557) § 3, Comp. St. Supp. p. 898, § 9, providing for the sale of a motor vehicle by one having a lien for repairs, etc., does not deprive the owner of property without due process of law in that it does not provide when lienor shall sell.

**6. CONSTITUTIONAL LAW §181—LIENS—IM-
PAIRING OBLIGATION OF CONTRACT—MOTOR
VEHICLES.**

Act April 14, 1915 (P. L. p. 556), Comp. St. Supp. p. 898, §§ 7-9, giving lien to one making repairs on or storing motor vehicles, etc., even after they have left his possession, was intended to operate prospectively and does not violate Const. U. S. art. 1, § 10, par. 1, and Const. N. J. art. 4, § 7, par. 3, as impairing the obligation of contracts.

7. STATUTES §268—CONSTRUCTION.

In the absence of any words expressing a contrary intention, a statute will be construed to operate prospectively.

**8. STATUTES §115(1) — TITLE — OBJECT —
LIENS.**

Act April 14, 1915 (P. L. p. 556) Comp. St. Supp. p. 898, §§ 7-9, entitled "An act for the better protection of garage keepers and automobile repairmen," does not violate Const. art. 4, § 7, par. 4, declaring that every law shall embrace but one object and that shall be expressed in the title.

Appeal from Supreme Court.

Action by the Crucible Steel Company of America against the Polack Tyre & Rubber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

William K. Flanagan, of Newark, for appellant. Kessler & Kessler, of Newark, for appellee.

KALISCH, J. This appeal from a judgment of the Supreme Court challenges the constitutionality of an act entitled "An act for the better protection of garage keepers and automobile repairmen" (P. L. 1915, p. 556, §§ 1, 2, 3; Comp. St. Supp. pp. 898, 899, §§ 7-9), which provides as follows:

"1. All persons or corporations engaged in the business of keeping a garage or place for the storage, maintenance, keeping or repair of motor vehicles and in connection therewith stores, maintains, keeps or repairs any motor vehicle or furnishes gasoline, accessories or other supplies therefor at the request or with the consent of the owner or his representative, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise, has a lien upon such motor vehicle or any part thereof for the sum due for such storing, maintaining, keeping or repairing of such motor vehicle or for furnishing gasoline, accessories or other supplies therefor, and may without process of law detain such motor vehicle at any time it is lawfully in his possession until such sum is paid.

"2. Any person or corporation acquiring a lien under the provision of section one of this act shall not lose such lien by reason of allowing the motor vehicle or part or parts of the motor vehicle to be removed from the control of the person or corporation having such a lien, and in case a motor vehicle or part or parts are so removed the person or corporation having the said lien may, without further process of law, seize the motor vehicle or part or parts thereof wherever the same is or are found within the state of New Jersey.

"3. All such property so held by any such garage keeper or automobile repairmen shall, after the expiration of thirty days from the date of such detention, be sold at public auction, upon notice of said sale being first published for the space of two weeks in some newspaper circulating in the city, borough, town, township or other municipality, in which said garage keeper or automobile repair shop is situated, also after five days' notice of said sale set up in five of the most public places in said city or township, and the proceeds of said sale shall be applied to the payment of such lien and the expenses of such sale; and the balance, if any remaining, shall be paid to the owner of such property or his representatives; and if the said balance is not claimed by said owner within sixty days after said sale, then the balance to be paid over to the overseer of the poor of the said city or township for the support of the poor.

"4. This act shall take effect immediately. Approved April 14, 1915."

The facts which present the question as to the constitutionality of the act for decision are as follows: The appellant who was the plaintiff below, on January 10, 1916, was the owner of an automobile truck which, among several other trucks, he sold to one George A. Felt by a bill of conditional sale, which instrument provides for weekly payments on account of the purchase price, stipulates that the title and ownership of the truck shall remain in the plaintiff until the whole of the purchase price, or any judgment obtained therefor, shall be fully paid, and covenants that, upon default in the performance of any of the obligations by the vendee, the whole purchase price shall become due and payable, and that the vendor, if it shall elect to do so may take possession of the truck; and the

vendee therein authorizes and empowers the vendor to repossess itself of the truck in case he defaults. This bill of conditional sale was recorded in the office of the register of Hudson county on January 13, 1916, and also in the office of the register of Essex county, on April 3, 1916. On May 11, 1916, and at the request of Felt, the conditional vendee defendant, applied four tires to the truck of the value of \$427.88. These tires were affixed to the double rear wheels. The wheels themselves to which the tires were applied were delivered to the defendant by the conditional vendee, but the truck itself seems never to have been in the defendant's possession, prior to its being seized by the defendant on August 25, 1916. The vendee, Felt, defaulted in the payment of the installments of the purchase price, and thereupon on May 18, 1916, the vendor demanded possession of the truck of the vendee, who refused to deliver the same. On the same day the vendor caused the truck to be replevied, and on May 25, 1916, the vendee gave a bill of sale for the truck to the vendor. The replevin action, however, instituted by the vendor was continued, and on July 16, 1916, judgment final was entered in favor of the vendor. On August 25, 1916, the plaintiff being in possession of the truck, to the wheels of which the defendant supplied the tires and made repairs, the defendant seized the same under and by virtue of the provisions of the statute above set forth. On September 13, 1916, the plaintiff brought its action of replevin, and as a defense thereto defendant set up and claimed a lien on the truck by virtue of the provisions of the statute, supra, and filed a counterclaim of \$427.88, for the tires supplied and repairs made. The case came on for trial before Speer, J., sitting with a jury, and the facts being uncontroverted, the court, by consent of counsel for the respective parties discharged the jury from a further consideration of the case, reserving the legal question as to the constitutionality of the court for future determination. The learned trial judge subsequently held the act to be constitutional, and gave judgment for defendant against the plaintiff, on the counterclaim.

At the outset for the sake of clarity it is essential to note that the facts of the present case invoked, solely, the application of the first two sections of the statute impugned as unconstitutional, owing to the fact that the plaintiff replevied the truck from the defendant a few days after its seizure by the latter, thereby raising the single issue of the validity of the lien, authorized by these sections.

The third section of the act provides a method of procedure to be pursued by the lienor, in case he detains the property for the enforcement of his lien. It is plain from a fair reading of the second section of the statute that when the owner or representative of such owner fails to pay for the re-

pairs or supplies and demands his property and the lienor refuses to surrender it, unless the charges for the repairs thereon or supplies thereto are first paid, that a detention within the meaning of the statute takes place. Or if the lienor seizes such property after it has been out of his possession and holds it for the purpose of enforcing his lien thereon, it likewise is a detention within the meaning of the second section of the statute.

In the present case, the defendant seized the property on which it had acquired a lien, but which it had let go out of its possession; and, before the time had arrived for the foreclosure of the lien in the manner provided by the third section of the act, the plaintiff, owner of the property, caused it to be replevied. Thus, it is obvious that we are not concerned with the validity of the third section of the act, unless the first and second sections thereof are so interwoven with and dependent on the third that the latter cannot be exercised without defeating the main purpose and general intent of the Legislature in enacting the statute. The rule in this regard is well stated by Chief Justice Gummere, in *State Bd. of Health v. Schwarz Bros. Co.*, 86 N. J. Law, 170, 90 Atl. 1061, speaking for this court, and in discussing the constitutionality of the act drawn into question in that case, on page 172 of 86 N. J. Law, on page 1061 of 90 Atl., says:

"An act is not necessarily void because it contains an unconstitutional feature. Where the main object intended to be effected by it is constitutional, and the objectionable feature can be rescinded without at all affecting that object, it is entirely settled that the statute is operative for all purposes except that in which it comes in conflict with the fundamental law. This rule has been so frequently declared and acted upon by the courts of this state as to be entirely familiar to every practitioner."

With this rule of statutory construction in mind, we now approach the consideration of the various grounds of appeal upon which counsel of appellant makes his attack upon the constitutionality of the statute.

[1] In support of the broad contention that the statute is unconstitutional, counsel adds a general assertion that the act permits the deprivation of property without due process of law in contravention of section 1, art. 14, of the amendment to the Constitution of the United States. The gist of the argument to support this claim is that the statute in permitting a person, who has acquired a lien upon a chattel and lets it go out of his possession, to retake the same wherever he may find it in this state, might prejudicially affect the rights of a third party who, ignorant of the existing lien, had in good faith and for a valuable consideration acquired a property interest therein. But no such case is before us for decision. We cannot indulge the presumption that a court will place a construction upon the statute so that it will operate to deprive a person of his property without due process of law. There is nothing in the language of the act itself from

which any such legislative declaration or intent may be properly inferred.

Counsel of appellant seems to have taken it for granted that the failure of the statute to make any provision for registration of the transaction in some official book of record, where a chattel to which a lien has been attached is permitted by the lienor to go out of his possession, invalidates the statute and renders it unconstitutional. This is clearly not so. The cases cited in the appellant's brief support no such proposition, and are not in point. The case of *Fishell v. Morris*, 57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82, rather tends to support the validity of the statute than otherwise. In 57 Conn. on page 552, 18 Atl. on page 718, Andrews, C. J., discussing the statute there under review, says:

"It says that the animals, naming the kind, 'shall be subject to a lien for the price of such keeping in favor of the person keeping the same until such debt is paid.' This is the exact idea of the common law—the right of a creditor to detain the property of his debtor in his possession till the debt is paid."

[2] Reading sections 1 and 2 of the act under consideration together, it is clear from their language that the authority conferred upon the lienor to retain "such motor vehicle at any time it is lawfully in his possession until such sum is paid" includes a motor vehicle which the lienor has allowed to go out of his possession and subsequently retakes to enforce his lien. It is to be observed that the statute is in some respects declaratory of the common-law right of lien. It extends this right of lien to other conditions in business life than those that existed at common law. Thus, for example, it gives the garage keeper a lien for the storing and maintaining of motor vehicles, a present popular means of conveyance unknown to the common law, and which has in a great measure supplanted the horse and wagon and revolutionized the mode of transportation; it gives a right of lien for furnishing gasoline, accessories or other supplies for motor vehicles, for which no right of lien could have properly existed at common law. The innovation which the statute makes in the common law is neither startling nor novel in so far as it enlarges and extends the right of lien to conditions not included at common law, but is in line with the natural progress of the law to meet necessities arising from new business conditions; and the wisdom of this species of legislation is not a court question, but is peculiarly within the province of the lawmaking power to determine.

In *White v. Smith*, 44 N. J. Law, 105, on page 106 (43 Am. Rep. 347), Depue, J., says: "The effort to subject common-law liens to uniform rules must necessarily be unsuccessful. Derived from the civil law, and founded on considerations of equity and justice, the rules by which they are governed vary with the grounds on which such rights are given."

The only radical change from the common law effected by the statute under consideration is that, in the cases mentioned in the

statute, the lienor does not lose his right of lien by permitting the property to which his lien has attached to go out of his possession, but he may retake the same and enforce his lien.

[3] At common law the lienor lost his right of lien if he permitted the property to go out of his possession.

What vested right of a person having a property interest in a motor vehicle is violated, by subjecting such vehicle to the right of lien, irrespective of the fact whether the lienor retains possession of the vehicle, has not been made so clear to us? The prime object of the legislation we are considering is to secure the payment of a debt incurred, by the owner or his representative, for the benefit of his property and the use to which it is put. It is therefore bordering upon the absurd to contend that this legislation invades property rights or authorizes the taking of property without due process of law. The fact that a third party, ignorant of the lien upon the property, might in good faith and for a valuable consideration acquire interest therein, while such property was out of the possession of the lienor and in the possession of the owner or his representative, cannot, as has already been observed, affect the validity of the statute, as this was a matter falling purely within the exercise of the wisdom and judgment of the Legislature when the law was enacted.

What was expressed by the Supreme Court of the United States, in *Provident Institution, etc., v. Mayor, etc., of Jersey City*, 113 U. S. 506, on page 516, 5 Sup. Ct. 612, on page 615, 28 L. Ed. 1102, speaking through Bradley, J., is apposite to the question under consideration. The learned justice said:

"Even if the water rents in question cannot be regarded as taxes, nor as special assessments for benefits arising from a public improvement, it is still by no means clear that the giving to them a priority of lien over all other incumbrances upon the property served with the water would be repugnant to the Constitution of the United States. The law which gives to the last maritime liens priority over earlier liens in point of time is based on principles of acknowledged justice. That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien laws stand on the same basis of natural justice. We are not prepared to say that a legislative act, giving preference to such liens even over those already created by mortgage, judgment, or attachment, would be repugnant to the Constitution of the United States."

[4] It is further urged that, since the second section of the statute declares that the property shall be subject to a lien until the charges on the property are paid, it therefore virtually deprives the owner of his property, as there is no obstacle in the way of the lienor to prevent him from retaining the property for an indefinite time. But this reasoning has not the merit even of being specious. The owner is not deprived of his property, except by his own act. He has the

privilege of paying the charges on the property and thus discharge the lien. He may, if he sees fit, contest the validity of the lien by bringing an action of replevin or trover, as was done in this case.

The legal situation does not differ from that existing at common law.

In the absence of any statute or agreement between the parties conferring the power upon the lienor to sell the chattel under the lien, the chattel cannot be lawfully sold, as no power of sale is implied from the transaction itself. *Doane v. Russell*, 3 Gray (Mass.) 382; opinion per Shaw, C. J., *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.) 246, 83 Am. Dec. 626; *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 76 N. W. 371, 42 L. R. A. 581, 74 Am. St. Rep. 380. In this last-cited case, Hooker, J., on page 534 of 42 L. R. A., after quoting from leading English and American cases on the subject, says:

"While the doctrine of these cases—i. e., that the creditor cannot sell the property—is indisputable, there was no impediment to the recovery of judgment and sale of the property, as well as any other property of the debtor on execution."

[8] Keeping in view that the object sought by the statute is for the better protection of garage keepers and automobile repairmen, it is manifest that sections 1 and 2 can fully accomplish this purpose, and that the statute is complete and workable without the aid of section 3. Therefore, from what has been said, it is apparent that we are not required to pass upon the legal efficacy of the third section of the act; but, nevertheless, it may prove useful to say in this connection that the ground of attack made upon it, by appellant, that it is unconstitutional because it leaves the time indefinite when the lienor is required to sell the property held or seized, is not sustained by a plain and fair interpretation of this section. The section expressly provides that such property shall "after the expiration of thirty days from the date of such detention," that is, from the time the owner refuses to pay the lien charges or from the time such property is seized (as the case may be), after being out of the lienor's possession, be sold at public auction, upon notice, etc. It does not require personal notice to be given to the owner, but provides for notice by publication, etc.

There is no material difference in this respect from the provision of section 6 of the act concerning distress for rent, which has been on our statute books, almost in its original form, since 1796. *Pat. Law*, p. 173; *Nix Dig.* p. 240; *Revision of 1877*, p. 309; 2 *Comp. Stats.* p. 1940.

Evidently the 30 days required of the lienor to hold the chattel after the detention of it has actually taken place is for the purpose of affording the owner an opportunity to pay the lien charges, or if he intends to dispute the same to resort to a writ of replevin. In the distress act 10 days is given to the tenant or owner of the goods to replevy the same. After the expiration of the 10 days, the land-

lord may take steps to sell the property distrained upon; but the statute is silent, as here, how soon after the expiration of the 10 days such steps shall be taken. In either case a fair construction for the purpose of carrying into effect the legislative intent would be that the requirements of the section must be performed with due diligence and within a reasonable time.

[8, 7] It is next asserted that the statute is unconstitutional in that it is a law impairing the obligation of contracts contrary to article 1, sec. 10, par. 1, of the Constitution of the United States, as well as to article 4, sec. 7, par. 3, of the Constitution of New Jersey.

This objection is without merit. The transaction, under consideration, occurred after the passage of the statute. In the absence of any words expressing a contrary intention, a statute will be construed to operate prospectively.

In *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491, it was held:

"1. State statutes, limiting the right of a creditor to enforce his claims against the property of his debtor, which are in existence at the time a contract is made, are not void as impairing the obligation of the contract.

"2. The inhibition of the Constitution against impairing the obligation of contracts is wholly prospective; the states may legislate, as to contracts thereafter made, as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.

"3. The established construction of the Constitution of the United States against the impairing the obligation of contracts requires that statutes of this class shall be construed to be part of all contracts made when they are in existence, and therefore cannot be held to impair their obligation."

The same court, in *Cross Lake, etc., Club v. Louisiana*, 224 U. S. 632, at page 638, 32 Sup. Ct. 577, 56 L. Ed. 924, at page 928, said that the clause in the federal Constitution providing that no state shall pass any law impairing the obligation of contracts as its terms disclose is not directed against all impairment of contract obligations, but only such as result from a subsequent exertion of the legislative power of the state.

[8] Lastly, counsel of appellant attacks the constitutionality of the act upon the ground that it violates article 4, sec. 7, par. 4, of the state Constitution, which declares that every law shall embrace but one object and that shall be expressed in the title.

This contention is plainly without merit. The title of the act sets out fully its general object. No more than this is required. In *State Board of Health v. Phillipsburg*, 83 N. J. Eq. 408, 91 Atl. 901, Walker, Chancellor, held:

"While the Constitution, art. 4, § 7, pl. 4, provides that 'every law shall embrace but one object and that shall be expressed in the title,' the meaning is that the leading subject of a statute should be fairly expressed in a statute; but the means or instruments by which the general purpose to be attained, or matters merely incidental to it are not a necessary part of the title, the words 'subject' and 'object' with regard to this constitutional provision having come to be regarded as synonymous."

This case was affirmed, especially upon this point, by this court, in 85 N. J. Eq. 161, 96 Atl. 62.

As a result of the views expressed herein on the constitutionality of the act assailed by the appellant, the judgment entered in the court below in favor of the defendant below against the plaintiff below, on the counterclaim, is affirmed, with costs.

(92 N. J. Law, 149)

JAMES v. DELAWARE, L. & W. R. CO. et al.
(No. 59.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. TRESPASSERS ON RAILROADS—CROSSING ACCIDENTS.

Whether, when a person who enters upon a railroad company's right of way as a trespasser and proceeds along that right of way until he reaches a public highway over the railroad, which he intends to cross, he then ceases to be a trespasser and becomes a traveler on the highway when crossing the railroad tracks thereon, quere.

2. RAILROADS ⇨307(5)—CROSSING ACCIDENTS—TRESPASSERS.

The Highway Crossing Act of 1909, Act March 31, 1909 (P. L. p. 54), 3 Comp. St. 1910, p. 4238, § 36a, is intended for the safety and protection of travelers upon the public highway intending to cross over the railroad company's right of way and tracks, and not for the benefit of those who have gotten upon the right of way and within the safety gates without approaching them on the highway.

3. RAILROADS ⇨307(5)—CROSSING ACCIDENT—TRESPASSERS.

The Highway Crossing Act of 1909, Act April 14, 1909 (P. L. p. 137), 3 Comp. St. 1910, p. 4238, § 36b, so far as the safety gates feature thereof is concerned, is intended for the safety and protection of travelers upon the public highway intending to cross over the railroad company's right of way and tracks, and not for the benefit of those who have gotten upon the right of way and within the safety gates without approaching them on the highway.

4. RAILROADS ⇨307(4)—CROSSING ACCIDENT—SAFETY GATES.

The Highway Crossing Act of 1910, Act April 12, 1910 (P. L. p. 490), 3 Comp. St. 1910, p. 4238, § 36c, does not apply in the case of an accident happening upon a railroad crossing where safety gates are installed.

5. RAILROADS ⇨327(3)—CROSSING ACCIDENTS—DUE CARE—LOOKING AND LISTENING.

Where a person enters upon a railroad company's right of way as a trespasser and proceeds along that right of way until he reaches a highway crossing and then attempts to cross the railroad tracks on the highway and is injured, he is subject to the common-law duty of looking and listening, and, if guilty of contributory negligence, is not entitled to recover damages.

6. NEGLIGENCE ⇨65—"CONTRIBUTORY NEGLIGENCE"—ELEMENTS.

"Contributory negligence" is present in a given case when the injured person by his own negligence has contributed to the injury in such a way that, but for his negligence, he would

have received no injury from the negligence of the other party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contributory Negligence.]

Appeal from Supreme Court.

Action by Daisy B. James against the Delaware, Lackawanna & Western Railroad Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Alexander Simpson and George S. Hobart, both of Jersey City, for appellant. Maximilian M. Stallman, of Newark, for appellees.

WALKER, Ch. The plaintiff-appellant sued the Delaware, Lackawanna & Western Railroad Company, the Morris & Essex Railroad Company, James F. Moore, and Joseph I. Case for damages to herself, resulting from being run down by a train of the Delaware, Lackawanna & Western Railroad Company, lessee of the Morris & Essex Railroad Company, which train was operated by the defendant-respondent James F. Moore, locomotive engineer; the allegation being that the defendant-respondent Joseph I. Case, who was flagman at the crossing where the injury occurred, neglected to close the safety gates at the highway known as Greenwood avenue in East Orange, N. J., before the plaintiff was in a position of danger. The action was tried before Judge Speer and a jury at the Hudson circuit. At the close of the plaintiff's case the court directed a nonsuit in favor of the Morris & Essex Railroad Company, and at the close of the whole case directed a verdict in favor of the remaining defendants. From the judgment thereupon entered the plaintiff has appealed to this court.

In the statement of the case, with which the brief for the plaintiff-appellant is prefaced, it is asserted, and may be conceded, that there was evidence from which the jury might have found the following facts:

At the point where the railroad crosses Greenwood avenue there are two tracks, one known as the east-bound track, on which trains run to New York; the other known as the west-bound track, on which trains run from New York. The highway crosses the tracks at right angles. About 300 feet to the west of the westerly line of Greenwood avenue is located what is known as the "east-bound station," where passengers board trains for New York. This station is located on the southerly side of the railroad tracks. There are crossing gates at the highway, one located on the northerly, the other on the southerly, side thereof, extending all the way across the highway, including the sidewalks on either side thereof. At the time of the accident a flagman was on duty in charge of the gates. Plaintiff had a return ticket on the line of the defendant

railroad, and on the day of the accident had been visiting at East Orange and was intending to return to New York. For that purpose she was on her way to the east-bound station when the accident happened. On her way to the station plaintiff crossed a vacant lot located on the northerly side of, and adjacent to, the northerly right of way line, about 400 feet east of Greenwood avenue. After crossing this lot, she turned to the west and walked along a path on the right of way, which ran parallel with the tracks and 5 or 10 feet distant therefrom. She continued along this path in a westerly direction until she reached the public highway known as Greenwood avenue. When she reached the highway the crossing gates were up. She walked a short distance to a point almost in the center of the highway and then turned to her left for the purpose of crossing the tracks and proceeded west to the east-bound station. Just as the plaintiff turned to pass over the tracks, she saw an east-bound train coming into the station, and, thinking that this was the train which she was to take to New York, she started to hurry over the crossing. While her attention was attracted to this train, a west-bound train approached from the opposite direction, moving very slowly, towards and over the crossing. This west-bound train gave no signal or warning of its approach until it was about 30 or 40 feet away, at which time a sharp blast of the whistle was sounded. Plaintiff was struck by this west-bound train while she was in the center of the crossing. This train was moving not faster than 8 miles an hour and could have been stopped within about 20 feet. As a result of the accident plaintiff received very serious personal injuries.

The defendant Moore, was, as stated, the engineer who was operating the locomotive by which the train was drawn. It was alleged that he was negligent in that he failed to give any signal of the approach of the train as required by the statute of this state, and did not keep a proper lookout. The defendant Case was employed by the railroad company as a flagman at the crossing, and it was alleged that he was negligent in that he did not close the gates or warn the plaintiff of the approach of the train.

It ought, perhaps, to be stated that plaintiff was the only one of several witnesses who testified the gates were up; the others said they were down. There was evidence also that the bell on the engine which struck the plaintiff was rung, as required by the statute; but this was disputed, largely by negative evidence. And there was evidence showing that the train was running about 20 miles an hour. These, under our decisions, were jury questions; but the plaintiff was not entitled to go to the jury, as will hereafter appear.

The nonsuit as to the Morris & Essex

Railroad Company is not before us for consideration. Counsel for the plaintiff-appellant concedes that at the trial there was no proof that that defendant had anything to do with the operation of the train which ran the plaintiff down.

The principal reliance of the plaintiff-appellant for a reversal of the judgment in this case is the contention that the railroad crossing statutes of 1909, chapters 85 and 98, apply, and that they required the trial judge to submit the question of the plaintiff's contributory negligence to the jury. This the trial judge refused to do, holding that neither statute was applicable, and that the plaintiff crossed the railroad tracks subject to the common-law duty of looking and listening and doing those things which would make looking and listening reasonably effective, observing that it was manifest that the plaintiff had not performed, or attempted to perform, that duty, because if she had looked in the slightest degree she must have seen the train which struck her, unless some temporary obstruction interfered, in which event she should have delayed crossing until an opportunity was afforded to make the required observation. In this court plaintiff-appellant argues also that the crossing act of 1910, chapter 278, applies; that under that act also the case was required to be submitted to the jury. This point appears not to have been made in the trial court.

The grounds of appeal are: (1) That the trial judge should have submitted the issues, so far as they related to the defendants the Delaware, Lackawanna & Western Railroad Company, James F. Moore, and Joseph I. Case, to the jury; and (2) that whether the last-named defendants were negligent, and whether their negligence was the proximate cause of the injury, and whether such injury was caused by contributory negligence on the part of the plaintiff, should have been submitted to the jury.

The points made on behalf of the plaintiff-appellant in the argument before us were: (1) That there was evidence to go to the jury on the question as to whether the engineer was negligent; (2) there was evidence to go to the jury on the question as to whether the crossing gateman was negligent; (3) under the crossing statutes of 1909 it was the duty of the trial judge to submit to the jury the question of whether the plaintiff was chargeable with contributory negligence, and under this head it was argued that the grade crossing act of 1910 applies; and (4) plaintiff was not a trespasser at the time of the accident. These contentions will be considered in their inverse order.

[1] Before proceeding to this, however, it is pertinent to remark that the question presented on this record, namely, a claim of liability of a railroad company for an injury at a grade crossing where safety gates are

installed, to one who got onto the crossing, not over the highway past the gates when up, but by getting onto the crossing inside of the company's right of way by coming down alongside of the tracks from a point beyond the highway, is one of novel impression; and therefore the cases in our courts in which the effect of the crossing acts were considered in relation to accidents are not helpful in its solution, because none of them involved any such question. See *Tischman v. Erie R. Co.*, 81 N. J. Law, 268, 81 Atl. 114; *Petit v. W. J. & S. R. Co.*, 86 N. J. Law, 298, 90 Atl. 1100; *Ferneti v. W. J. & S. R. Co.*, 87 N. J. Law, 268, 93 Atl. 576; *Brown v. Erie R. Co.*, 87 N. J. Law, 487, 91 Atl. 1023, Ann. Cas. 1917C, 496; *Waibel v. W. J. & S. R. Co.*, 87 N. J. Law, 573, 94 Atl. 951; *Hatch v. Erie R. Co.*, 88 N. J. Law, 545, 97 Atl. 38; *Schnackenberg v. D. L. & W. R. Co.*, 89 N. J. Law, 311, 98 Atl. 266; *Kratz v. D. L. & W. R. Co.*, 90 N. J. Law, 210, 100 Atl. 208.

There are, however, cases in other jurisdictions bearing upon the question at issue here, notably *Matthews v. P. & R. R. Co.*, 161 Pa. 28, 28 Atl. 936, and *C. R. I. & P. R. Co. v. Eininger*, 114 Ill. 79, 29 N. E. 196.

In *Matthews v. P. & R. R. Co.* it is stated that for a long time the railroad company had maintained safety gates on each side of the crossing where the accident occurred, and the court said in its opinion, at page 81 of 161 Pa., at page 937 of 28 Atl.:

"If the gates were up inviting him to cross, and no warning was given by the watchman, notwithstanding the difficulties of seeing and hearing, it would have been for the jury to determine whether he exercised care according to the circumstances. But if a trespasser reached the middle of that crossing from the ties either up or down the railroad, he is in no sense of the word a traveler from the street approaching danger, and about to exercise a right common to the public, that of crossing the railroad. The watchman will not be on the lookout to warn him, nor will the gates be lowered to stop him. These safeguards are to keep people from going on the crossing on the approach of trains, not to warn them to get off. The deceased was bound to know the purpose of the gates and the watchman, and that they were not there to guard against danger to those using the crossing from the direction of outgoing and incoming trains."

In *C. R. I. & P. R. Co. v. Eininger*, the question was with reference to a flagman, not as to gates, at a street crossing over a railroad. But it is not perceived that there is any difference in principle between the two; both flagmen and gates are for the purpose of warning the traveling public as to the danger of, and preventing them from, crossing over a railroad where it intersects a public highway. The court said in its opinion, at page 81 of 114 Ill., at page 197 of 29 N. E.:

"Flagmen are for the protection of persons crossing railroad tracks, and are not for the benefit of persons walking along a railroad track, employing it as a footpath."

While the plaintiff's injury in the *Eininger* Case occurred at a street crossing, it does

not appear that the injured person was attempting to cross the street where the accident occurred, but was going along the railroad company's right of way. While this circumstance was more unfavorable to the plaintiff in that case than the situation in the *Matthews* Case, where the injured person was attempting to cross the highway, having gotten upon it from within and along the railroad right of way some distance from the highway where the accident occurred, still it has a distinct bearing upon the question as to whether a railroad company owes the duty of warning or protection, at a highway crossing, to a person who goes deliberately upon the right of way without approaching it on the highway where the safety device, whatever it may be, is maintained. The facts in the *Matthews* Case make its doctrine particularly apposite in the case at bar, for there, as here, the injured person went upon the highway from within the company's right of way upon which he trespassed at a point beyond the highway crossing.

1. As to whether plaintiff was a trespasser at the time of the accident: Counsel for defendants-respondents argues that the plaintiff was a trespasser upon the tracks by reasons of the provisions of section 55 of the General Railroad Act, Comp. Stat. p. 4245, which provides:

"It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad: Provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

Counsel for plaintiff-appellant argue that she was not a trespasser because she was within the proviso of the statute which is that the section shall not apply to the crossing of a railroad by any person at any lawful public crossing, and that there is no dispute but that at the time of the accident and for an appreciable period prior thereto the plaintiff was in the position of a highway traveler about to pass over the railroad crossing.

Assuming, although the plaintiff entered upon the defendant railroad company's right of way as a trespasser and had proceeded along that right of way until she reached the highway crossing, that then she ceased to be a trespasser and became a traveler on the public highway, still that fact would not entitle her to recover if neither of the grade crossing statutes of 1909 applied, for, assuming her right to be upon the crossing at the time she was injured, she was guilty of contributory negligence and may not escape the consequences thereof, unless that ques-

tion was required to be submitted to the jury by the operation of the legislative acts mentioned. Their applicability or nonapplicability to the case sub judice will now be considered.

[2] 2. As to whether the crossing statutes of 1909 applied: The first, chapter 35, Comp. Stat. p. 4238, § 36a, is as follows:

"Whenever any railroad company shall have assumed to establish and maintain what are known as safety gates at any railroad crossing in this state, and a person is killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down, as required by any statute giving the railroad the right to run through an incorporated city at any rate of speed they see fit, upon compliance with the provisions of such statute, that in all such cases the question whether the person so killed or injured, upon attempting to cross such railroad crossing, at a time when the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages for such loss of life or personal injury."

Now, the first provision is that whenever any railroad shall have established and maintained safety gates at a railroad crossing. Here is manifested an intention to provide safety by the gates themselves, and the only rational safety thus sought to be established, as we view it, is to prevent persons going by—that is, past—the gates when down and getting onto the tracks in a situation of danger. The gates were, in other words, installed so that, when down, persons would be prevented from going onto the tracks until they were raised and the way thus demonstrated to be clear and free from danger. We think it would be doing violence to the legislative intent, clearly manifested, to hold that the operation of these gates was intended as well for the benefit of those already within them, and who therefore could not be stopped by them, as for those approaching outside of them and who could be effectively warned by their being lowered. The further provision that, in all cases where persons are killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks when such gates are not down, the question of contributory negligence shall be determined by the jury, clearly contemplates a case where the person crossing is a traveler on the highway, and who, on the highway, has reached the side line of the company's right of way for the purpose of crossing over its tracks and who would certainly be warned of his danger and prevented from going upon the tracks by means of the lowered gates. It cannot be said that the operation of gates behind a person already on the railroad right of way and in the act of crossing the tracks could afford him any protection. In this situation the person on the right of way could see approaching trains as well, if not better than, the gateman whose duty it is to lower the gates upon the approach of trains.

The title of the statute is "an act relative to accidents at railroad crossings." Thus in the title, as well as in the enacting clause, the word "crossing" is prominent and illuminating. It contemplates crossings all the way over the railroad company's right of way and tracks upon the highway and not some part of them inside the outside lines of the right of way. And the act was not intended to benefit a person, who, through a trespass upon defendant's right of way, or otherwise, has gotten onto the highway crossing within the outside lines of the gates which were installed for the protection of travelers on the highway and are not intended as signals to those who have gotten within them without approaching them on the highway.

[3] The second, chapter 96, Comp. Stat. p. 4236, § 36b, is as follows:

"Whenever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall, during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription 'out of order' be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of his (the) failure of the person injured or killed to stop, look and listen before passing over said crossing."

What has been said above with reference to chapter 35 is generally applicable to chapter 96. Here again the manifest legislative intent was to protect the traveling public at any crossing; that is, to prevent a member of the public from continuing traveling beyond a safety gate extending over the highway crossing along the edge of a railroad company's right of way, when down, which would give warning of danger and actually prevent a person from going onto the tracks and getting into a place of danger, except by the most deliberate acts on his part. The title of this act is "an act with reference to the degree of care necessary to be used by travelers over railroad crossings protected by flagmen or safety appliances or both." The clear legislative intent in this title is to provide protection for travelers upon the public streets and highways, and it could not have been in the contemplation of the lawmaking body that the act they were passing was one which would put a premium upon the recklessness or carelessness of persons who gain access to a railroad's right of way on a highway crossing without having, as a traveler on the highway, gotten onto the railroad by walking or driving on the highway up to it. Further, as to

this statute: During such hours as posted notice "at such crossing" shall specify, the traveling public, unless a written notice "out of order" be posted at a conspicuous place at such crossing, shall be entitled to assume that the gates are in good and proper order and will be duly and properly operated. Where is this notice to be posted to carry out the legislative intent? Manifestly not inside the gates, but outside of them facing down the highway so that those approaching on the street and intending to cross the right of way and tracks may see and look out for their safety accordingly. The warning about the gates being out of order is intended for the protection of such persons as approach them and not for those who have ignored their presence by going onto the tracks without regarding them.

The accident to the plaintiff-appellant which is the subject of this suit was first made a cause for action in the District Court of the United States for the District of New Jersey, where, after trial, the plaintiff had judgment, which was reversed in the United States Circuit Court of Appeals for the Third Circuit. In the case on appeal, *D. L. & W. R. Co. v. James*, 241 Fed. 344, 154 C. C. A. 224, the court said:

"Some 400 feet east of the crossing, Miss James had entered on the railroad's right of way and walked westwardly alongside of the track. In so walking along the track, she was, by the New Jersey statute quoted in the margin (Comp. Stat. p. 4245, § 55), a trespasser. But while this was her then status, it is clear that, when she left the side path and entered on the street crossing and attempted to cross, she ceased to be a trespasser. Nevertheless, the fact of her prior trespass is not to be overlooked, for by such precedent trespass she was enabled to reach the crossing inside the gates, which she would have had to pass had she come up by a proper approach on Greenwood avenue. It follows therefore that by her violation of the statute of New Jersey she brought herself into a position where she had deprived herself of the protection which another statute of New Jersey, also quoted in the margin (Comp. Stat. p. 4238, § 36b), was designed to give to those traveling on Greenwood avenue as they approached such crossing. Indeed, it is evident that it was the plaintiff's own trespass, and not the alleged non-closure of the gates, that brought her inside the gate line."

Quotation is made from this opinion to show that the United States Circuit Court of Appeals, with reference to this very accident and upon what must have been substantially the same state of facts in evidence as appears from observations in the opinion, also held that the plaintiff was not entitled to the benefit of the New Jersey statute, and we may say statutes for the protection of persons crossing over highways over railroads, because of her getting onto the right of way not over the highway but as a trespasser, in the first place at least, by going onto the railroad's right of way and following it down to the crossing. And we agree with that court that, even if she were not a trespasser because upon the highway crossing at the time the accident occurred, still, as her

precedent trespass enabled her to reach the crossing inside the gates, it is not to be overlooked. As to whether when she reached the crossing she ceased to be a trespasser, we find it unnecessary to decide.

The rationale of this subject can perhaps be best expressed in the language of the Supreme Court of Pennsylvania in the *Matthews Case*:

"These safeguards (railroad crossing gates) are to keep people from going on the crossing on the approach of trains, not to warn them to get off."

It is true that this court held, in *Brown v. Erie R. Co.*, 87 N. J. Law, 487, 91 Atl. 1023, Ann. Cas. 1917C, 496, that both of these statutes of 1909 (chapters 85 and 96) applied to every railroad crossing in the state which is protected by safety gates, but there is nothing in the *Brown Case* which makes for the contentions of the plaintiff-appellant in the case at bar. In the *Brown Case* the decedent approached and passed onto the railroad right of way on the highway where safety gates were installed, which were up at the time, and he was killed. While it is not stated in terms in the opinion that he approached the right of way and walked onto the tracks from outside of them, such appears to be the fact by the clearest inference from all that was said therein; and there is nothing whatever in that case to suggest that the deceased gained access to the tracks in any irregular manner. An examination of the paper book in that case, which was before the judges and which is preserved in the state library, will show the fact to be that deceased approached and went onto the railroad right of way over and along the highway at the point where it joined and crossed over the railroad tracks.

[4] Counsel for the plaintiff-appellant asserts in addition that the grade crossing act of 1910, chapter 278, Comp. Stat. p. 4238, § 36c, applies, and argues that under it a trial judge must, in the first instance, submit the question of contributory negligence to the jury. But that that statute has no application to the case at bar is apparent from its title, which is, "An act concerning the liability of railroads for injury to persons or property caused by running cars across public streets and highways at which crossings no safety gates, bell or other device to give warning to the traveling public, have been installed." This title very clearly expresses the object of the enactment (*Waibel v. W. J. & S. R. Co.*, 87 N. J. Law, 573, 94 Atl. 951), and, as safety gates were installed and existed at the crossing where the accident happened at the time of its occurrence, this statute, by its very terms, excludes its applicability to the case at bar.

As none of these grade crossing acts of 1909 and 1910 apply, the plaintiff-appellant's right to recover must be tested by the common-law rule of contributory negligence. That rule was thus stated by Depue, J., speaking for the Court of Errors and Ap-

peals, in *N. J. Express Co. v. Nichols*, 83 N. J. Law, 434, 439 (97 Am. Dec. 722):

"To conclude him (plaintiff) from maintaining his action, his conduct must have been negligent, and his negligence must have contributed to the injury in such a way that, if he had not been negligent, he would have received no injury from the negligence of the defendant."

[5] The facts concerning the accident from the plaintiff's own lips upon the witness stand were as follows:

"Q. Just describe what you did. A. I went through the lot at Eaton Place onto a path that runs parallel with the tracks, and I walked up the track—up the path—alongside of the tracks. Q. And where were you going? A. To Grove Street Station. * * * Q. What was your intention in going in that direction? Where were you going to? A. New York. Q. To take a train? A. Yes. Q. When you saw this train coming into the Grove Street Station, where were you? I mean the train going to New York. Where were you with reference to the crossing? A. I was walking up towards it. * * * Q. Then what did you do with reference to the crossing? A. I wanted to get—I thought that was my train and tried to get it. Q. Well, did you get on the crossing? A. I walked up on the crossing, and when I— Q. And when you got on the crossing, how did you get on the crossing; I mean, did you walk on the cobblestones or go in between the rails, or how did you get on the crossing? A. I went right in between the rail—between the gate and the track. Q. The first rail? A. Yes. Q. What is there between the gate and the first rail? A. A path. Q. Aren't the cobblestones there between the gate and the first rail? (No answer.) Q. Well, you walked on—if you do not know—you walked on between the gate and the first rail, and did you keep on going west? A. Yes, sir. Q. How far west did you go before you started to cross the crossing? A. Well, as I remember, I was standing there near the center of it when I saw the train—the east-bound train pass. Q. And did you hear any bell or whistle from the west-bound train? A. No. Q. Then what was the next thing you knew? A. Well, the east-bound train passed by me, and then that is all I know. Q. You do not remember the west-bound train hitting you at all? A. No. Q. Where were you when you came to? A. In the Orange Memorial Hospital."

It is apparent from this statement of the plaintiff that what she did was this: Being on the crossing and near to a passing train, there being, however, a track between her and the passing train, on which near track a train was approaching her, which she must have seen had she looked, she waited for the passing of the train on the farther track, intending to cross over both tracks, when, just after the passing train got by her, she was struck by the approaching train on the near track. She appears not to have looked along the near track in the direction from which the train thereon was approaching, as prudence for her own safety required her to do, for had she done so she might have drawn back and avoided the accident which resulted from her carelessness. If that which she did was not negligence contributing to her injury in such a way that had she not been so negligent she would have received no injury no matter how negligent the defendants, or any of them, were, it is hard to conceive of a case of that sort. It appears

that she was utterly reckless and took no precaution whatever for her own safety.

[6] It is plain that upon the undisputed facts the plaintiff-appellant was guilty of contributory negligence as a matter of law; and this required the trial judge to direct a verdict for the defendants-respondents, as he did, if not to nonsuit the plaintiff when her case was rested, which he refused.

3 and 4. As none of the three grade crossing acts apply, it is unnecessary to consider and decide whether the plaintiff was a trespasser on the railroad at the time she was injured, or whether the engineer or the gate-man was negligent, for, as matter of law, as already shown, her own contributory negligence bars her from any right of recovery.

The judgment under review must be affirmed.

(89 N. J. Eq. 3)

BARTLEY v. LINDABURY. (No. 42/187.)

(Court of Chancery of New Jersey.
June 13, 1918.)

1. CORPORATIONS \S 121(1) — STATEMENT AS TO STOCK ISSUED FOR PROPERTY.

In suit for specific performance of contract to buy corporate stock, it was not a defense that the statement in writing called for by supplement to the Corporations Act (Act Feb. 19, 1913 [P. L. p. 29]) was not filed when the stock was issued, at least where such statement was filed after suit was brought.

2. SPECIFIC PERFORMANCE \S 16—HARDSHIP TO DEFENDANT.

Because of hardship to defendant, specific performance of a contract to buy stock was not granted against buyer, a farmer, who, being unfamiliar with business methods, had waited until after making contract before applying for a loan on the stock to enable him to make cash payment, and had been unable to secure it; part of the consideration being the buyer's farm, his only means of livelihood and stock having greatly depreciated in value since the date of the contract.

3. SPECIFIC PERFORMANCE \S 25—RIGHT TO REMEDY.

Courts of equity will often refuse to enforce specific performance of an agreement that they would not, on the evidence, set aside.

Suit by William A. Bartley against J. Wilson Lindabury. Decree for defendant.

Elmer King, of Morristown, for complainant. Nathaniel C. Toms and Charles A. Rathbun, both of Morristown, for defendant.

STEVENS, V. C. The bill is filed to enforce the specific performance of the following agreement:

"This agreement made and entered into this 19th day of January, 1916, between Wm. A. Bartley of Bartley, N. J., party of the first part, and J. Wilson Lindabury of Mt. Olive, N. J., party of the second part.

"Party of the first part agrees to sell to party of the second part \$9,900.00 of the stock held by him in the corporation of Wm. Bartley & Sons, in consideration of which the party of the second part does hereby pay unto the party of the first part the sum of \$5.00 as a binder to this agreement, the receipt of which amount the party of the first part hereby acknowledges. The balance to be paid as follows: \$1,000.00

on or before January 24, 1916, and the remaining \$4,900.00 of the cash payment to be paid on or before April 1, 1916. The remaining \$4,000.00 to be paid by the transfer of a guaranteed deed for the farm owned and occupied by the party of the second part, consisting of 115 acres and buildings situated thereon, located in the township of Mt. Olive, county of Morris, state of New Jersey, said deed to be transferred on or before April 1, 1916.

"It is further mutually understood and agreed that in the event that the farm is sold for more than \$4,000.00 the party of the second part is to receive one-half of the increased price over and above the commission paid for selling.

"In witness whereof the parties hereto have this day and year set their hands and seals first above written.

Wm. A. Bartley.

"J. Wilson Lindabury.

"Witness: Mrs. Jennie L. Lindabury.

"Witness: Mrs. Jennie L. Lindabury."

The complainant was, at the time the agreement was made, a stockholder of Wm. Bartley & Sons, a corporation doing business in the village of Bartley, whose capital stock was \$24,000. Of this, complainant owned 101 shares. The defendant was a farmer. His family lived opposite the factory, and his farm was in Mt. Olive, two miles distant.

The complainant had had some difference with the other factory owners, and wanted to sell his stock. A week or ten days before the agreement was executed, he went to Mt. Olive and asked defendant to buy it. He spoke of the company's condition, and suggested that he (defendant) talk with the company's officers, which he did. The agreement was drawn by complainant himself, and was executed in defendant's house in the presence of his wife. After signing, the defendant sought to borrow money on the stock to enable him to pay the \$5,900, which the agreement called for. He could not get it, and within 24 hours notified complainant over the telephone that the agreement was off. In May following, the machine shop was partially destroyed by fire, and, the insurance being inadequate, there was a net loss estimated at from \$8,000 to \$10,000. At the time the agreement was made the stock seems to have been worth about par.

[1] There is no merit in the defendant's contention that the agreement was nothing but an option. One has only to read it to see that it was, in form at least, a contract binding on both sides. And there is no proof of fraudulent representation. Furthermore the defendant's contention that he is not bound by the contract for the reason that the statement in writing, called for by the supplement to the Corporations Act (P. L. 1913, p. 28), was not filed at the time the stock was issued is untenable. The act does not say *when* the directors are to file the statement which it prescribes. While its language is a little ambiguous, it is apparent that what is called for is a statement of the completed transaction. The company, if it purchase property, must pay "what the same is reasonably worth in money, at a fair, bona fide valuation," and may "issue therefor

stock to the amount of the value thereof, in payment." After this is done the directors are to make and file a true statement of the transaction. This was done in the present case, but not until after suit brought. Whether or not it should have been done before, I find nothing in the terms of the act which would invalidate complainant's stock and make it unmarketable.

[2] I come now to the only defense which seems to me to possess any merit, and that is that the court ought not to enforce the equitable remedy of specific performance because it would be harsh and oppressive. With considerable hesitation, I have adopted this view. In his work on Equity Jurisprudence, vol. 8, p. 449, Pomeroy says:

"Oppression or hardship may result from unconscionable provisions of the contract itself, or it may result from the situation of the parties, unconnected with the terms of the contract or with the circumstance of its negotiation and execution; that is from external facts or events or circumstances which control or affect the situation of the defendant."

To the same effect, is *Crane v. De Camp*, 21 N. J. Eq. 414.

Looking first at the external circumstances, it appears that defendant, a farmer, was unfamiliar with business methods. Had he been otherwise, he would have applied for a loan before signing the contract. It also appears that the fire loss must have considerably diminished the value of the stock. While a vendee ordinarily takes the risk of depreciation, it is still true that the defendant is here placed in a position of peculiar hardship. He agreed to give for the stock, not only \$5,900 in cash, but also his farm, his only means of livelihood. The result of decreeing performance would probably be this: He would lose his farm, and would be decreed to pay \$5,900 in money. Failing to pay, the stock decreed to be transferred would be subject to levy and sale. In its depreciated condition it is more than likely that there would be but little demand for it, and that, bidders falling, complainant would buy it in and so become the owner of both farm and stock.

Looking at the agreement itself, it is not entirely clear what is meant by the stipulation, "party of the first part agrees to sell to party of the second part \$9,900 of the stock held by him in the corporation." Does it call for stock whose par value is \$9,900, or does it call for as many shares as would, taken at their market value, make up that amount? The agreement calls for a "guaranteed" deed. Does it mean a deed containing covenants of seisin, quiet enjoyment and warranty, or does it mean a deed for land, title to which is guaranteed by a title or trust company? Complainant's bill prays for a warranty deed. These obscurities might not of themselves prevent specific performance, but there is another provision which seems to me to be oppressive, particularly in view of what has happened. That provision is "that in the

event that the farm is sold for more than \$4,000, the party of the second part (defendant) is to receive one-half of the increased price over and above the commission paid for selling." The agreement, drawn by complainant himself, does not compel him to sell. He may retain indefinitely. The undisputed evidence is that the farm is worth \$7,000. For this and the cash payment of \$5,900, the defendant is to receive stock, whose market value did not exceed, and may not have equaled \$9,900 at the time of the making of the agreement, and which is now, unquestionably, worth less. The clause in question was not the subject of discussion, and is plainly one-sided.

[3] The law is well settled that courts of equity will often refuse to enforce the specific performance of an agreement that they would not, on the evidence, set aside. *Woollam v. Hearn*, *Leading Cases in Eq.* vol. 2, p. 695 (3 Amer. Ed.); *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Bowker v. Cunningham*, 78 N. J. Eq. 458, 79 Atl. 608. There is no rule more clearly established, says Chancellor Zabriskie in *Crane v. De Camp*, 21 N. J. Eq. 418, than "that upon an application for a specific performance of a contract the court must be satisfied that the claim is fair, reasonable, and just, and the contract equal in all its parts. If these points are not established by complainant, he will be left to his remedy at law."

It seems to me that as a matter of judicial discretion, looking at all the circumstances, to decree specific performance would be harsh and oppressive within the meaning of the cases, and that the equities of the case would be better subserved by leaving the parties to their legal remedy of damages.

(92 N. J. Law, 332)

WEST SHORE R. CO. v. STATE BOARD OF TAXES AND ASSESSMENT et al.

(Supreme Court of New Jersey. June 17, 1918.)

1. HIGHWAYS §126 — TAX — PROPERTY LIABLE — RAILROADS.

In view of Act March 29, 1917 (P. L. p. 785), the state board, upon receiving its total of local municipal aggregates for the purpose of computing the average rate of taxation, under 4 Comp. St. 1910, p. 5280, to determine tax upon first and fourth class railroad properties, cannot ignore the additional one mill added to the local levy by Road Tax Act March 13, 1917 (P. L. p. 41), notwithstanding the provision of the Railroad and Canal Act that the tax imposed shall be in lieu of all other taxation upon the property within the act.

2. STATUTES §225 — CONSTRUCTION — ONE SUBJECT-MATTER.

Where divers laws are made relating to one subject-matter, the whole must be considered as constituting one system, and mutually connected one with another.

3. STATUTES §212 — CONSTRUCTION — PRESUMPTIONS.

The Legislature, in passing a law, is presumed to be conscious of the legal effect and operation of existing laws.

4. STATUTES §190 — AMBIGUITY.

In case of doubt or ambiguity, such a construction should be adopted as will make all the provisions of the statute consistent with each other and with the pre-existing body of the law.

5. COMMERCE §73 — TAXATION — RAILROAD COMPANIES.

Fullman equipment, used by a railroad entirely in interstate traffic, is not taxable in the state.

Certiorari to State Board of Taxes and Assessment.

Certiorari by the West Shore Railroad Company, by the United New Jersey Railroad & Canal Company, by the Central Railroad Company of New Jersey and the Hudson & Manhattan Railroad Company, by the Raritan River Railroad Company, by the Lehigh Valley Railroad Company and others, by the Erie Railroad Company, and by the Long Dock Company to review proceedings of State Board of Taxes and Assessment and others. Tax in part set aside, and in other respects affirmed.

Argued November term, 1917, before SWAYZE, TRENCHARD, and MINTURN, JJ.

Collins & Corbin, Robert J. Bain, George Holmes, Edwards & Smith, and Albert O. Wall, all of Jersey City, for prosecutors. John W. Wescott, Atty. Gen., of Camden, and Herbert Boggs, of Newark, for defendants.

MINTURN, J. [1] The writs of certiorari in these cases were allowed for the purpose of bringing up the records of the state board of taxes and assessment, in the cases of the Erie Railroad Company and six kindred companies, and involve the question whether under the General Railroad Act (4 Comp. St. 1910, p. 5260 et seq.) first and fourth class railroad properties are affected by the provisions of chapter 16 of the Laws of 1917, commonly known as the Road Tax Act in so far as that act imposes a state tax of one mill on the dollar for state purposes, for the year 1917, upon those classes of property. The act in question provides for the levying and collecting in all the municipalities of the state of a tax of one mill on the dollar of all real and personal property, which, when collected in due course, shall be paid to the state treasurer, to be placed by him in the state road fund. The insistence of the various prosecutors is that, in so far as this return by the municipalities to the state treasurer involves an increasing of the state tax imposed upon them, it is illegal and void.

This contention is based upon the various railroad enactments, which under the settled policy of the state have resulted in segregating certain classes of railroad property from the general ratables of the state, and subjecting them to a state tax in lieu of the local tax imposed by the various taxing districts in which such properties are located. *State Board v. Central R. R. Co.*,

48 N. J. Law, 146, 4 Atl. 578. The effect of these enactments was to segregate, for taxing purposes by the state, what are known as first and fourth class railroad properties, the tax upon which under the provisions of the supplement of 1906, to the General Railroad Tax Act (C. S. p. 5280) shall be computed by the state board of taxes and assessment at the "average rate of taxation." The third section of the act defines the manner in which such average rate shall be struck, viz.:

"The average rate of taxation shall be computed and determined by the said board by dividing the aggregate taxes by the aggregate value of the general property in the state, which said rate, so arrived at and determined, shall be entered upon the records of the board, and shall constitute the average rate of taxation for the year." P. L. 1906, p. 122.

The Railroad and Canal Act (4 Comp. St. 1910, p. 5280, § 445) provides that the tax so imposed shall be in lieu of all other taxation upon the property within its provisions. In this situation the Legislature passed what is known as the Road Tax Act (chapter 16, Laws of 1917), which imposes a tax of "one mill on each dollar of the value of all the real and personal property" in every municipality, "to be assessed, levied and collected in the same manner and at the same time as other taxes upon real and personal property are now assessed, levied and collected." This tax, when collected, is to be eventually paid to the state treasurer, who is directed to place the same in the state road fund.

The insistence of the prosecutor in effect is that, while this additional tax is to be collected from all the taxable real and personal property in the state, it cannot legally be exacted from them because of the particular status they occupy under the legislation, peculiarly affecting them, and to which we have adverted. The contention thus made is not without some color of support, in view of the adjudication of this court in *Gillen v. Essex County Board of Taxation* (*Johnson v. City of Passaic and Borden v. Jersey City*) 102 Atl. 676. The effect of these decisions, however, was simply to determine that the act of 1917 does not *ex proprio vigore* impliedly or expressly comprehend a tax upon first and fourth class railroad property. That determination, however, does not reach the inquiry contained in the present issue, which is whether, when the state board has received its total of local municipal aggregates for the purpose of computing the state tax rate, it can ignore the additional one mill added to the local levy, and make up the state tax rate, minus that added factor; or, reduced to the concrete legal inquiry presented here, did the Legislature by the act of 1917 evince an intent to impose the additional one mill of taxation upon the segregated railroad property retained by the state for the purposes of taxation, as well as upon the general ratables of the state assessed locally? Obviously a negative answer to this inquiry would result in attributing to the

legislative body an intent to impose what must be conceded to be a state tax for a state purpose, by a process of elimination which would in its application produce neither uniformity nor equality, and thus run counter to the constitutional inhibition.

[2] The inquiry, therefore, obviously resolves itself into one of legislative intent, and to define the legislative purpose we must consider, not only the act *sub judice*, imposing the tax, but all kindred legislation; for the rule of construction is fundamental that, when divers laws are made relating to one subject-matter, the whole must be considered as constituting one system, and mutually connected one with another. *N. J. Insurance Co. v. Meeker*, 37 N. J. Law, 304. The act of 1906 (chapter 82), which is the supplement to the act for the taxation of railroad and canal property, leaves the state board no discretion in establishing the average rate of taxation for the state ratables, so far as the local returns from the various taxing districts are concerned. The state board is required by the provisions of that act to accept them at their face value, and make the state computation of the average rate upon the basis of the figures so returned. The act of 1917 is mandatory, in terms, and requires the addition of the road tax to the local rate, thus necessarily increasing the average rate of taxation when the local returns are made the basis of the computation of the state board, in accordance with the requirements of the supplement of 1906. That such must have been the legislative purpose is manifest, unless we are prepared to attribute to the lawmaking body an intent to effectuate, by an inequality of taxation, the raising of revenue for a general state purpose, or an absence of consideration for the *modus operandi* of existing laws upon the same general subject.

[3] It is rather to be presumed that the Legislature, conscious of the legal effect and operation of existing laws, passed the act *sub judice*, for the purpose of effectuating the end that its language (taken in connection with legislation, which had established a familiar and well-understood policy of dealing with the subject of taxation, both state and municipal) must necessarily effectuate, unless the present equilibrium, established as a state policy of equality, in the distribution of the public burdens is to be seriously impaired and disturbed.

[4] Consonant with this view, the rule of construction has been held to be that the mind of the Legislature is presumed to be consistent, and, in case of a doubtful or ambiguous expression of its will, such a construction should be adopted as will make all the provisions of the statute consistent with each other, and with the pre-existing body of the law. *Shaw v. Macon*, 21 Ga. 280; *Fouke v. Fleming*, 13 Md. 392; *Black*, Interpretation of Laws, 98. If a doubt as to the legislative purpose were to be indulged in this regard, it is obviously dissipated by the pro-

visions of chapter 230 of the Laws of 1917, an act passed at the same session, and entitled:

"An act to appropriate and to provide for the payment of a portion of the state tax levied and assessed upon railroad and canal property in this state to the state road fund, to be used for state road purposes."

The preamble of the act clarifies the legislative intent expressed in the earlier act by reciting the legislative purpose in levying the tax as follows:

"Whereas, the tax now levied and assessed upon railroad and canal property, under and by virtue of the provisions of the act [of 1884 and 1888] and of the supplements and amendments thereto, will be increased in the rate of one mill on the dollar" by reason of the passage of the act sub judice, "and it is the legislative intent to effect such increase of taxation upon railroad and canal property, and to appropriate and apply such increase to the state road fund, for state road purposes."

And the act accordingly makes the appropriation. The imposition of the road tax is superadded to the local burdens by practically the same legislative *modus operandi* as is the state school tax, the inclusion of which has never been questioned, as a legitimate factor in the computation of the average rate of taxation by the state board. These considerations make it manifest that the action of the state board in including the additional one mill on the dollar, as returned by the local assessors, was in accordance with the letter and spirit of the legislation providing for it, and that the proceedings of that board in that regard should be affirmed.

[5] The action of the board, however, in the case of the Erie Railroad, comprehended an assessment and tax on the tangible personal property of that company, which included an assessment and tax on certain Pullman equipment, which it is conceded by the Attorney General has no situs in this state for the purposes of taxation, being used entirely in interstate traffic. That situation manifestly exempts the Pullman equipment from taxation here. *Central R. R. Co. et al. v. State Board*, 49 N. J. Law, 1, 7 Atl. 306.

The tax to that extent will be set aside, and in other respects affirmed.

(92 Vt. 355)

McDONALD v. McNEIL.

(Supreme Court of Vermont. Washington.
May 16, 1918.)

1. FRAUD §26—PERSONS LIABLE FOR REPRESENTATIONS.

A person, inducing another by false representations as to land to buy for both and extend him credit for his part of purchase money, is liable for the fraud.

2. FRAUD §59(2)—MEASURE OF DAMAGES.

The measure of damages for fraudulent representations as to land, inducing plaintiff to buy it with defendant, is the difference between the value of plaintiff's share as it was and as it would be if it was as represented.

3. FRAUD §64(1)—QUESTION FOR JURY.

Evidence as to fraudulent representations being made, inducing purchase, held sufficient to go to jury.

4. TRIAL §140(2) — QUESTION FOR JURY — CONFLICT IN PARTY'S TESTIMONY.

Plaintiff's testimony is not neutralized by it being somewhat contradictory, but it is for the jury to say which of such statements they will accept.

5. FRAUD §54—ACTION—DECLARATION—INTENT—"FALSELY AND FRAUDULENTLY."

The words "falsely and fraudulently," applied by the declaration in a tort action to defendant's representations, inducing plaintiff to act to his injury, necessarily imply deliberate intent to deceive, so express averment of such intent is unnecessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False; Fraudulent.]

6. NEW TRIAL §6—SETTING ASIDE VERDICT—DISCRETION.

Motion to set aside the verdict is addressed to the court's discretion.

Exceptions from Washington County Court; Fred. M. Butler, Judge.

Action on the case by D. H. McDonald against Frederick McNeil. Plea the general issue. Verdict for plaintiff, and defendant excepted. Affirmed.

Argued before WATSON, C. J., and HAS-ELTON, POWERS, TAYLOR, and MILES, JJ.

John W. Gordon, of Barre, for plaintiff.
F. L. Laird, of Montpelier, for defendant.

POWERS, J. This is a tort action for false representations, whereby the plaintiff was induced to purchase a certain piece of real estate. There was evidence tending to show that the defendant, who owned a piece of land on the shore of Cold Stream Lake, in Penobscot county, Me., by falsely and fraudulently representing to the plaintiff that a 90-acre lot contiguous to the one above mentioned had growing upon it 800 large hemlock trees, 153 large pine trees, a certain large number of cords of bobbin stock white birch, and other valuable wood and timber, and that there were 25 valuable cottage lots on that part of the lot bordering on the lake, induced the plaintiff to furnish the money and buy said 90-acre lot and to take the title thereto to said parties jointly, and to give the defendant credit for his half of the investment; that it turned out that the number of pine and hemlock trees was grossly overstated; that the quantity of wood and lumber was greatly exaggerated; that the shore land was too wet to be available for cottage lots; and that the value of the land bought was much less than represented. The trial below was by jury, and the verdict was for the plaintiff. By special verdicts, the jury found that the defendant induced the plaintiff to furnish the money and buy the land by false statements and representations, knowingly made with intent to deceive, that the plaintiff relied upon

them, believing them to be true; that the property in question was worth \$1,900; and that it would have been worth \$800 more, if it had been as represented.

[1] The case, then, presents the record feature of one held for a tort by which he himself lost as much as the other party. This feature does not prevent a recovery. Ordinarily, the parties to actions of this character stand in the relation of vendor and vendee, or as parties to an exchange of property. But such relations are not essential to the right of recovery. Liability grows out of the fact that the plaintiff has been misled to his prejudice, and not that the defendant has profited by his wrong. An actual motive to do injury to the plaintiff is not essential, but if a false representation is made with knowledge of its falsity, the intent to deceive is presumed. 12 R. C. L. 349; note to *Cottrell v. Krum*, 18 Am. St. Rep. 561. It is not necessary to show that the defendant acted from motives of personal advantage (*Whiting v. Price*, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307), and the fact that he actually gains nothing by the deception is not controlling (*Pasley v. Freeman*, 3 T. R. 51, 2 Smith L. C. 1300, and note; *James v. Crosthwait*, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 728; *Chellis v. Cole*, 116 Me. 283, 101 Atl. 444). In *Ewins v. Calhoun*, 7 Vt. 79, the defendant gained nothing by his fraud, yet he was held liable, and in *Paddock v. Fletcher*, 42 Vt. 389, it was said that the defendants were liable for their deception whether its fruits went into their own pockets or not. With these rules in mind and the special verdicts before us, we find little difficulty in disposing of the question of liability. Though the defendant lost equally with the plaintiff by the purchase, he knowingly misrepresented material matters, and did this in circumstances rendering him liable to the plaintiff for his share of the loss.

[2] In actions for deceit in the sale or exchange of real estate, two different rules for the assessment of damages have grown up, each recognized by courts of the highest authority. One is that the damages are to be measured by the difference between the property as it is and as it would be if it was as represented. The other is that the damages are to be measured by the difference between the value of the property and the price paid. Our rule is the one first above stated. It applies as well to personal as to real property, to sales and exchanges, and is too firmly established to be questioned. *Bowman v. Parker*, 40 Vt. 410; *Shanks v. Whitney*, 63 Vt. 405, 29 Atl. 367; *Belka v. Allen*, 82 Vt. 456, 74 Atl. 91; *Howton v. Strout Farm Agency*, 90 Vt. 50, 96 Atl. 330; *Maidment v. Frazier*, 90 Vt. 520, 98 Atl. 987; *Turner v. Howard*, 91 Vt. 49, 99 Atl. 236.

This was the rule applied to the case before us, the plaintiff being allowed to recover one-half the difference between the value as it was and as it was represented. The defendant excepted, and insists that the second rule above specified should have been applied. So it remains to consider whether the facts that the defendant gained nothing by the transaction and was to become a partner in the enterprise affect the question.

It is to be noted that it is not the case of one partner deceiving another. The deception preceded the partnership. It was the deception that resulted in forming the partnership. So the fact that the defendant became a part owner as one of the results of his misrepresentation does not affect the quality of his conduct or the results flowing from it. He stands no differently than one wholly disinterested. The plaintiff's situation is affected by this relation only to the extent that he is relieved of one-half of the loss he would otherwise have sustained.

We see no logical reason why the damages here should not be assessed under our usual rule. We find no case wherein any such distinction as the defendant insists upon has been discussed, though the rule we adopt appears to have been applied in several cases. *Medbury et al. v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 728, was an action brought against a third person for fraudulent representations regarding the cost and value of a certain tannery. One of the plaintiffs sold out his interest in the property for just what he paid for it, and it was urged in behalf of the defendant that as one of the plaintiffs had suffered no loss, there could be no recovery. But the court held otherwise, saying, in effect, that if through fraud he paid a higher price than the estate was worth, he was entitled to damages, without regard to what disposition he afterwards made of the property.

In *Shaw v. Gilber*, 111 Wis. 165, 86 N. W. 188, a manufacturer was induced by the defendant's false and fraudulent representations to sell his goods on credit to an insolvent corporation, and was allowed to recover their full value, though this included his usual profit.

In *Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431, one induced by the false and fraudulent representations of a third party to accept a mortgage in part payment for property was allowed to recover the difference between the value of the mortgaged property and what it would have been if as represented.

Page v. Wells, 37 Mich. 415, was a case not wholly unlike the one in hand. There the defendant, under an arrangement which the court construed as a contract of employment, was to ascertain and report to the plaintiff the facts affecting the quality, quantity, and value of certain pine lands. A report having been made pursuant to the ar-

rangement, the plaintiff bought the lands in reliance thereon. The event showed that the lands were misrepresented in the reports, and suit was brought for damages. In disposing of the question of damages, Judge Cooley said:

"If the plaintiff was induced to purchase lands on representations which proved to be untrue, the measure of his loss, as it seems to us, would be perfectly plain, and would be reached by an answer to the following question: 'How much less is the land worth as it is, than it would have been if its condition and quality had been as represented?'"

That was an action of assumpsit; we see no reason why the language of the court is not equally applicable to an action of tort. Then, too, in that case, the defendant was paid a specific price for making the examination and report, while here the advantage which the defendant expected to gain was to come through being taken in on credit as an equal owner. This difference does not, however distinguish the cases, so far as applicable legal rules are concerned. The plaintiff was entitled to the benefit of his bargain. The defendant should make it good to him. Courts holding to the other rule say that a plaintiff should not be allowed to speculate out of the defendant's wrongs; to that we reply, Nor should a defendant be allowed to gamble on it. And under their rule, the temptation to interfere in the affairs of others, in order to help a friend or punish an enemy, would be greatly enlarged. If active fraud is to carry no greater penalty than to make price and value agree, honesty will not be much encouraged.

[3] There was no error in overruling the defendant's motion for a verdict. The defendant's claim that there was no evidence tending to show fraud or misrepresentation is not supported by the transcript, which is referred to. The defendant knew that the plaintiff was wholly unacquainted with this land, and was relying entirely on what he said about it. He admitted that he made most of the representations complained of, but claimed that he merely quoted what Mr. Appleby, the owner, said about it. But the plaintiff and his wife, who was present, testified that the defendant did not quote Appleby, but made the statements of his own knowledge, and that he claimed that he had actually counted the hemlock trees. As to the cottage lots and what was said about them, the defendant insisted on the stand that his statements were true.

[4] It is true, as claimed by the defendant, that in some particulars the plaintiff's testimony was somewhat contradictory. But the result is not what is claimed for it; it was for the jury to say which of such statements they would accept. *Pocket v. Almon*, 90 Vt. 10, 98 Atl. 421.

[5] An express averment of an intention to deceive was unnecessary. It is alleged

in the declaration that the representations were "falsely and fraudulently" made. The word "falsely" in some connections implies a purpose to deceive (*State v. Smith*, 63 Vt. at page 211, 22 Atl. 604); and the term "fraudulently" includes the idea of intentional deception (*Hammatt v. Emerson*, 27 Me. 308, 48 Am. Dec. 598). When in a tort action the terms "falsely and fraudulently" are applied to misrepresentations inducing one to act to his injury, they necessarily imply a deliberate intent to deceive. *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974, Ann. Cas. 1913A, 386; *Bank of Montreal v. Thayer*, 7 Fed. 622; *Eibel v. Von Fell*, 64 N. J. Law, 364, 48 Atl. 1117; *Hammatt v. Emerson*, *supra*.

[6] There was no error in overruling the motion to set aside the verdict. It was addressed to the discretion of the court, and that discretion was neither withheld nor abused. *Lincoln v. C. V. Ry. Co.*, 82 Vt. 187, 72 Atl. 827, 137 Am. St. Rep. 998; *French v. Whelden*, 91 Vt. 64, 99 Atl. 232.

Judgment affirmed.

(92 Vt. 338)

MORGAN v. VILLAGE OF STOWE.

(Supreme Court of Vermont. May 16, 1918.)

1. MUNICIPAL CORPORATIONS §733(4)—MUNICIPAL WATER SUPPLY—INJURIES TO PERSONS—LIABILITY.

In general, a municipality is liable for negligence in construction and maintenance of water systems, etc., for its private advantage and emolument as is a natural person, the liability including negligence of its duly authorized agent.

2. MUNICIPAL CORPORATIONS §745½—MUNICIPAL WATER SUPPLY—INJURIES TO PERSONS—LIABILITY.

A municipality is not liable for injury from negligent performance of governmental duties by authorized agents, though expense of the performance is borne by the municipality.

3. PLEADING §214(1)—ADMISSIONS BY DEMURRER.

On demurrer to declaration, facts stated in the declaration are taken to be true.

4. EVIDENCE §83(2)—MUNICIPAL WATER SUPPLY—CHARTER POWERS—PRESUMPTIONS.

Where city has organized and installed fire protection system the presumption must be that it was done in accordance with its charter powers.

5. MUNICIPAL CORPORATIONS §733(4)—MUNICIPAL WATER SUPPLY—LOCATING HYDRANTS—GOVERNMENTAL ACTS.

A fire protection hydrant connected with a municipal water works system was not a part of the system constructed for the city's benefit or emolument, since it was set apart for the exclusive benefit of the public.

6. MUNICIPAL CORPORATIONS §745½—GOVERNMENTAL ACTS.

To make the act of a city a governmental act, it need be performed only by one legally authorized, and not by any particular officer.

7. MUNICIPAL CORPORATIONS §733(4)—MUNICIPAL WATER SUPPLY—LOCATING HYDRANTS—LIABILITY.

Plaintiff could not recover for injuries caused by alleged negligent location of fire hydrant connected with municipal water system, since

the location thereof was a governmental act in its nature judicial.

Exceptions from Lamolle County Court; Zed. S. Stanton, Judge.

Action by J. C. Morgan against the Village of Stowe. On plaintiff's exceptions to order sustaining demurrer to complaint pro forma. Judgment affirmed.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

M. P. Maurice, of Morrisville, R. W. Hurlburt, of Hyde Park, and T. O. Cheney, of Morrisville, for plaintiff. F. G. Fleetwood, of Morrisville, and J. W. Redmond, of Newport, for defendant.

MILES, J. This suit is brought to recover against the defendant for the negligent location of one of its hydrants, in consequence of which it is alleged that the plaintiff was injured. The declaration was demurred to and the demurrer was sustained, and the case comes here on exception to that action of the court.

The question here involved is of much importance, as it affects most, if not all, of the incorporated villages and cities in the state; for the hydrant, alleged to have been negligently placed, was located, with reference to the street and sidewalk, as hydrants are usually placed, and was constructed for the purpose for which hydrants are maintained and used in villages and cities.

[1, 2] The general rule as to the liability of municipalities for negligence, in the construction and maintenance of water systems, lighting plants, and the like, which are for the private advantage and emolument of the municipality, is that of a natural person; and for the negligence of its duly authorized agent in relation thereto, by which injury is done to another, without the fault of the injured party, the municipality is liable. This rule is not disputed by either party; nor is there any dispute but that the law in this state is well settled, whatever it may be in other jurisdictions, that a municipality is exempt from liability when injury results from a negligent performance of a governmental duty, by one authorized to perform it, though expense of the performance is borne by the municipality. The dispute in this case arises upon the application of these rules; the plaintiff claiming that the hydrant in question is a part of the water system and not a governmental structure, and the defendant claiming that it is such a structure, exclusively constructed and maintained for a governmental purpose. By the defendant's charter it was created a fire district, and its trustees were given the power of and made subject to the same restrictions as prudential committees in fire districts, with power to make contracts and expenditures for the preservation of property, in the defendant vil-

lage, from loss or damage by fire, and to provide a supply of pure water for fire, domestic and other like uses, for itself.

[3] The plaintiff in his declaration, alleges, in substance that the defendant is the owner of the waterworks, and has operated the same for the purpose of supplying the inhabitants of the defendant with water for domestic purposes and for use in the protection of the property of the inhabitants from loss and damage by fire; that in the process of construction the defendant placed the hydrant in question in the margin of one of defendant's streets, very close to the traveled track and inside the sidewalk, and that, in consequence of its being placed so close to the traveled track, it endangered the life and property of the plaintiff, and of all persons having occasion to use the street. The declaration being demurred to, the facts stated above are taken to be true. In brief, the negligence alleged is that the hydrant was negligently placed in the street, and that that was the proximate cause of the plaintiff's injury. The defendant concedes that, if the facts stated in the declaration show that the defendant was using the hydrant for its own private advantage and emolument, the judgment below should be reversed; but it claims that the declaration shows that the hydrant was placed where it is located and was being maintained at the time of the alleged injury for the sole benefit of the public, and the act in placing it there was a governmental act.

[4] For authorities sustaining its contention, the defendant relies principally upon the case of *Welsh v. Rutland*, 56 Vt. 223, 48 Am. Rep. 762. Plaintiff argues that that case is unlike the case at bar, because in that case the negligence complained of was the act of a public officer in the discharge of a governmental duty, and that the direct injury was caused by ice in the street, for which municipalities have never been liable. A complete answer to that position is that the declaration does not count upon a defect in the street, and the decision of that case was not based upon that ground, and the discussion of the case in the opinion of the court is with reference to the liability of the village on account of its negligence in repairing one of its hydrants. The negligence counted upon in this and the *Welsh Case* is with reference to the hydrant, and in this respect they are alike, and the only difference is that in the *Welsh Case* the negligence alleged consisted in a failure to properly repair the hydrant, while in this case it is for a failure to properly locate the hydrant. The plaintiff further claims that the *Welsh Case* differs in principle from this case because in that case the facts show that there was a duly installed and duly authorized fire protective system. From the charter of the defendant and the allegations in the declaration in this case, it appears that the defendant has a "duly in-

stalled and duly authorized fire protective system." Its charter powers for the installation of a fire system are as broad as those in the Welsh Case, and the declaration shows that its fire system was completely installed and organized; for the plaintiff alleges, as above set forth, facts indicating that the defendant duly organized as a fire district.

All that is alleged to have been done by the defendant in the construction of the fire department and the installation of the hydrant in question could not have been legally done without some kind of an organized system, and the presumption must be that it was done under its charter. The charter of Rutland was more restricted, if anything, than the defendant's charter; for the defendant's charter gave to the trustees of the defendant, as stated above, all the powers of prudential committees of fire districts, and for such powers see P. S. 8653, to and including section 8656. The difference in the facts of the two cases is a difference in fact merely and not in principle. In the Rutland charter the supervision of the fire department was largely committed to engineers and wardens whose duties were defined in the charter. In the case at bar the supervision of that department is given to the trustees as prudential committees in fire districts, whose duties are declared in P. S., sections above referred to.

[5] From a careful examination of the Welsh Case we think the principle involved in that case is not materially different from the principle involved in the case at bar, and if the repair of the hydrant in the Welsh case was a governmental act, the placing of the hydrant in this case was equally a governmental act, and, if that case states the law, the placing of the hydrant in question was a governmental act. Strictly speaking, the hydrant in question was not a part of the water system over which the water commissioners had charge, and for which they were empowered to fix water rates; and, though the hydrant was connected with the water main, it was not a part of the water system constructed for the benefit or emolument of the defendant (*Sanborn et al. v. Enosburg Falls*, 87 Vt. 479, 89 Atl. 746), and, though attached to that system, it was set apart for the exclusive benefit of the public.

In the *Sanborn* Case the facts disclosed that defendant put, on the side of one of its streets, a "barrel catch-basin"; that there was a tile running under the sidewalk into this barrel and a six-inch tile from the barrel across the street, underground, connected with the sewer of the village; that the tile was put in to protect the sidewalk and to carry surface water into the sewer; that the tile, sluice, and catch-basin became frozen and were neglected by the defendant in consequence of which the plaintiff's property was injured by overflowing water.

The plaintiff sought to recover on the

ground that the negligence was the defendant's failure to keep in repair its sewer system. The court held that the tile and catch-basin were not a part of the sewer system, though connected with it, but were maintained for the protection of the street, and that the defendant was not liable for the injury. In 19 R. O. L. 1116, § 397, it is stated, that it makes no difference that the municipality uses the same reservoirs and pipes for its fire service that it employs for the distribution of a public supply for domestic purposes, from which it derives a profit, since the two functions are clearly distinguishable. So here, the hydrant was maintained for the protection of the public from loss or damage by fire, as stated in the plaintiff's declaration. This case, being in principle substantially like the Welsh Case, deserves the same disposition as should be given to that case. If the decision in that case is sound, the judgment in this case should be affirmed.

The Welsh Case has been cited as authority and with approval in *Weller v. Burlington*, 60 Vt. 28, 12 Atl. 215, *Bates v. Rutland*, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363, 22 Am. St. Rep. 95, *School Dist. v. Bridport*, 63 Vt. 383, 22 Atl. 570, *Sanborn v. Enosburg Falls*, supra, and other Vermont cases, and it may now be treated as having declared the settled law of the state. The plaintiff does not directly attack its soundness, but seeks to avoid its effect by setting up a distinction between that case and the case at bar. He argues that in the Welsh Case the officer whose negligence was the alleged cause of the injury was a public officer, because he was a first assistant engineer of the fire department, and that in this case the hydrant in question was not located by any public officer.

[6] We fail to see the distinction claimed by the plaintiff. In the Welsh Case the alleged negligent act was performed by an officer of the fire department under the direction of the village trustees, and in this case the negligent act was performed by "the defendant by its servants and agents." We do not apprehend it is necessary for an act to be performed by any particular officer, to give to the act the character of a public or governmental act. It is enough if the act is performed by one having legal authority to perform it; and while performing the act he is, by virtue of the performance of that act, a public officer. *Bates et ux. v. Rutland*, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363, 22 Am. St. Rep. 95, was an action for negligence in locating a stone crusher too near the highway, in consequence of which the plaintiff's horse was frightened and the plaintiff thrown out and injured. The crusher was located by direction of the village trustees outside of the limits of the village, with the consent of a majority of the selectmen, and was being operated by authority of the trustees in preparing material with which to repair the vil-

lage streets. It was held that the action did not lie, the court saying:

"The officers by whom the work was being performed were, for this purpose, public officers, and for their negligent acts an action does not lie against the defendant."

In another place in the opinion the court, recognizing the principle that the character of the employment is determinative of whether the act is governmental or otherwise, say:

"It must be conceded that the defendant corporation is a political subdivision of the state, chartered and organized mainly for governmental purposes. Then, were the trustees and street commissioners, at the time of the accident, engaged in a public service, or in a work that was for the peculiar benefit of the defendant in its local or special interests? The character of the employment is determinative of the defendant's liability for the acts of these officers."

In *Fisher v. City of Boston*, 104 Mass. 87, 6 Am. Rep. 196, the court says:

"It makes no difference whether the Legislature itself prescribed the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from, in its corporate capacity."

In *Hafford v. City of New Bedford*, 16 Gray (Mass.) 297, the court say:

"The members of the fire department of New Bedford, when acting in discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service, and no action will lie against the city for their negligence or improper conduct, while acting in the discharge of their official duty."

In the *Welsh Case* the repair complained of was being done by the first assistant engineer, under the direction of the trustees. Under the Rutland charter the duties of the engineers and wardens were to inquire into the condition of the property of the fire department and to supervise and care for the same, and report its condition to the trustees of the village as often as circumstances rendered it necessary, for the safe-keeping and proper repair of such property. This would seem to indicate that the duties of the engineers and wardens were to look after the property and report to the trustees, who were to direct to be made such repairs as they adjudged were necessary, and that was what was done in the *Welsh Case*. The trustees directed the engineer to do what he did do. The act was that of the trustees through the engineer, and, from anything appearing in the case, the legal effect of the act would have been the same if performed by the trustees personally, or by some other person, not connected with the fire department, under the direction of the trustees. It is the lawful act performed for the public good that determines its governmental character.

[7] It does not appear in the case at bar who located the hydrant complained of, but

we are to assume that it was by some one having legal authority to locate and construct it; and, that being so, and for the public good, and that alone, it falls within that class of cases of which the *Welsh Case* is one and the *Sanborn Case*, and the cases therein cited are others. In the *Welsh Case* it is held as follows:

"The fire department and its service are of no benefit or profit to the village in its corporate capacity. They are not a source of income or profit to the village, but of expense, which is paid, not out of any special receipts or fund, nor defrayed even in part, by assessments upon particular persons or classes benefited, as in case of sewers or waterworks, but from the general fund raised by taxation of all the inhabitants."

In another place, in the opinion of the court, it is said:

"While it may be true that the hydrant is not part of the aqueduct, so far as private uses of the water thereby supplied are concerned, it is certainly the very means by which the public use of the water, namely, its use for the extinguishing of fires and the like, are obtained."

The *Welsh Case* clearly holds that a hydrant is a public or governmental structure, and it is a matter of common knowledge that it is used exclusively for public purposes, and is so constructed as to be of no value for individual or private uses. This principle is recognized in *Tainter v. Worcester*, 123 Mass. 811, 25 Am. Rep. 90, in which the court say:

"The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, reservoirs, and hydrants to supply water for the extinguishment of fires."

And it is also recognized in *Jewett v. City of New Haven*, 38 Conn. 368, 9 Am. Rep. 382, in which the court quoted with approval from *Wheeler v. City of Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368, as follows:

"The laws of this state have conferred upon its municipal corporations powers to establish and organize fire companies, procure engines and other instruments necessary to extinguish fires, and preserve the buildings and property within their limits from conflagration; and to prescribe such by-laws and regulations for the government of such companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental."

In *Fisher v. Boston*, *supra*, the court say:

"Cities and towns are authorized by law to procure and maintain fire engines and reservoirs of water therefor, and to pay the necessary expense thereof, either by general taxation or out of moneys belonging to the town, because the prevention of damage to buildings by fire is an object which affects the interest of all the inhabitants and relieves them from a common burden and danger, and is therefore within the scope of municipal authority."

And further along in the opinion the court say:

"In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town house or public way."

To the same effect are *Hafford v. New Bedford*, supra; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Bigelow v. Randolph*, 14 Gray (Mass.) 541; *Oliver v. Worcester*, 102 Mass. 489, 8 Am. Rep. 485.

The great weight of authority is to the effect that hydrants and apparatus for the extinguishment of fire in a municipality are in their nature public or governmental property, and that for negligence in their use and maintenance for a public purpose no action will lie.

The plaintiff claims that while it may be true that hydrants and apparatus used for the extinguishment of fires in a village or city may be public or governmental property, yet in this case the defendant is liable, because of a faulty execution of the plan for the installation of the fire department. In support of this he can claim no more than is alleged in the declaration, namely, that the hydrant was improperly located. He fails to distinguish between a faulty execution of a plan and a faulty location of a part of a plan. In the location of a plan the village authorities must necessarily deliberate and adjudge upon the system or plan of location, and such action on the part of the village trustees is in its nature judicial, for which no private action is incurred for errors of judgment or want of forecast. Such is the holding in *Winn v. Rutland*, 52 Vt. 481, much relied upon by the plaintiff, in which the court say:

"In acting under the chartered power, the village authorities must necessarily deliberate and adjudge upon the system or plan of the work, when to perform it and where to locate it. So far, no liability to private action is incurred for errors of judgment or want of forecast. The inauguration of a plan of sewerage, so long as it remains in mere resolution, cannot, in the nature of things, work actionable injury or harm to individuals. Having devised a plan, it may be carried into execution with due care and skill, without risk of private action."

The same principle is held in *Tainter v. Worcester*, supra, in which the court say:

"The works to be constructed by the city of Worcester, under the statute of 1864, were, so far as related to safeguards against fire, to be erected and maintained by the city for the benefit of the public and without pecuniary compensation or emolument. The questions whether and where the public hydrants should be erected were within the exclusive control of the municipal authorities, as the public interest might seem to them from time to time to require."

To the same effect is *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 832, in which the court say:

"As to common sewers, built by municipal authorities under power conferred by law, it has been held, upon great consideration, that, as the power of determining where the sewers shall be made involves the exercise of a large and quasi judicial discretion, depending upon considerations affecting the public health and general convenience, therefore no action lies for a defect or want of sufficiency in the plan or system of drainage adopted within the authority so conferred."

We think, and so hold, that the location of the hydrant in question was a public and governmental act performed by the defendant through its agents, who acted in the capacity of governmental officers, and that the *Welsh Case* is full authority for this holding, and must control and govern this case. Judgment affirmed.

(32 Vt. 375)

NEW YORK CENT. RY. v. CLARK.

(Supreme Court of Vermont. Brattleboro.
May 17, 1918.)

1. ACCOUNT, ACTION ON §21 — PLEAS TO SPECIFICATION.

In an action on a book account in the statutory form followed by a specification of items, a plea by defendant going to the specification and not to the declaration is bad, since a specification itself cannot be pleaded to.

2. JURY §14(3)—ACCOUNT—JURY TRIAL.

An answer or plea in bar going to the merits of a claim for an accounting, or which, if true, defends upon the state of the accounting claimed, does not entitle a defendant to a jury trial.

3. ACCOUNT, ACTION ON §21—DEFENSE.

In an action on book account, a plea of nothing due, no dealings and absence of account, does not relieve defendant from liability to account.

4. PLEADING §214(2) — DEMURRER—ADMISSIONS.

A demurrer admits only what is well pleaded.

5. APPEAL AND ERROR §231(2)—RESERVATION OF OBJECTIONS—GROUNDS OF DEMURRER—FUNDAMENTAL ERROR.

Under rule 14, a ground of demurrer may be considered on appeal, although not specified below, where the error is so fundamental as to distort the course of the law.

Exceptions from Windham County Court; E. L. Waterman, Judge.

Action by the New York Central Railway, lessee of the Boston & Albany Railway, against H. G. Clark and trustee. Demurrers to defendant's plea were overruled, and plaintiff excepts. Reversed and remanded, with directions.

Argued before WATSON, O. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Stickney, Sargent & Skeels, of Ludlow, for plaintiff. Harvey & Whitney, of Brattleboro, and Hale K. Darling, of Chelsea, for defendant.

HASELTON, J. This is an action of contract. The defendant filed four pleas by way of an answer. To these pleas severally the plaintiff demurred. The trial court overruled the demurrers, adjudged the defendant's pleas sufficient, and, exceptions being taken, passed the cause to this court before final judgment. The plaintiff seeks its remedy by an action of book account, using the brief and simple language of the time-honored form provided by statute, a form which, because of its brevity, and simplicity, and comprehensiveness, conforms both in letter and in

spirit to the requirements of the practice act. *Blaisdell v. McClary*, 90 Vt. 431, 98 Atl. 1001. The plaintiff filed a specification in which it charges the defendant for a claimed balance for the transportation of freight in cars. There are many items in the specification. Nearly all of the charges are on 20,000 pounds of freight "Brattleboro-Brighton," the freight charges being \$30. Accompanying each charge referred to above is a credit of \$28. Sixteen of the charges are for the same amount of freight each, but the charge in each such instance is \$28, and there is in each such case an accompanying credit of \$30. One charge is \$24 for freight on 16,000 pounds, and the companion credit is \$22.40. That is, in some few cases the credits are more than the items of charge to which they respectively correspond, and in all other instances the items of credit are less than the corresponding debit items.

[1] The defendant's answer is by way of four pleas, so-called. Reduced to a brief statement, such as the practice act contemplates, pleas 1 and 2 set out that each of the several items of the plaintiff's specification arose out of contracts by which the plaintiff agreed with the defendant to ship specified amounts of live stock from Brattleboro in this state to Brighton station in Massachusetts; that in each instance the plaintiff falsely and fraudulently represented to the defendant that the rate charged was the proper and legal rate; that the defendant had no knowledge as to the rate or charge for the shipment as fixed by rule, published tariff, or any regulation of law, except as it was disclosed to him by the plaintiff; that, however, the plaintiff knew that by some rule, regulation, or tariff, and by some computation thereunder, an additional rate might be charged the defendant; that, in each instance, as the plaintiff knew, the defendant was shipping a whole or a part of the shipment as agent for others from whom he had collected or was to collect proportionately; that the defendant was persuaded to enter into each such contract of shipment, to make the shipment, and to pay therefor according to the contract by the false and fraudulent concealments of the plaintiff. These two pleas of the defendant's answer are substantially the same. The second, however, sets up, in terms, an estoppel. These pleas we shall refer to again, but we here note that they are bad, in that they go to the plaintiff's specification and not to its complaint or declaration. *Currier v. King*, 81 Vt. 285, 289, 69 Atl. 873; *Aseltine v. Perry*, 75 Vt. 208, 210, 54 Atl. 190; *Alexander v. School District*, 62 Vt. 273, 277, 19 Atl. 995; *Lapham v. Briggs*, 27 Vt. 28.

A specification may show a defendant how to plead to the complaint, but a specification cannot itself be pleaded to. "Specifications

are the creature of the court, and are not a part of the record for the purpose of subsequent pleading." And this is emphatically true in an action of book account in view of the well-established character of the action and the duty of the auditor to bring the credit down to the time of the hearing before him. *Porter v. Smith*, 20 Vt. 344; *Delaware v. Staunton*, 8 Vt. 48.

Proceeding in his answer by what he calls pleas 3 and 4, the defendant says that "there is no sum or amount justly due from him to the plaintiff by the plaintiff's original book," and "that there is not and never has been any account or subject of account or book account between the plaintiff and the defendant," that the plaintiff has not and never has had any account or book account with or against the defendant, and that "there has never been between the plaintiff and the defendant any account for transactions, contracts or matters of deals of any sort which were the subject or basis for any account or book account." All these matters set forth by the defendant in his answer by pleas 3 and 4 go to the merits of the plaintiff's claim in his action on book, as do also the matters set out in pleas 1 and 2 which go to the specification. All these matters are for the consideration of an auditor after judgment to account is rendered. Our cases illustrate the kinds of defense that may be made in bar of an accounting. Such a defense is the permanent disability of the plaintiff to maintain such an action. *Library Bureau v. Hooker*, 84 Vt. 530, 80 Atl. 680. See, also, *Metcalf v. Metcalf's Estate*, 89 Vt. 63, 94 Atl. 1, where the marital relation between the plaintiff and the deceased Metcalf, during the time when the account was claimed to have accrued, was relied on, though in vain, as a bar to an accounting on book. See, further, *Hunneman v. Fire District*, 37 Vt. 40, where it is held that if a defendant, sued as a corporation, would deny its corporate existence, such defense should be raised before judgment to account is rendered.

[2] The defendant throughout his brief seems to take the position that because some matters may be pleaded in bar of any accounting, anything in bar may be so pleaded, and a jury trial demanded on the issue so formed. But an answer or plea in bar that goes to the merits of the claim for an accounting, or that, if true, defends upon the state of the accounting claimed, does not entitle a defendant to a jury trial; in fact, a defendant is not entitled to file such an answer to a claim to an accounting on book. The defenses of payment, nothing due, no dealings, settlement, accord and satisfaction, and all defenses which involve a consideration of the merits of the claim made, all such defenses as are here made must go before the auditor, and on consideration of the auditor's report all the rights of the defend-

ant are protected as appears from our statutory provisions and our cases.

[3] That no part of the defendant's answer relieves him from liability to account appears from the following cases: *Blaisdell v. McClary*, 90 Vt. 431, 98 Atl. 1001; *Library Bureau v. Hooker*, 84 Vt. 530, 537, 80 Atl. 660; *Davis v. Farwell*, 80 Vt. 166, 170, 67 Atl. 129; *Hogan v. Sullivan*, 79 Vt. 36, 64 Atl. 234; *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; *Smith v. Bradley*, 39 Vt. 366; *Matthews v. Tower*, 39 Vt. 433; *Sargeant v. Sunderland*, 21 Vt. 284; *Porter v. Smith*, 20 Vt. 344; *Hagar v. Stone*, 20 Vt. 106. In the action of book account "the right to plead (or answer) in bar is as limited as the right to defend before the auditor is extended." *Steele, J.*, in *Smith v. Bradley*, 39 Vt. 366, 369. The most thorough discussion of the nature and incidents of the action of book account, to be found in our reports, is the opinion in *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366. Therein Judge Thompson, referring to the rule laid down as above by Judge Steele, says:

"This has ever been the rule in this state. This has in effect absolutely precluded the forming of an issue * * * on the merits of the plaintiff's account."

[4] The defendant in his brief speaks of the things which the plaintiff's demurrers admit. But demurrers admit only what is well pleaded, and here nothing is well pleaded by the defendant. *Matthews v. Tower*, 39 Vt. 433, 440.

[5] The defendant says that the plaintiff's demurrers to pleas 1 and 2 are bad because the grounds therefor as specified set up matters of fact; that is, that they are speaking demurrers. If we assume that this is so, the fact remains that, with all such stated grounds struck out or disregarded, there are left demurrers to the pleas in question, and the trial court was bound to notice grounds of demurrer not pointed out that vitally affect the integrity of our judicial system. Rule 14 of this court says that when, as here, a demurrant is the excepting party, he will not, without leave, be heard upon any cause of demurrer not shown by the bill of exceptions to have been specially pointed out on the hearing below. This means that there may be grounds of demurrer so fundamental that this court will consider them, and may hear counsel thereon, although such grounds were not pointed out below; and this rule is not inconsistent with the practice act, for while that provides that a demurrer shall distinctly specify the reason why the pleading demurred to is insufficient, there is nothing in the act to prevent the court from noticing and holding insufficient a plea or answer, wholly irrelevant and calculated to distort the course of the law, merely because the demurrer does not in terms point out the real character of the plea. The trial court and this court have the inherent power to

keep unwarranted proceedings from creeping into our practice, and such power it is the duty of each court to exercise. *Lee v. Follensby*, 83 Vt. 35, 43, 74 Atl. 327, 138 Am. St. Rep. 1061; *Powers v. Rutland R. Co.*, 83 Vt. 415, 76 Atl. 110. Much of the discussion in the briefs of counsel on both sides relates to matters not now before us, and such matters we refrain from here discussing.

Judgment on the pleadings reversed, and cause remanded that judgment to account may be rendered.

(79 N. H. 520)

PAGE et al. v. PORTSMOUTH HOSPITAL et al.

(Supreme Court of New Hampshire. Rockingham. June 29, 1918.)

Transferred from Superior Court, Rockingham County; Allen, Judge.

Petition by Calvin Page and another, as executors, against the Portsmouth Hospital and another. Case transferred. Case discharged.

Petition for the construction of a will. The question is whether two houses and the land on which they stand are devised by a certain clause of the will.

Calvin Page, of Portsmouth, for plaintiffs. John H. Bartlett, of Portsmouth, for defendants.

PER CURIAM. In the absence of briefs or arguments for the parties, the executors are advised that the two houses mentioned are not included in the description of real estate devised by the clause of the will or codicil referred to.

Case discharged. All concurred.

(79 N. H. 54)

PARKER v. TOWN OF NEW BOSTON.

(Supreme Court of New Hampshire. Hillsborough. June 29, 1918.)

1. APPEAL AND ERROR ~~§~~842(6)—EXCEPTION—ADMISSION OF PHOTOGRAPH.

Exception to the admission of a photograph as evidence does not raise a question of law.

2. HIGHWAYS ~~§~~194—ACCIDENT—"EMBANKMENT."

A road with a vertical stone-supported drop at the side of 11 inches may be found to be an embankment, within Laws 1893, c. 59, § 1, as to liability of towns for injury to traveler from defectively railed embankments.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embankment.]

3. HIGHWAYS ~~§~~213(2)—DANGEROUS CONDITION—QUESTION FOR JURY.

Whether a highway, because of 11 inches lateral drop without railing, and obscured by vegetation, presented a dangerous condition, rendering it unsuitable for travel, within Laws 1893, c. 59, § 1, as to town's liability for injury to traveler, is a question for jury, on testimony and view.

4. TRIAL §=120(2)—ARGUMENT OF COUNSEL— INFERENCE OF LAW.

For counsel to ask the jury to draw an inference from defendant's failure to offer experimental evidence of the capacity of highway at place of accident, for passage of meeting automobiles and teams, is not objectionable, as stating fact not in evidence; whether the inference could be drawn being a question of law.

5. APPEAL AND ERROR §=1060(1)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Statement of counsel in argument, that they criticize us for not having plaintiff's wife here, "when she is at home with three children," if involving testimony as to a fact not in evidence, does not avoid verdict; her nonattendance not being thereby explained, it appearing the children were boys 8 to 13 years old.

Transferred from Superior Court, Hillsborough County; Allen, Judge.

Action by Henry E. Parker against the town of New Boston. Case transferred, after verdict for plaintiff, on defendant's exceptions. Exceptions overruled.

Case for injuries from a defective highway. Verdict for the plaintiff. The defendant excepted to the admission of a photograph of the plaintiff's vehicle, to the denial of its motions for a nonsuit and a verdict, and to statements of plaintiff's counsel in argument. The facts sufficiently appear in the opinion.

Robert W. Upton and John M. Stark, both of Concord, for plaintiff. James P. Tuttle, of Manchester, for defendant.

PARSONS, O. J. [1] The exception to the admission of the photograph as evidence does not raise a question of law. Pritchard v. Austin, 69 N. H. 367, 46 Atl. 188.

[2, 3] The plaintiff met an automobile upon the highway and turned out to pass. In so doing the wheels of his wagon went over the edge of the road, where it had been built up with stones to hold the shoulder. The vertical drop was 10.8 inches, and the edge of the wall was about one foot from the traveled path. The plaintiff was thrown from his wagon and struck on a stone wall beside the road. At the time the space between the traveled part of the way and the wall was filled with vegetation and apparently safe for travel. The defendant's motions for a nonsuit and a verdict were upon the ground that the evidence did not disclose as the cause of the injury a dangerous embankment defectively railed within the meaning of the statute. Laws 1893, c. 59, § 1. The road supported by the vertical wall of stones substantially 11 inches high could be found to be an embankment. Wilder v. Concord, 72 N. H. 259, 264, 56 Atl. 193. There was no railing. Whether the construction presented a dangerous condition, which, obscured by vegetation, was so likely to cause injury in the use of the way that a railing should have been erected was a question of fact for the jury. The opinion of the road builders, called by the defendant, if competent, was not conclusive. The jury

had a view, and it was for them to say, upon the testimony and their examination of the road, whether the highway was unsuitable for the travel upon it because of the lack of a railing. Seeton v. Dunbarton, 72 N. H. 269, 271, 56 Atl. 197. It cannot be said that, as in Wilder v. Concord, supra, a railing would obstruct the highway.

[4] The exceptions to argument are not well founded. Whether the inference which counsel asked the jury to draw from the defendant's failure to offer experimental evidence of the capacity of the highway at the place of accident for the passage of meeting automobiles and teams could be drawn, was a question of law. Counsel stated no fact not in evidence.

[5] The statement, "They criticized us for not having Mrs. Parker in here when she is at home with three children," was, counsel making it claim, so far as it involves an assertion as to Mrs. Parker's location, an inference from the evidence that plaintiff lived with his wife and had three children at home. But, if it be assumed the assertion was testimony as to a fact not in evidence, the error does not require the destruction of the verdict. The three children were boys between 8 and 13 years of age. There was nothing in the case tending to show, and counsel did not claim, there was anything in the mother's care of children of this maturity which would necessarily prevent her attendance at the trial. The statement that Mrs. Parker was at home under such circumstances had no tendency to explain her non-attendance. It was entirely immaterial upon the issue upon which counsel offered it, and had no tendency to confuse or prejudice the jury, and was in effect an admission that she could have been produced, as the defendant appears to have claimed she should have been. A verdict will not be set aside for the admission of immaterial evidence, unless it is clear it must have influenced the jury. Cook v. Brown, 34 N. H. 460, 470; Rowell v. Hollis, 62 N. H. 129. The statement of unproved facts in argument which avoids a verdict is the statement of facts material upon some issue in the case, or if wholly irrelevant such as are calculated to prejudice the jury. Story v. Railroad, 70 N. H. 364, 376, 387, 48 Atl. 288.

Exceptions overruled. All concurred.

(79 N. H. 21)

WOOLDRIDGE v. LAVOIE.

LAVOIE v. WOOLDRIDGE.

(Supreme Court of New Hampshire. Belknap. June 4, 1918.)

1. INFANTS §=58(2) — CONTRACTS — RESCISSION.

A minor, who purchased an automobile, could rescind the contract at any time before he became of age, or within a reasonable time thereafter, for any reason, or no reason, and recover the money paid, on returning the car

and accounting for benefits received, or damage caused to the car.

2. INFANTS ¶58(1)—CONTRACTS—RESCISSION—RESTITUTION.

Where a minor purchased an automobile, but rescinded the contract, he was chargeable with the value of the benefits received, including the pleasure derived from the use of the car, if the manner in which he used it was the reasonable thing for a boy in his station of life to do.

3. INFANTS ¶59—CONTRACTS—RESCISSION.

A minor, who purchased an automobile and rescinded the contract, while liable to account for any damages to the car caused by his tortious acts, cannot be compelled to account for damages caused by his ignorance or unskillfulness.

4. INFANTS ¶58(1) — CONTRACTS — RESCISSION.

The court may, during trial of an action of assumpsit against a minor for the price of an automobile purchased by him, permit the minor to rescind, if that is the reasonable thing for him to do.

5. APPEAL AND ERROR ¶1043(3)—HARMLESS ERROR.

In action for price of automobile sold to minor, coupled with attachment, when the minor brought action to recover the portion of the price already paid, also attaching the automobile, the seller was not prejudiced by the fact that the car was under attachment in both suits, since ordering judgment on the verdict for defendant in the first suit discharged the attachment therein, and payment of judgment for plaintiff in the second suit would discharge that attachment.

Transferred from Superior Court, Belknap County; Kivel, Judge.

Actions, one by Wilbur W. Wooldridge against Arthur Lavoie, and one by Arthur Lavoie, by his father, Peter Lavoie, against Wilbur W. Wooldridge. Causes transferred. Exceptions overruled.

Assumpsit. The first action is to recover the balance due on the purchase price of an automobile; the second, to recover back the part of the purchase price already paid. Trial by the court. Verdict for the defendant in the first action, and for the plaintiff in the second for \$210. The court found that Wooldridge sold Lavoie the car for \$275, and that it was fairly worth that sum at that time. Lavoie paid him \$200 at the time of the sale, and has since paid \$10. The court, while the trial was in progress, permitted Lavoie, who is a minor, to rescind the contract he made with Wooldridge and to return the car to Wooldridge. The value of the car at that time was \$50. The depreciation in the value of the car was due in part to natural causes and in part to Lavoie's improper use of it. Transferred on Wooldridge's exception to the verdicts and to the court's permitting Lavoie to rescind the contract.

Frank P. Tilton, of Laconia, for exceptant. Oscar L. Young, of Laconia, opposed.

YOUNG, J. [1] Since Lavoie was a minor, he could rescind the contract he made with Wooldridge at any time before he became 21, or within a reasonable time thereafter,

for any reason, or for no reason, and recover back the money he had paid toward the purchase price, by returning the car and accounting for (1) any benefit he had received from its use, and (2) paying any damage to the car that was caused by his tortious acts. *Hall v. Butterfield*, 59 N. H. 354, 358, 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408; *Young v. Currier*, 63 N. H. 419.

[2] While it is true, as Wooldridge contends, that the pleasure to be derived from the use of a car may be a benefit to a minor within the meaning of this rule, whether Lavoie was benefited by using this car in the way he did depends on whether using it in that way was the reasonable thing for a boy in his station in life to do; and as the facts are understood the court has found that using the car in the way Lavoie did was not the reasonable thing for him to do.

[3] Although Lavoie should account for any damages to the car that were caused by his tortious acts, he cannot be compelled to account for damages that were caused by his ignorance or unskillfulness in operating the car (*Stack v. Cavanaugh*, 67 N. H. 149, 153, 30 Atl. 350); and while the court has found that a part of the depreciation in the value of the car was due to Lavoie's "improper use of it," it has not found that he either willfully or negligently damaged the car, and one of these things must appear before he can be compelled to account for any part of the depreciation, for the test to determine that question is the same that would be applied to determine the plaintiff's right to recover, if Lavoie had hired the car and this was a suit to recover damages caused by the way Lavoie used it.

[4, 5] There is no merit in Wooldridge's contention that the court erred in permitting Lavoie to rescind the contract during the trial. No reason has been suggested, and none is apparent, for holding that the court cannot permit a minor to rescind his contract at any time before judgment, if it finds that that is the reasonable thing to do. Neither is there any merit in his contention that he is prejudiced by the fact the car is under attachment in both of these suits, for ordering judgment on the verdict in the first suit in and of itself discharges the attachment in that suit, and paying the judgment in the second suit will have that effect in so far as the attachment in that suit is concerned.

Exceptions overruled. All concurred.

(22 Conn. 690)

DESSUREAULT v. MASELLY.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. DEATH ¶108(3) — CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In action for death of 11 year old boy of low mentality, crushed by a heavy truck, ques-

tion of contributory negligence of deceased *held*, under the evidence, to be for the jury.

2. NEGLIGENCE \S 186(29) — **CONTRIBUTORY NEGLIGENCE—ELEVEN YEAR OLD BOY.**

An 11 year old boy of subnormal mentality cannot be said, as a matter of law, to have failed to exercise due care for a boy of his years and mental capacity in his failure to avoid a truck that backed up diagonally toward him, where he had reason to believe truck would back up straight.

3. NEGLIGENCE \S 184(4) — **SUFFICIENCY OF EVIDENCE.**

In action for death of 11 year old boy crushed by heavy truck through alleged negligence of truck driver, evidence *held* to support verdict for plaintiff.

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Action by Nelson Dessureault, administrator, against Frank M. Maselly, to recover damages for negligently causing the death of the plaintiff's intestate, brought to the superior court in New Haven county. Plaintiff was nonsuited in a trial to the jury before Bennett, J., and from the refusal of the trial court to set aside said judgment, plaintiff appeals. Error, judgment set aside, and new trial ordered.

Clayton L. Klein, of Waterbury, for appellant. Lawrence L. Lewis, of Waterbury, for appellee.

PER CURIAM. The evidence offered by the plaintiff tended to prove the following facts: The plaintiff's intestate was a minor child about 11 years of age, and his mentality was below that of the average child of his years. The defendant owned and operated a heavy motor truck, which was used in the transportation of freight. This ran into the child. The accident in question happened on November 3, 1918, about 6 o'clock in the afternoon at a freightyard in the city of Waterbury. When the accident occurred there were only three persons present, the defendant's servant, Angelo Colantonio, the driver of the car, a brother of the plaintiff's intestate by the name of Nelson, and the boy William who was killed. The testimony as to the direct acts of negligence was limited to that of Nelson, the brother of the deceased. From his testimony it appears that on the afternoon of the day when the accident happened the two boys went to the freight station in Waterbury upon the invitation of Colantonio, the defendant's servant. When they reached the freightyard it was about dusk. The defendant's servant told the boys to get off the truck and see if he was backing up straight to the freight car door. The boys then got off the truck. Nelson jumped into the box car, and William remained upon the ground about four feet at the right of the freight car door, in which his brother was standing. At this time the rear of the motor truck was about seven feet distant from the freight car. While the boys were occupying these positions the truck was sta-

tionary and not directed straight toward the freight car door. Nelson, who was standing in the door, shouted to the operator of the truck to go ahead. Instead of going ahead as directed by the boy, Colantonio backed the truck up swiftly in a diagonal direction, so that the rear of the truck caught William between the truck and the freight car, crushing his head and skull which resulted in his death. From the uncontradicted testimony of the brother Nelson, it is a little difficult to understand why the deceased boy failed to exercise ordinary care. The record discloses that the trial court found that the defendant's agent was negligent, but granted a motion to nonsuit on the ground that the evidence did not show that the deceased boy was free from contributory negligence. In the latter there is error.

[1-3] The question of contributory negligence as the evidence appeared was one for the jury, and, furthermore, it could not be said as a matter of law that the plaintiff's intestate was not in the exercise of due care for one of his years and mental capacity. The jury might have found that the defendant's servant knew, or should have known, that the deceased was mentally abnormal; that the injured boy was about four feet to the right of his brother, who was standing in the car door; and that the boy who was killed had reason to think that the rear of the truck would not come back diagonally, but would be guided straight toward the open freight car door, where his brother was standing. It is fair to assume that he heard the direction of the brother to go ahead, and that he acted accordingly. Instead of going ahead the driver of the truck caused it to go backward swiftly in a diagonal direction toward the deceased, which gave no reasonable chance for the boy to escape the injury which caused his death. This evidence was uncontradicted, and would have supported a verdict, and the judgment of nonsuit should not have been granted.

There is error, the judgment of nonsuit is set aside, and a new trial is ordered. The other Judges concurred.

(93 Conn. 1)

HALL v. J. LA COURCIERE CO. et al.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

MASTER AND SERVANT \S 380 — **WORKMEN'S COMPENSATION ACT—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT"—FAILURE TO CARE FOR WOUND.**

Where, when injured workman reported to representative of employer, neither he nor representative thought wound required medical attention, but later condition became worse, so that medical treatment was necessary, injury arose "out of and in course of employment," within Workmen's Compensation Act, and not from his own willful or negligent failure to care for his wound.

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Proceedings under the Workmen's Compensation Act (Laws 1913, c. 138), by John W. Hall, opposed by the J. La Courciere Company, the employer, and others. Compensation was awarded, and the employer appeals. No error.

Seymour O. Loomis, of New Haven, for appellant. Oswin H. D. Fowler, of Wallingford, for appellee.

SHUMWAY, J. The compensation commissioner, in a memorandum filed with the award, correctly says that the only question in the case as to which any doubt can be entertained is whether the claimant so far neglected his injury as to affect his claim for compensation. He has found these facts:

At the time the claimant received his injury he reported it to the representative of the employer respondent, and the representative concurred in the view that it did not call for medical attention. The claimant was injured on the 4th of June, 1917, and he continued to work until the afternoon of June 8th, when he quit work on account of the injury. On the latter day he had a talk with the respondent's representative, and he advised the claimant to go to any physician he desired to consult, as the respondent was insured. The claimant did not think it was necessary to consult a physician, and so stated at the time, but thereafter he had home treatment by a practical nurse. The claimant's injury was caused by a blow upon the leg, which broke the skin and was followed by infection as a result. At the time of the last conversation with respondent's representative, the leg was swollen and inflamed. The condition of the leg improved, and he returned to his work, and remained working from June 19th to June 25d. On June 25th he tried to work, but could not, and on that day he went in company with his employer to the office of a physician. It did not appear that his condition or his injury was in any way affected by the delay in seeking medical attention, nor that any prejudice resulted from the delay.

Upon these facts the commissioner properly held that the claimant's injury arose out of and in the course of his employment. It appeared to the employer and claimant that the injury did not require medical aid or attention. Certainly there does not appear to be anything in the conduct of the claimant to indicate that he willfully or negligently failed to care for his wound, and to give it such attention and treatment as it seemed to require. After the event it may seem that it would have been more prudent to have sought a physician's aid sooner; but that does not deprive the claimant of his right to compensation, as his disability was

the direct result of the injury, and was not in any way heightened or aggravated by willful misconduct. At the most; under the finding, the claimant erred in judgment in not properly appreciating the danger of infection in an open wound.

There is no error. The other Judges concurred.

(92 Conn. 677)

SCHRAYER v. BISHOP & LYNES.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. MASTER AND SERVANT §332(2)—TORTS OF SERVANT—QUESTIONS FOR JURY.

Where the servant, returning in an automobile from delivering goods, intending to stop on his way to the place of business at his home for lunch, struck and killed a pedestrian, it could not be said, as a matter of law, that a deviation of a few blocks from the direct route to the place of business was a departure from the master's service, relieving the master from liability for the tort.

2. MUNICIPAL CORPORATIONS §706(8) — STREET ACCIDENTS—CARE REQUIRED OF MINOR.

In action for death of minor, struck by automobile on the street, it was proper to instruct that the boy could not be careless, and was bound to use his faculties, and to do what he could reasonably do to avoid the injury.

3. DEATH §78 — MEASURE OF DAMAGES — WRONGFUL DEATH.

Deceased's estate is entitled to some compensation for wrongful death alone, without considering his expectation of life or probable accumulation.

4. APPEAL AND ERROR §1004(1)—HARMLESS ERROR.

In action for wrongful death of minor pedestrian, defendant could not complain of instruction authorizing recovery of the lump sum, which would fairly give compensation for the loss of the net earnings of the space of time which the boy could be fairly expected to live after reaching 21; such instruction being harmless to defendant.

Appeal from Superior Court, Fairfield County; William M. Maltbie, Judge.

Action by Ella F. Schrayer, administratrix of George Kavano, deceased, against Bishop & Lynes. Judgment for plaintiff, and defendants appeal. No error.

Carl Foster, of Bridgeport, for appellants. Nehemiah Candee and John T. Dwyer, both of South Norwalk, for appellee.

SHUMWAY, J. The material facts which present the question of law the defendants raised by the appeal are these: The plaintiff's intestate, George Kavano, a boy about 15 years old, was killed on April 19, 1917. He was struck by an automobile truck on Main street, in the city of Norwalk. He was riding a bicycle, and George Ayrault was driving the truck. Ayrault was employed by the defendant as a truck driver at the time. He was returning from a trip made to deliver merchandise for the defendants. It was half past 12 o'clock p. m., and it was his intention to go home for his dinner. Ay-

ault had been accustomed to use the truck to go to his house for dinner from two to four times a week, for a period of from two to four years, with the knowledge and consent of the employer's manager. There is no question made on the appeal that the injury to the plaintiff's intestate was not caused, in part at least, by Ayrault's negligence.

The defendants claim that the court erred in submitting to the jury as a question of fact whether Ayrault at the time was acting within the scope of his employment; second, that the court erred in charging the jury upon the question of Kavano's duty as a boy of 15 years to exercise reasonable care; third, that the court erred in charging the jury on the measure of damages.

[1] The first question above stated has been before this court in a number of cases, beginning with *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 835, to *Carrier v. Donavon*, 88 Conn. 37, 89 Atl. 894. But the rule in this state is laid down in *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361, and is the one uniformly applied. In the last case the court uses this language:

"In cases where the deviation is slight, and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury."

The court, in leaving to the jury as a question of fact whether this act of the defendant's servant in intending to go home to his dinner under the circumstances was a departure from his master's service, was as favorable to the defendant as the facts in the case permitted. Ayrault was on his return trip; the outward trip was confessedly in the line of his employment, and it cannot be said that a simple intention on his part to go home with the truck for his dinner, with the consent of his employer, was a departure from his master's business. The deviation, if any, may have been so slight that the court might have properly instructed the jury as a matter of law that the servant was acting within the scope of his employment. It does not appear how far from the most direct route to defendant's yard, where presumably the truck was placed when not in use, Ayrault had departed at the time of the accident; but it does appear that the direct route from the point where he came upon Main street after delivering his load of merchandise was in a southerly direction, while he turned to go northerly. It would not be contended that, if Ayrault's house had been on the direct route to the yard, his purpose to stop for his dinner on the way would be a departure from his master's business; and neither can it be said as a matter of law that taking a more in-

direct way constituted such departure, because, so far as appears, the deviation may have been so small as to be no deviation at all, even if it is assumed that it was his intention to depart wholly from the master's service.

[2] Upon the question of due care on the part of the boy Kavano the court said:

"The same rule applies to the boy with reference to what he should do as applies to the man. Each must use reasonable care. But there is this distinction: You do not ordinarily ask of a boy the same care which you ask of a man, and the law don't. The law says that what a boy must do is to use that degree of care which a boy of the same degree of intelligence, of the same age, of the same experience, might reasonably be expected to exercise. It is not now the care of an ordinarily prudent man; it is the care of an ordinarily prudent boy, similar to the boy in question, in these various respects. So that the burden which rests upon the plaintiff in regard to the care which this boy should exercise is this: Did he act as a boy of that age and experience and intelligence and general surroundings might be expected to act."

This extract may be open to objection, if stated in connection with Ayrault's duty, under the circumstances, because it would not be his duty to use the same precautions to avoid injury to this boy as he would a child just beginning to walk. He is only bound to regulate his conduct by that which by due attention he could see. He could not see the boy's intelligence and experience in life. The court also said:

"The boy cannot be heedless or careless. He is bound to use his faculties. He is bound to do what he can reasonably to avoid injury to see and hear, and use generally his faculties; and if he finds himself in a position where danger is imminent, he is bound to do what he can reasonably to avoid it."

This correctly defines the plaintiff's intestate's duty.

[3, 4] The court charged the jury in regard to the damages in substantially the language of this court in *Broughel v. S. N. E. T. Co.*, 73 Conn. 614, 48 Atl. 751, 84 Am. St. Rep. 176, as follows:

"Just so far as you can, you are to base it on the loss which would come to his estate by reason of his untimely death."

But the trial court said further:

"So that the rule, as I say, is the lump sum which will fairly give compensation for the loss of the net earnings for the space of time which you may fairly expect this boy to live after he gets to be 21."

The rule thus stated does not contain all the elements of damage named in the case above cited. *Broughel v. S. N. E. T. Co.* However, as stated, it did the defendants no harm. Quoting from that case:

"Under the statutes, the right to recover a limited compensation for death alone, as one of the results or consequences of a wrong inflicted upon a man in his lifetime, survives to or is vested in his executors or administrators for the benefit of certain designated beneficiaries, and is thus in a certain sense made a part of his estate, regarded as that aggregate of rights and possessions which a man leaves at his death."

So the law is that a man's estate is entitled to some compensation for death alone, without wandering into the somewhat hazy realm of an individual's expectation of life or his probable accumulations, though these latter are in some cases proper subjects of consideration on the question of damages. The evidence was sufficient to sustain the verdict for the damages awarded in this case.

There is no error. The other Judges concurred.

(117 Me. 303)

Appeal of LIBBY et al.

In re JERRARD'S WILL.

(Supreme Judicial Court of Maine. July 8, 1918.)

1. WILLS \Leftrightarrow 574 — RELEASE OF DEBT DUE TESTATRIX.

Will of executrix, who was life tenant of estate of deceased husband, *held* to clearly indicate that she did not consider note in her favor existing claim against her husband's estate, and that she did not intend to enforce it.

2. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 464—DEATH OF ADMINISTRATOR—ADMINISTRATION OF ESTATE—ACCOUNTING.

Administrator of deceased administrator should account in probate court for benefit of his intestate, but the accounting is limited to acts done by deceased representative in his lifetime.

3. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 510 (8)—ACCOUNTING—REVIEW.

The Supreme Judicial Court is not called upon to pass upon all the items of a disallowed account, on report of an appeal from the decree of a judge of probate.

4. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 464—DEATH OF EXECUTOR—ACCOUNTING.

Where estate was devised to widow, with power of appointment as to part of the estate, any residue remaining to go to certain legatees, debts paid her executors cannot be included in their account of the decedent's administration of her husband's estate, as their payment devolved on the administrator of the husband's estate; but the latter could not pay for expenses of administration and litigation concerning the widow's own property, under Rev. St. 1916, c. 63, §§ 25, 27.

Appeal from Supreme Judicial Court, Penobscot County, at Law.

In the matter of the accounting of Leon L. Libby and Alice M. Cornforth, executors of the will of Samantha C. Jerrard, deceased, who was executrix of the will of Simon G. Jerrard. From a decree of the judge of probate, disallowing the account, the executors appeal. On report from the Supreme Court of Probate. Appeal sustained, and proceeding remanded.

Argued before CORNISH, C. J., and SPEAR, BIRD, HANSON, and PHILBROOK, JJ.

Manson & Coolidge, of Pittsfield, for appellants. Matthew Laughlin, of Bangor, pro se. A. J. Merrill, of Bangor, for appellee Home for Aged Women.

BIRD, J. Simon G. Jerrard, of Levant, in the county of Penobscot, died testate on the 28th day of January, 1909, at the age of 80 years, leaving a widow, Samantha C. Jerrard, and no issue. By his will, which bears the date of January 1, 1898, he appoints his widow executrix, provides for a monument on his burial lot, bequeaths certain personal property to relatives, to be delivered at the decease of his wife or during her lifetime, at her election, certain personal property to be delivered the legatee in the usual course of administration, and two money legacies payable on the decease of his wife. The remaining items of the will are as follows:

"Ninth. All the rest, residue and remainder of the property of whatever name or kind of which I may die possessed, together with the use and proceeds during her lifetime of all property embraced in the foregoing bequests, I hereby give, devise and bequeath to my beloved wife, Samantha C. Jerrard for her sole and separate use for and during her natural life, with full power to use, dispose of, sell and convey any or all of it as she may desire, the same as I might do if living, and to dispose of by will, at her discretion, as a memorial fund in her own name and mine to be devoted to some charitable, benevolent or educational use, a sum not exceeding three-fourths part of what may remain of my estate at her decease. And I earnestly desire that my said wife during her lifetime shall dispose of by gift to such of my relatives as are not specially named in this instrument all my household goods, pictures, silver, glass and crockery ware and all other articles which go to make up the furnishings of our home, so that none of said furnishings shall ever be disposed of by sale.

"Tenth. Whatever may remain of my estate at the decease of my said wife, not disposed of by or under the foregoing provisions of this will, after paying all her just debts, funeral expenses and the costs of administration, I give devise and bequeath as follows: To my sister Mrs. Jane L. Bennett, to my brother John F. Jerrard, to my brother Anson C. Jerrard, to my sister Mrs. Helen N. Jenkins and to my sister Mrs. Angelia J. Brackett each one seventh part. To my sister Mrs. Sarah G. Crosby the income of one-seventh part during her natural life and at her decease said part to be divided equally between her son Ellery C. Crosby and her daughter Mrs. Ada M. Wing, and the remaining seventh part to be divided equally between Sanford C. Jerrard and Eva M. Jerrard son and daughter of my brother George W. P. Jerrard. * * *

This will was duly admitted to probate in the probate court of Penobscot county.

After the decease of her husband, his widow, Samantha, continued to reside upon and operated the farm hereinafter referred to for about a year and a half. She then took up her residence with her niece, and the niece also of her deceased husband, Alice M. Cornforth, with whom she lived until her decease. Under date of August 16, 1911, Samantha C. Jerrard, of Pittsfield, in the county of Somerset, as the widow of Simon G. Jerrard, and avowedly for the purpose of executing the power of appointment given her by the ninth item of the will of her deceased husband, made a will by the first item of which she appointed Leon L. Libby, one of the appel-

lants, executor. The second and remaining item follows:

"Second. I hereby give and bequeath the sum of four thousand dollars to the Home for Aged Women at Bangor, Maine, said amount to be invested in long time securities, more with a view to the safety of the principal than to the income, and said amount as invested to constitute a permanent memorial fund to be known as 'The Col. Simon G. and Samantha C. Jerrard Fund.' The annual income and no more of this fund shall be used for the general purposes of maintaining said home and carrying out the purposes thereof.

"This legacy is to be paid from the property described in said ninth paragraph of the will of Simon G. Jerrard and is disposed of by authority of said paragraph."

On the 25th day of October, 1911, she made a second will, which confirms that of August 18, 1911, makes sundry bequests of personal property and gives all the remainder of her personal estate to Alice M. Cornforth, whom she appoints executrix.

The widow, Samantha C. Jerrard, died, aged 80 years, on the 4th day of December, 1911, without rendering any account as executrix of her husband's estate or filing any inventory thereof.

Both her wills were duly proved and allowed in the probate court of Somerset county, as one will, and letters testamentary issued to Leon L. Libby and Alice M. Cornforth, named as executor and executrix in the respective wills.

Subsequently, apparently on January 30, 1912, Matthew Laughlin, Esq., of Bangor, was appointed administrator de bonis non with the will annexed of Simon G. Jerrard.

The inventory of the estate of Samantha C. Jerrard, which was filed July 14, 1913, shows real estate, \$1,000; goods and chattels, \$118.50; and rights and credits, \$6,696.46—totaling \$7,814.96.

Without filing any inventory of the estate of Simon G. Jerrard, as of the date of his decease, which perhaps was neither possible nor possibly needful, the executors of the will of Samantha C. Jerrard filed in the probate court of Penobscot county what purports to be the first and final account of Samantha C. Jerrard, as executrix of the last will and testament of Simon G. Jerrard. It bears date of the fourth Tuesday of July, 1913. In Schedule A they charge the deceased executrix with:

"Property which was in the hands of Samantha C. Jerrard at the time of her decease and had been the property or proceeds of property of the late Simon G. Jerrard."

As such appear sundry choses in action, aggregating \$1,030, and further choses in action, all substantially deposits in banks in the name of Samantha C. Jerrard, and notes to her order, aggregating \$2,698.81, making the total amount of Schedule A \$3,728.81.

In Schedule B the first item of credit is:

"Delivered to Matthew Laughlin, administrator de bonis non with the will annexed of Simon G. Jerrard, the following assets listed in Schedule A, standing in the name of Simon G. Jerrard," in the aggregate amount of \$1,030.

The second item or credit is:

"Retained by Alice M. Cornforth and Leon L. Libby, as executors of the estate of Samantha C. Jerrard, the remaining assets listed in Schedule A towards payment of the following:

To pay the balance due on the promissory note dated Levant, January 18, 1888, signed by Simon G. Jerrard, for value received promising to pay to the order of Mrs. Samantha C. Jerrard the sum of \$3,667.80 on demand, with interest, on the back of which is indorsement of payment of \$3,200 on April 28, 1891; there being due on said note, after computing the interest and deducting said payment, on January 23, 1909, the date of the death of said Simon G. Jerrard, the sum of \$2,454.31...\$2,454.81

To pay as provided for in the last will and testament of said Simon G. Jerrard:

Debt of Samantha C. Jerrard, due James H. Crosby, for store bill of \$189.56, tax bill of 1910 for \$34, and interest \$20.84, less credit of \$80 for stock and farming tools	\$183.90	2,698.81
Costs of administration of the estate of Samantha C. Jerrard, the commission due the executors of her will on her personal property, appraised at \$6,814.96, at 5 per cent.	\$340.74	
Services and expenses of Manson & Coolidge as attorneys for said executors	500.00	840.74
	<hr/>	
	\$3,478.85	\$3,728.81

Balance due from the estate of Simon G. Jerrard to the estate of Samantha C. Jerrard.....\$780.14."

In July, 1916, the accountants moved to amend their account by substituting in Schedule B, for the sums of \$340.74 and \$500 (\$840.74), the sum of \$2,474.30, according to the statement attached to their motion. With few exceptions, the items in the statement are charges of administration of the estate of Samantha C. Jerrard and incurred since the decease of their testatrix.

The judge of probate refused the allowance of the amendment and disallowed the account. From the decree of the judge of probate, the executors appealed, alleging the following reasons of appeal:

"Because it is their right and their duty to file and have allowed this account of the administration by Samantha C. Jerrard of the goods and estate of Simon G. Jerrard; because each of the items in said account were proper, and should by said decree have been allowed; because the petition for the amendment of said account should have been allowed by said decree, and the items contained in said amendment were proper, and should have been allowed by said decree."

The case is before this court upon report from the Supreme Court of Probate.

The first item of Schedule B, in the amount of \$1,030, should be allowed. The delivery of the specific rights and credits is alleged, and the administrator de bonis non acknowledges that he received them.

The second item of Schedule B, in amount of \$2,454.31, is claimed as a lawful credit by right of retainer of assets to meet the bal-

ance due upon the note of the testator, Simon G. Jerrard, to the order of the testatrix, Samantha O. Jerrard, of the accounting executors. It appears that this note, dated January 18, 1888, was given for the sum of \$3,667.30. April 28, 1891, the testator conveyed to his wife, the payee, his homestead farm and two other parcels of real estate for the recited consideration of \$3,200, and on the same day the payee indorsed upon the note the payment of \$3,200. From the date of the note to the day of the death of maker more than 21 years had elapsed, from the date of the indorsement to his death nearly 18 years, and to the claim of the right to retain, which was first made manifest to the administrator de bonis non by the filing of the account in July, 1913, more than 25 years.

As to the actual consideration for the note, there is no evidence. Whether Mrs. Jerrard was at its date possessed of any property is open to great doubt. Her niece, Mrs. Cornforth, one of the executors, testifies that she once inherited three hundred and some odd dollars, and does not know that she ever acquired any other means.

It seems that, at the time the note of January 18, 1888, was made, Simon G. Jerrard was liable upon a note of large amount, and was holding the office of sheriff of Penobscot, wherein he was liable at any time to be involved in litigation.

The indorsement upon the note of the expressed consideration for the conveyance of the farm by her husband to Samantha O. Jerrard was, as already noted, in her own hand, and there is no evidence tending to show that the husband was at any time aware of it.

There is no evidence tending to show that Mrs. Jerrard in her lifetime intended to exercise the right of retainer, but there is evidence that her executors claimed to exercise the right.

Under these circumstances, it is at least doubtful if Mrs. Jerrard considered the note an existing liability against the estate of her husband, or intended ever to enforce it.

[1] But on the 16th day of August, 1911, less than 4 months before she died, she made a will in exercise of the power of appointment given by the will of her husband, whereby she gave the sum of \$4,000 to the Home for Aged Women of Bangor. This will she confirmed 2 months later. By his will the sum so given was not to exceed "three-fourths part of what may remain of my estate at her decease." If the account of her administration rendered by her executors is correct, and she regarded the note enforceable, her husband's estate remaining was but little more than \$1,000, and her will becomes a reproach to her husband's memory. On the other hand, if there be deducted from the rights and credits (\$6,696.46) shown by the inventory of her estate the notes and interest thereon received by Mrs. Jerrard upon the sale of her farm (\$3,455.75) and the

bank deposit claimed to be her own (\$157.65), there remains the sum of \$3,083.06. If to this sum be added the assets (\$1,030) turned over to the administrator d. b. n. c. t. a., we have the sum of \$4,113.06. If to this be added \$500, given the husband of Mrs. Cornforth previously to the making of her second will, and the principal of a note for \$500 given Mrs. Cornforth on the day the will was executed (*Crosby v. Cornforth*, 112 Me. 113, 90 Atl. 982, which it is agreed may be considered), we have the sum of \$5,113.06, not far from \$5,333, the sum to which the husband's estate should have amounted to warrant the exercise of the power of appointment in the sum of \$4,000. She could, however, have reached these figures only upon the basis of considering the balance of the note of \$3,667.30 as not to be enforced. We conclude that her wills clearly indicate that she did not consider the note an existing claim against her husband's estate and did not intend to enforce it as such. *Barstow v. Tetlow*, 115 Me. 96, 106, 97 Atl. 829.

The administrator de bonis non with the will annexed of Simon G. Jerrard claims that he is entitled to receive from the executors of the will of Samantha O. Jerrard the balance of the assets of the estate of the former, as shown by their account, less the amount of \$1,030 already paid him.

In *Hall v. Otis*, 71 Me. 326, 330, the will under which the controversy arose was not dissimilar to that of Simon G. Jerrard. The wife was given the residue of the estate for life, with power of disposal, with remainder over upon her decease of what then remained to be divided among his surviving brothers and sisters. She was named executrix. Proceedings in equity were commenced by the administrator d. b. n. c. t. a. against the executor of the deceased widow. After a construction of the will, to the effect that the brothers and sisters surviving are entitled to what remained, the court says:

"We think * * * that his administrator is entitled to all that portion of Daniel E. Hall's [the testator's] estate (including the proceeds of property sold by his widow) which had not been expended at the time of her decease."

In *Hatch v. Caine*, 86 Me. 282, 284, 29 Atl. 1076, 1077, a bill in equity for the recovery of a sum of money in a savings bank, which plaintiff claimed was a part of the estate of Joseph Storer, deceased testator, whose administrator d. b. n. c. t. a. brings the bill against the executrix of the widow of testator, the will was substantially like those in the foregoing case, and in the case under consideration, with remainder over to a charitable institution. The court concludes its opinion as follows:

"It is settled law in this state that, under wills similar to the one now before us, the widow takes only a life estate, and that whatever remains of the estate at her decease goes to the beneficiaries named in the will, and that a bill in equity may be maintained by the administra-

tor de bonis non cum testamento annexo, to obtain possession of the remainder."

The case of *Small v. Thompson* arose under a will of very like character, in which provision is made for the payment from the property remaining at the decease of the life tenant, the widow of the testator, of her debts and funeral expenses. The appellant in the Supreme Court of Probate was the administrator d. b. n. c. t. a. of the testator, and the appellee the executor of the will of the deceased life tenant. The case was before this court upon the exception of the appellee. The Supreme Court of Probate found that a portion of the estate of the testator remained in the hands of the life tenant and executrix at the time of her decease, and decreed that the appellee be charged with the personal property in question, which may be subjected to the charges of administration not actually paid by the executrix in her lifetime, and then paid or delivered to the administrator of the testator de bonis non "by him to be applied to the payment of the debts of [the life tenant] and her funeral expenses, the charges of administration, and then distributed among the heirs at law of [the testator], as provided in his will." 92 Me. 539, 543, 545, 43 Atl. 509, 510.

[2] The right and duty of an administrator of a deceased administrator to account in the probate court, for the benefit of his intestate, were early recognized by this court. *Nowell v. Nowell*, 2 Me. (2 Greenl.) 75, 81. The same case indicates by fair inference that the accounting is limited to acts done by the deceased representative in his lifetime, and that the administrator of the latter can proceed no further in the administration of the estate of the first intestate. In harmony with the case last cited is *Small v. Thompson*, 92 Me. 539, 545, 43 Atl. 509.

[3] By statute it is provided that:

"The executor of an executor has no authority, as such, to administer the estate of the first testator; but on the death of the sole or surviving executor of any last will, administration of said estate not already administered may be granted with the will annexed, to such person as the judge thinks fit." R. S. 1913, c. 68, § 27; Laws Mass. 1783, c. 24, § 10; Pub. Laws of Maine 1821, c. 51, § 19.

See *Prescott v. Morse*, 64 Me. 422.

And by R. S. c. 68, § 25, the power and duty of administrators d. b. n. are extended to effects not distributed, and are no longer restricted to those unadministered. *Walker v. Savings Bank*, 113 Me. 353, 357, 93 Atl. 1025, L. R. A. 1915E, 840, Ann. Cas. 1917E, 1.

It may be that the conclusions already reached practically dispose of the appeal; but, as the case is reported for the decision of all questions of law and fact involved, it may be incumbent upon the court to reach further conclusions and to make further suggestions, which will guide the probate court in passing upon the account, to which we must refer the allowance or disallowance of the particular items, as well by reason of

lack of evidence to determine as to many of the items, as because we do not think that by reporting an appeal from the decree of the judge of probate this court can be called upon, among other things, to pass upon all the items of a disallowed account. It has none of the powers to employ the instrumentalities which other courts may invoke in such cases. See *Crocker v. Crocker*, 43 Me. 561, 562; *Fessenden, Appellant*, 77 Me. 98, 99.

[4] These conclusions or suggestions involve a construction of the final or tenth item of the will of Simon G. Jerrard, see *Small v. Thompson*, 92 Me. 537, 544, 43 Atl. 509, which provides that:

"Whatever may remain of my estate at the decease of my wife, not disposed of by or under the foregoing provisions of this will, after paying all her just debts, funeral expenses and the costs of administration, I give, devise and bequeath as follows."

Then follow the names of the legatees and the proportions in which they are to take.

We conclude, upon the whole will and its evident purpose, that the testator intended by the tenth item to give to the legatees named whatever of his estate remained in the hands of his wife at her decease, not used and disposed of by his wife, after the payment of the legacies made payable upon her decease and the bequest to the Home for Aged Women, less the amount required to pay her just debts, funeral expenses, and the costs of administration. Her debts paid by the executors of her will cannot be included in the account of these executors in their account of her administration of her husband's will. This necessarily follows from the conclusion, already reached, that their payment devolved on his administrator de bonis non. In the account no charge of funeral expenses is made.

Numerous charges purporting to be the expenses of the administration of her estate contracted by her executors appear in their account. To what extent they are a charge upon the estate of Simon G. Jerrard depends upon the meaning of the words used in the tenth item of his will, "the costs of administration." Considering, as before, the whole will and the evident purpose of the testator and the circumstances revealed by the evidence, we think the expression quoted refers to the expense of administering his own estate by his administrator de bonis non, any unpaid expense of administration incurred by his executrix in her lifetime (and there appears to be no charge for such expenses), and the cost of the probate and allowance of such will or wills of his widow as were made in execution of the power of appointment given her by the ninth item of his will and that expenses of the administration under her wills arising from litigation or otherwise concerning her own property and estate were not intended to be included. It is significant that the expenses of the litigation in *Crosby v. Cornforth*, 112 Me. 109, 115, 90 Atl. 981,

were ordered paid from her estate. The court in that case must have acted with full knowledge and advisedly, as it had before it all the wills both that of Simon G. Jerrard and those of his wife. The controversy in that case concerned only her own estate. Be that as it may, we think it clear that whatever expenses of administration arise from the probate and allowance of her wills are not to be allowed, except the nominal fees and expenses attending the allowance of her first will, nor should they appear in the account of the executrix of Simon G. Jerrard's will rendered by her executors. They are to be paid by, and credited in the account of, the administrator de bonis non.

For the same reasons this court does not pass upon the motion to amend. It comprises many items. The facts should be determined in the Supreme Court of Probate, and the various items sought by amendment to be added to the account, be allowed or disallowed in accordance with the law declared in this opinion.

The allusion, necessarily made in the discussion of this case, to the right of retainer, is not to be regarded as a recognition of its existence in this jurisdiction. Whether or not, in view of our statutory provisions regarding the allowance of the private claims of executors and administrators, they may still exercise the common law right of retainer is not decided.

Appeal sustained, with costs.

Remanded to Supreme Court of Probate for further action in accordance with this opinion.

(123 Md. 48)

CHRISTOPHER v. SISK. (No. 8.)

(Court of Appeals of Maryland. June 19, 1918.)

1. EVIDENCE §—43(1) — JUDICIAL NOTICE — COURT RECORDS.

The Court of Appeals takes judicial notice of all papers properly filed in such court.

2. JUDGMENT §—570(1) — CONCLUSIVENESS — TITLE TO LAND.

A judgment dismissing a bill of complaint for specific performance of alleged land contract precludes the court, in action between same parties for restitution of possession of land involved in former action, from granting motion to quash proceedings, where matters set up in motion are a repetition of allegations of dismissed bill.

Appeal from Circuit Court, Caroline County; W. H. Adkins and Philemon B. Hopper, Judges.

"To be officially reported."

Action by Albert W. Sisk against Gootee Christopher. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOOK-BRIDGE, and CONSTABLE, JJ.

T. Alan Goldsborough, of Denton, for appellant. Henry R. Lewis, of Denton (Charles B. Harrison, of Preston, and Lewis & Knotts, of Denton, on the brief), for appellee.

CONSTABLE, J. The appellee in this case instituted proceedings before a justice of the peace, under authority of article 53 of the Code, for restitution of the possession of real estate. The appellant, at the hearing before the justice of the peace, attempted to raise the question of the jurisdiction of the justice to hear the case, for the reason that title to land was involved. Judgment of restitution of the premises to the appellee was entered, and an appeal therefrom was taken to the circuit court. On appeal before that court, the appellant again raised the same question of jurisdiction by filing a motion to quash the proceedings. The motion was overruled, and the judgment affirmed. From that judgment this appeal was prosecuted.

The testimony introduced in this case on the motion to quash was that offered at a former trial between the same parties and about the same subject-matter, and was certified by the lower court as follows:

"We, judges of the circuit court for Caroline county, hereby certify that all questions involved in this case were by us decided in favor of the appellee. We further certify that the appellant (who claimed that the title of land was involved, depriving the justice of the peace of jurisdiction, that being the only jurisdictional question raised) agreed that, if the justice of the peace had jurisdiction, his judgment should be affirmed. We further certify that the foregoing testimony is that offered at the trial of the motion to quash in this case. It is a transcript of testimony taken in No. 1711 Chancery, in the circuit court for Caroline county, and it was agreed between counsel that the said testimony should be the testimony in the case at bar; it being understood that the testimony was objected to, the court's rulings excepted to, and the testimony admitted subject to exception, just as appears in the testimony taken in the chancery case, and further understood that the appellant's exceptions were finally overruled, just as they were in the chancery case. We do not indorse the interpretation put upon the court's opinion in the chancery case by the appellant in his affidavit filed with the justice of the peace.

"As witness our hands and seals this 14th day of January, 1918.

"W. H. Adkins, [Seal]

"Philemon B. Hopper, [Seal]

"Associate Judges of the Circuit Court for Caroline County."

[1] It appears that the decree in No. 1711 Chancery, in the circuit court for Caroline county, mentioned in the above certificate, was appealed from, and the record transmitted to this court was No. 20 on the April term, 1916, docket, but, before argument, was dismissed by order of the appellant. The record in that appeal is now on file among the papers of this court and is now before us. We will briefly refer to it, as, of course, we take judicial notice of all papers properly filed in our own court. It is disclosed by it that the appellant herein filed his bill of complaint for the specific performance of an alleged contract of sale entered into by and between the appellant and appellee herein for precisely the same tract of land as is

in controversy in this case. After a full hearing, the court passed an unrestricted decree dismissing the bill. It is apparent, from a consideration of the two records, that the matters set up in the motion to quash are but a repetition of the allegations relied upon by the appellant in furtherance of his bill for specific performance, and upon which the circuit court decreed adversely to him.

[2] It is our opinion that this case presents for application the doctrine of res judicata or estoppel by judgment. The principle is stated in 15 R. O. L. § 429, as follows:

"Briefly stated, this doctrine is that an existing, final judgment or decree rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, upon matters within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit."

In 23 Cyc. 1116, it is said:

"The principle of estoppel by judgment is in no way dependent on the form as the object of the litigation in which the adjudication was made; it is only essential that there should have been a judicial determination of rights in controversy with a final decision thereon."

These abstracts are in full accord with the Maryland decisions. *Harryman v. Roberts*, 52 Md. 64; *Thomas v. Malster*, 14 Md. 382; *C. & O. Canal v. Gittings*, 36 Md. 276; *Trayhern v. Colburn*, 66 Md. 277, 7 Atl. 459; *Barrick v. Haines*, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; *Tifel v. Jenkins*, 95 Md. 665, 53 Atl. 429; *Whitehurst v. Rogers*, 38 Md. 503; *Martin v. Evans*, 85 Md. 8, 36 Atl. 253, 36 L. R. A. 213, 60 Am. St. Rep. 292.

In an endeavor to oust the justice of the peace of jurisdiction, the appellant made and filed an affidavit. The Code, by article 53, § 5, provides the method by which this may be accomplished; but this way was not availed of by the appellant, nor under the facts could have been. We are of the opinion that both the justice of the peace and the circuit court had jurisdiction, and will therefore dismiss the appeal.

Appeal dismissed, with costs to the appellee.

(131 Md. 696)

BALTIMORE & O. R. CO. v. BRANSON.

(Court of Appeals of Maryland. June 28, 1917.)

1. COMMERCE § 8(6)—FEDERAL EMPLOYERS' LIABILITY ACT—EXCLUSIVE APPLICATION.

The federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665) furnishes an exclusive remedy in all cases falling within its provisions.

2. APPEAL AND ERROR § 1175(8)—REMAND TO LOWER COURT.

Plaintiff, having elected to rely for recovery upon the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665), and it having been definitely determined that he has no cause of action thereunder, the Court of Appeals will not remand the case in order that the cause of action may be changed into one at common

law, in effect a new cause of action barred by limitations.

Action by David Branson against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appealed to Court of Appeals, which affirmed the judgment. On further appeal to Supreme Court of United States judgment was reversed, and case remanded to Appellate Court for further proceedings. On motion in Court of Appeals to remand to Circuit Court. Motion denied.

Whiting & Eppler and Albert A. Doub, all of Cumberland, for the motion.

BURKE, J. This case came first to this court upon an appeal by the Baltimore & Ohio Railroad Company from a judgment entered against it in the circuit court for Allegany county in favor of David Branson. The court, on May 17, 1916, affirmed the judgment. *B. & O. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225. The case was then taken by the Baltimore & Ohio Railroad Company upon writ of error to the Supreme Court of the United States, and that court reversed the judgment and remanded the cause to this court for further proceedings. The Supreme Court filed no opinion, but contented itself by entering upon its records the following notation, viz.:

"Judgment reversed, with costs upon the authority of *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439 [35 Sup. Ct. 902, 59 L. Ed. 1397]; *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556 [36 Sup. Ct. 188, 60 L. Ed. 486, L. R. A. 1916C, 797]; *Chicago, Burlington & Quincy R. Co. v. Harrington*, 241 U. S. 177-180 [36 Sup. Ct. 517, 60 L. Ed. 941]; *Minneapolis & St. Louis R. R. Co. v. Winters* [242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 353, Ann. Cas. 1918B, 54]; *Baltimore & O. R. Co. v. Branson*, 242 U. S. 623, 37 Sup. Ct. 244, 61 L. Ed. 534."

The mandate from that court was received and filed in this court on March 22, 1917.

The plaintiff below (David Branson) filed an application in this court, asking that the case be remanded to the circuit court for Allegany county for retrial upon an amended declaration. This application was overruled by this court by an order dated May 9, 1917.

[1] The object of this memorandum is to state briefly the reason for denying the motion. The suit was brought under the federal Employers' Liability Act, approved April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, §§ 8657-8665). That act created a new cause of action, and in all cases falling within its provisions it furnishes an exclusive remedy and supersedes the state laws. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; *Taylor v. Taylor*, 232 U. S. 363, 34 Sup. Ct. 350, 53 L. Ed. 638.

[2] In view of the authorities cited by the

Supreme Court, it may be supposed that the judgment was reversed solely upon the ground that Branson was not employed in interstate commerce at the time he suffered the injury sued for. In cases not covered by the act, the common-law liability of the common carrier by rail continues, and an action based upon common principles may be maintained against it upon proof of actionable negligence. The plaintiff did not incorporate in his declaration a count charging a common-law liability, but elected to rely for recovery upon the act. It is now definitely determined that he has no case under the act, and the court was asked to remand the case in order that by amendment the cause of action upon which the case was tried, and finally determined adversely to the plaintiff, might be changed into a common-law action to enforce a common-law liability. This would be by an amendment of the pleadings, the introduction of a new or different cause of action. The injury complained of was suffered by the plaintiff about four years ago.

It appears, so far as we are advised by the record in this case, that the plaintiff could not, by amendment, state a cause of action which would not be in effect the commencement of a new suit, which would be barred by limitations. *Spencer v. B. & O. R. R. Co.*, 126 Md. 194, 94 Atl. 660; *Hogarty v. Phila. & R. Ry.*, 255 Pa. 236, 99 Atl. 741; *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006.

In such a situation, we followed the usual practice, and denied the motion to remand the case. This, however, does not prevent the bringing of a new suit, if the plaintiff desires to do so.

(131 Md. 513)

BALTIMORE CAR WHEEL CO. v. CLARK.
(No. 39.)

(Court of Appeals of Maryland. Dec. 12, 1917.)

1. TRIAL §272—INSTRUCTIONS—EXCEPTIONS—WAIVER.

Where defendant proceeded to examine witnesses on its own behalf after rejection of its prayer, at conclusion of plaintiff's case, to withdraw case from the jury, it lost the benefit of its exception to the ruling.

2. BROKERS §51—COMMISSIONS.

Mere fact that agent introduced purchaser to seller or disclosed names by which they came together would not entitle agent to commission.

3. BROKERS §51—COMMISSIONS.

If introduction by agent of purchaser and seller or disclosure of names by which they came together was the foundation on which negotiations were begun and conducted and sale made, agent is entitled to his compensation.

4. BROKERS §53—COMMISSIONS.

To entitle agent to commission sale must have been result of his efforts or negotiations.

5. BROKERS §86(1) — COMMISSIONS — EVIDENCE.

To entitle plaintiff to recover compensation for sale of defendant's land, plaintiff must establish his right by preponderance of evidence.

6. APPEAL AND ERROR §97(2) — REVIEW — DEMURRER TO EVIDENCE.

In determining whether plaintiff's prayer for submission of issues was properly granted, court on appeal will decide merely whether evidence in record, viewed in light most favorable to plaintiff, is legally sufficient to warrant a jury finding upon issues submitted.

7. BROKERS §88(3) — ACTION FOR COMMISSION—QUESTION FOR JURY.

In action for commissions, whether plaintiff was procuring cause of sale of defendant's land held, under evidence, a jury question.

8. EVIDENCE §314(1) — FACTS NOT WITHIN WITNESS' OWN KNOWLEDGE.

In action by plaintiff for commission on sale of defendant's land, where witness under examination had nothing to do with purchase, and could not possibly have testified of his own knowledge whether purchaser's general manager knew of plaintiff's letter in regard to purchase or to what extent board of directors of purchaser were influenced by it, it was not error to sustain objections to questions.

9. BROKERS §88(3) — PROCURING CAUSE — QUESTION FOR JURY.

Proximate or procuring cause is ordinarily a question for jury, and court will not, except in clear case, decide it.

Appeal from Baltimore City Court; Chas. W. Heulsler, Judge.

"To be officially reported."

Suit by Linwood L. Clark against the Baltimore Car Wheel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are defendant's prayers:

Defendant's First Prayer.

The defendant prays the court to instruct the jury that the mere fact of the agent having introduced the purchaser to the seller, or disclosed the names by which they came together to treat, will not entitle him to compensation, but, if it appears that such introduction or disclosure was the foundation on which the negotiations were begun and conducted and the sale made, the agent is entitled to his compensation. (Granted.)

Defendant's Second Prayer.

The defendant prays the court to instruct the jury that to entitle the plaintiff to recover a commission for the sale of the property mentioned in the evidence must not only show his efforts or negotiations to accomplish the sale, but he must show that the sale was the result of such efforts or negotiations. (Granted.)

Defendant's Third Prayer.

The defendant prays the court to instruct the jury that, if they find from the evidence that the plaintiff is entitled to recover compensation for making the sale mentioned in the evidence, the recovery shall be limited to a commission only on so much of the purchase price as represents the price paid for the property, which the evidence shows belonged to the defendant at the time he met the plaintiff, and the plaintiff shall not be entitled to any commission on the sum paid by the purchaser for the property bought by the defendant from Hubner and Hunting for the purpose of meeting the requirements of the Pennsylvania Railroad, if they shall so find. (Granted.)

Defendant's Fourth Prayer.

The defendant prays the court to instruct the jury that, to entitle the plaintiff to recover in this case, he must establish that right by a preponderance of evidence.

(Granted.)

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Rignal W. Baldwin, of Baltimore (Duvall & Baldwin, of Baltimore, on the brief), for appellant. Edward L. Ward, of Baltimore, for appellee.

BURKE, J. This is an appeal by the Baltimore Car Wheel Company, a corporation, from a judgment for \$1,112.55 entered against it in the Baltimore city court wherein Linwood L. Clark was the plaintiff. The suit was brought by Mr. Clark to recover commissions at the rate of 2½ per cent. on the sale of certain property of the appellant to the Pennsylvania Railroad Company. \$44,502 was the amount paid by the purchaser for the property. The action was in assumpsit, and the declaration contained the common counts only. During the course of the trial the defendant reserved five exceptions. Two relate to rulings on evidence, and three to the action of the court on the prayers and special exceptions. The exact date when the sale was made does not appear, but it may be said to have been concluded prior to May 12, 1916, as the deed was recorded on that day. The sale was made directly by the defendant to the railroad company.

The legal principles which must control the case are so well settled that we need only refer to a few, among many in this court, in which they have been announced and applied.

In *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706, the court said:

"We do not agree with the counsel for the appellees that they would have earned their reward by merely disclosing the names of the persons who ultimately purchased the property, as a secret of their business as property agents, if a sale had not been affected. We understand the rule to be this (in the absence of proof of usage): That the mere fact of the agent having introduced the purchaser to the seller, or disclosed names by which they came together to treat, will not entitle him to compensation; but, if it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted, and the sale made, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the agent's hands, so as to deprive him of his commission."

See, also, *Blake v. Stump*, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 108.

In *Martien v. Baltimore City*, 109 Md. 260, 71 Atl. 966, which followed *Keener v. Harrod*, supra, and *Walker v. Baldwin*, 106 Md. 634, 68 Atl. 25, Judge Thomas said that:

"To entitle a broker to recover commissions for the sale or purchase of property, he must not only show his efforts or negotiations to ac-

complish the sale or purchase, but he must show that the sale or purchase was accomplished as the result of such efforts or negotiations."

This principle was again announced in the recent case of *Way v. Turner*, 127 Md. 327, 96 Atl. 676.

[1] At the conclusion of the plaintiff's case the defendant submitted a prayer to withdraw the case from the jury upon the ground that no legally sufficient evidence had been offered to entitle the plaintiff to recover. This prayer was refused, and this ruling constitutes the first exception. As the defendant proceeded to examine witnesses on its own behalf after the rejection of this prayer, it lost the benefit of this exception. *Pennsylvania Railroad Co. v. Cecil*, 111 Md. 238, 73 Atl. 820; *Knecht v. Mooney*, 118 Md. 583, 85 Atl. 775; *Bernstein v. Merkel*, 126 Md. 454, 95 Atl. 55.

After the testimony of both parties had been concluded, the court granted the following prayer submitted by the plaintiff:

"The court instructs the jury that, if they shall find from the evidence that the plaintiff was employed by the defendant to make sale of its property referred to and located in Baltimore city, and that the plaintiff submitted said property to the Pennsylvania Railroad Company, and that thereby the said railroad and the defendant were put into communication about it, and that a portion of said property was thereafter sold to said railroad by the defendant, the plaintiff is entitled to recover such commissions as may have been agreed upon between the plaintiff and the defendant, if the jury shall find that any agreement was made as to the amount of commissions, or such commissions as the jury may believe to be reasonable for the services, if the jury find there was no agreement as to their amount, provided the jury shall further find that the disclosure to the said railroad by the plaintiff caused the communication by the railroad with the defendant and was the foundation upon which the negotiation was conducted, and the sale made."

The defendant filed special exceptions to the granting of this prayer: First, because there was no evidence from which the jury could find that the railroad and the defendant were put into communication about the property mentioned in the case by anything done by the plaintiff; and, secondly, that the disclosure to the railroad by the plaintiff caused the communication by the railroad with the defendant and was the foundation upon which the negotiation was conducted and the sale made. The exceptions were overruled.

[2-5] The defendant submitted four prayers, all of which the court granted. These prayers, which the reporter will set out in the report of the case, embodied correct principles, and submitted the case of the defendant clearly and fairly to the jury.

The plaintiff's granted prayer was correct in form, and announced principles under which he was entitled to recover, as those principles are declared in the cases cited, and, unless the court committed injurious error in its rulings on evidence embraced in the second and third bills of exceptions and

in overruling the special exceptions and granting the plaintiff's prayer, the judgment must be affirmed. As the action of the court in overruling the special exceptions to the prayer presents the most important question in the case, that will be first considered.

[6] In passing upon the action of the court, it is not our duty or province to decide the question of fact as to whether the railroad company and the defendant were put into communication about the property by anything done by the plaintiff, or the fact that the disclosure to the company caused the communication by the company with the defendant and was the foundation upon which the negotiation was conducted and the sale made. Our duty is limited to a decision as to whether there is found in the record evidence legally sufficient to prove these facts, or, stated in another way, our duty is merely to decide whether there is found in the record any legally sufficient evidence from which the jury could properly find those facts. We must assume the truth of the evidence offered by the plaintiff, and we must give him the benefit of all legitimate and fair inferences deducible in his favor from all the facts and circumstances of the case.

[7] There is evidence in the record tending to establish the following facts which relate to the question we are now considering. The property of the appellant which it sold to the railroad company is located in the west or northwest section of Baltimore city, and lies directly between the railroad lines of the Western Maryland and the Pennsylvania Railroads. The Pennsylvania Railroad had purchased from the appellant two small pieces of land, one in 1911, and the other in 1912, being portions of about 16 acres of land in that locality. The property of the appellant was offered to the railroad in 1914, and it declined to buy, owing, as stated in a letter dated November 7, 1914, from S. C. Long, general manager, "to the unsettled conditions about Baltimore in connection with the tunnels," etc. The appellant was anxious to sell the property, and it was again offered to the railroad by Caughy, Hearn & Carter on February 17, 1915. This offer was submitted to Mr. Long, the general manager, who replied that he saw no reason for changing the recommendation of November 7, 1914, as, "under the present status of affairs, we do not recommend the purchase of this property."

Linwood L. Clark, the plaintiff, is an attorney at law, and has been engaged in real estate business in Baltimore city for 12 or 13 years. In August, 1915, he learned that the property of the appellant was for sale, and in company with a Mr. Kennedy he visited the property, and was shown over it by Mr. J. Paul Baker, the secretary of the defendant company. Mr. Baker gave him a booklet containing a description of the property, and Mr. Clark testified that Mr. Baker authoriz-

ed him to sell the property, and promised to pay him a commission of 2½ per cent. on the sale. He prepared a prospectus of the property setting forth its advantageous location and suitability for manufacturing and other purposes. He inclosed this prospectus in a letter, dated August 9, 1915, which he sent to T. W. Hulme, the real estate agent of the Pennsylvania Railroad, Broad Street Station, Philadelphia. It was stated in the prospectus that:

"This property was for years the plant used to manufacture the famous Lord Baltimore electric trucks. The machine shops and equipment on this place are such that could be used in the manufacture of machinery, and particularly war materials, such as gun carriages, gun mounts, motors, and anything in the line of vehicle construction. Besides being equipped with lathes, drills, cranes, etc., the plant has two cupolas, one of which is capable of handling 100 tons a day, and the other having an output of 40 tons. The machine shop is located in a substantial frame, two-story building, reinforced with iron girders, measuring 100 feet by 66 feet. The storage and smelting department is of similar construction, and measures 70 feet by 661 feet.

"Three streets are laid out by the city running through the undeveloped portion of this property, and could be advantageously sold off for building purposes if not desired for extensions to the factory buildings. Adjoining the factory buildings is a large stone office building, splendidly designed for its purpose.

"The Car Wheel Company is well located for a manufacturing site of any description, and particularly any enterprise which deals in the output of any iron commodity. The adjacent property to the Car Company has been rapidly developed in the past two years, and sites in this locality are now scarce."

Mr. Hulme replied to this letter on August 16, 1915, stating that he saw "no necessity for the acquisition of the property of the Baltimore Car Wheel Company comprising about sixteen acres of land." On August 19, 1915, three days after the letter of Mr. Hulme to the plaintiff referred to above, S. C. Long, the general manager of the Pennsylvania Railroad Company, wrote to Mr. Hulme as follows:

"Dear Sir: Referring to your letter of October 29, 1914, to General Superintendent Lee, and our reply thereto of November 7th, in regard to offer of Baltimore Car Wheel Company to sell our company property at Fulton Junction, which at that time we did not care to acquire, recently we find it desirable to make use of this property for the construction of a Y connection between our tracks and those of the Western Maryland Railroad, and we are writing to ask if you will ascertain whether it will be possible for us to lease what property we need from the Car Wheel Company during the time we are constructing the B. & P. tunnels, and if so, what the rental would be.

"Will you kindly ascertain this information, and advise us at your early convenience, and oblige, Yours truly, [Signed] S. C. Long, General Manager."

On August 24, 1915, Mr. Hulme wrote to Paul C. Welsh, the local agent of the railroad company at Baltimore, in reference to obtaining a lease upon the property of the appellant. In this letter he stated that:

"Recently Mr. Linwood L. Clark, 215 St. Paul street, Baltimore, has again referred the prop-

erty to us, and we advised him under date of August 16th that the railroad company was not interested in the property."

The appellant declined to lease the property, and thereupon the sale of the property conveyed by the deed of May 12, 1916, was concluded between Mr. Welsh, representing the railroad company, and J. Paul Baker, representing the appellant; the negotiations extending over a period of two months. Under the rules of the railroad company, if the question of the sale or purchase of property arises, it is the duty of the real estate agent to ask the general manager whether or not such sale or purchase would be necessary or desirable, and in this particular case the purchase was made upon the authority of the board of directors upon the recommendation of Mr. Long, the general manager. The evidence is clear that Mr. Hulme received the letter of August 9, 1915, written by Mr. Clark, and also the prospectus inclosed, and in view of the relation existing between the real estate and the general manager departments it is reasonable to conclude that before this property was purchased the general manager, Mr. Long, was fully advised by Mr. Hulme as to Mr. Clark's connection with the property and what he had said about it in the prospectus. The matter of the Clark offer Mr. Welsh testified "was cut and dried at headquarters."

The defendant caused to be issued a commission to take the testimony of Mr. Long and Mr. Hulme at the office of Mr. Hulme, Broad Street Station, Philadelphia, but the evidence of neither was taken. They could have testified as to what knowledge they had of Mr. Clark's efforts to sell the property, and whether or not they were influenced by the advantages, etc., set forth in the prospectus. But neither was called; the defendant contenting itself with taking the deposition of Mr. Study, a clerk in Mr. Long's office, and of Mr. Gauff, the right of way agent. The evidence of either of these witnesses does not tend to show that the sale effected cannot be referred to the instrumentality of Mr. Clark. The facts and circumstances stated and the fair conclusions to be drawn from them were sufficient to have justified the court in overruling the special exceptions and granting the plaintiff's prayer.

[8] There remains to be considered the ruling of the court upon the questions embraced in the second and third exceptions. These questions were:

(1) "When Mr. Long wrote the letter of August 19, 1915, was he acquainted from this office in any way with the fact that Mr. Clark had submitted this property to the railroad company?"

(2) "What influence, if any, did the letter from Mr. Clark, dated August 9, 1915, have upon the purchase of this property by the railroad company from the Baltimore Car Wheel Company?"

The facts sought to be proved were very important. If Mr. Long did not know that the property had been submitted by Mr. Clark, or if he did know that the purchase of the property was not influenced by the statements contained in that letter, these facts could have been readily proved by him and probably by Mr. Hulme. But the witness under examination, Mr. John P. Gauff, had nothing to do with the purchase, and could not possibly have testified of his own knowledge whether Mr. Long was acquainted with the Clark offer, or to what extent he or the board of directors were influenced by it. He did, however, answer the first question, so far as he was qualified to answer, by saying that he did not acquaint Mr. Long with the Clark offer.

In *Way v. Turner*, 127 Md. 827, 96 Atl. 676, relied on by the appellant, this court did decide, as matter of law, that the services of Mr. Turner were not the procuring cause of the sale therein under consideration, but in that case Mr. Hazard, the purchaser of the property, positively testified that he was not influenced in the purchase by the communication mentioned in the testimony.

[9] Proximate or procuring cause is ordinarily a question for the jury, and the court will not, except in a clear case, decide it. That question was, under the facts and circumstances of this case, one for the consideration of the jury, and was submitted to them by appropriate instructions.

Finding no error in the rulings of the court, the judgment will be affirmed.

Judgment affirmed, with costs.

(123 Md. 637)

MAYOR AND CITY COUNCIL OF BALTIMORE v. POE et al.

POE et al. v. MAYOR AND CITY COUNCIL OF BALTIMORE.

(Nos. 8, 9.)

(Court of Appeals of Maryland. May 3, 1918.)

1. MUNICIPAL CORPORATIONS §358(3)—CONTRACTS FOR PUBLIC IMPROVEMENTS—STIPULATIONS TO DETERMINE DISPUTES.

A contract for construction of a sewage pumping station, expressly leaving to the determination of the city engineer and architect the questions of quantity, quality, acceptability, and value of the work and material, and the number of working days consumed, makes their decision final and conclusive on the parties if within the scope of the submission, and is not subject to review in the absence of fraud or bad faith.

2. MUNICIPAL CORPORATIONS §358(1)—CONTRACT FOR PUBLIC IMPROVEMENTS—WAIVER OF PROVISIONS.

A provision in a contract for the construction of public improvements, making the engineer's certificate a condition precedent to payment for extra work, may be waived by the city.

8. MUNICIPAL CORPORATIONS ↔374(6)—CONTRACT FOR PUBLIC IMPROVEMENTS — QUESTIONS FOR JURY—WAIVER OF PROVISIONS IN CONTRACT.

Notwithstanding a provision in a contract for the construction of a sewage pumping station that certificates of the engineer and architect were a condition precedent to payment for extra work, the waiver of such provision was for the jury where it had been continuously and repeatedly ignored by the parties.

4. MUNICIPAL CORPORATIONS ↔374(6)—CONTRACT FOR PUBLIC IMPROVEMENTS — QUESTIONS FOR JURY.

In an action for a balance due upon a municipal contract to construct a sewage pumping station, items referred by the engineer without deciding them, to a committee of the sewerage commission which did not act upon them, should have been presented to the jury.

5. MUNICIPAL CORPORATIONS ↔374(5)—CONTRACTS FOR PUBLIC IMPROVEMENTS — ITEMS RECOVERABLE.

In an action for a balance due on a municipal contract for the construction of a sewage pumping station, increased expense to the contractor in disposing of excavated material because his dumping pier was moved by order of the city was not recoverable.

6. MUNICIPAL CORPORATIONS ↔374(6)—CONTRACT FOR PUBLIC IMPROVEMENTS — QUESTIONS FOR JURY.

Where a municipal contract for the construction of a sewage pumping station provided that the city engineer should give all necessary lines and grades, levels, etc., for the contractor's guidance, and the contractor claimed that the engineer gave wrong lines, and the work had to be done over again, the question was one for the jury.

7. MUNICIPAL CORPORATIONS ↔374(1)—CONTRACTS FOR PUBLIC IMPROVEMENTS—ACTIONS—RIGHTS OF SUBCONTRACTORS.

In an action by the receivers of the contractor to recover a balance due under municipal contracts for the construction of a sewage pumping station, the receivers, acting for all the creditors, might recover damages suffered by subcontractors recognized by the city as the contractor's representatives.

8. MUNICIPAL CORPORATIONS ↔374(4)—CONTRACTS FOR PUBLIC IMPROVEMENTS—ACTIONS—EVIDENCE.

In an action by the contractor's receivers under a contract for the construction of a sewage pumping station, time sheets relating to the value of extra work performed by a subcontractor were erroneously excluded; the city being liable for the subcontractor's claim.

9. MUNICIPAL CORPORATIONS ↔374(4)—CONTRACT FOR PUBLIC IMPROVEMENTS—ACTIONS—EVIDENCE.

In an action to recover a balance due under a contract for the construction of a sewage pumping station, it was not error to exclude evidence as to what labor was employed in removing a dumping pier for excavated material under orders by the city; the contract providing that the contractor himself was to dispose of such material.

10. MUNICIPAL CORPORATIONS ↔374(4) — CONTRACTS FOR PUBLIC IMPROVEMENTS—ACTIONS—EVIDENCE.

In an action by the receivers of a contractor to recover a balance due for the construction of a municipal sewage pumping station, extracts from the minutes of the sewage commission were inadmissible.

Appeals from Superior Court of Baltimore City; John J. Dobler, Judge.

Action by Edgar Allan Poe and others, re-

ceivers of the Noel Construction Company of Baltimore City, a body corporate, against the Mayor and City Council of Baltimore, a municipal corporation. From a judgment for plaintiffs, both parties appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTERSON, URMER, STOCKBRIDGE, and CONSTABLE, JJ.

Robert F. Leach, Jr., Asst. City Sol., and S. S. Field, City Sol., both of Baltimore, for Mayor and City Council of Baltimore. J. Kemp Bartlett and Charles F. Harley, both of Baltimore (Robert D. Bartlett, of Baltimore, on the brief), for receivers of Noel Const. Co.

CONSTABLE, J. There are cross-appeals in this case; each party appealing from the judgment rendered in favor of the receivers of the Noel Construction Company.

The case arose out of the contracts awarded to the Noel Construction Company by the city of Baltimore through the board of awards for the construction of the sewage pumping station near East Falls, in Baltimore city. It was proposed by the city to erect the station building by two separate contracts, one for the substructure or foundation, called contract No. 3, and the other for the erection of the superstructure, called contract No. 4, and invited bids for that work. The specifications for contract No. 3 provided that, if that contract was awarded to one bidder, and the contract for the superstructure was awarded to another bidder, the number of working days from the date of the commencement of the work to its completion would be limited to 200 days, but that, if the contracts for both the substructure and the superstructure were awarded to the same bidder, the number of working days from the date of commencement to completion would be limited to 420 days. The same provision as to limit of time for completing the substructure and the superstructure was made in the specifications for contract No. 4; 220 working days if different bidders, and 420 days if the same bidder was awarded both contracts. The Noel Construction Company, being the lowest bidder for each of the two contracts, was awarded both. Provision is made for computing what shall be working days under the terms of the contracts as follows:

"Every day except Sundays and also except legal holidays on which no work is done shall be considered a working day, provided that it is not unfitted either by wind, rain, snow or temperature for working out of doors.

"The length of time (expressed in days and parts of days) during which the work has been delayed by any act or omission of the sewerage commission shall be allowed to the contractor and excluded from such computation."

Calvin W. Hendrick, chief engineer of the city, was in charge of contract No. 3, or the

substructure contract, and Henry Brauns, an architect, was in charge of contract No. 4, or the superstructure contract. Contract No. 8 contained this provision:

"The engineer shall determine the number of working days that the contractor is in default in completing the work to be done under this contract, and shall certify the same to the commission in writing. * * * His determination and certificate shall be final and conclusive."

Contract No. 4 contains the same provision, except the architect is substituted for the engineer. Provision is also made in the contracts that for each and every working day that the engineer or architect shall certify that the contractor is in default in completing the work to be done under the specifications, the contractor shall pay to the city the sum of \$35, and that for each day the work may be completed before the time fixed in the contracts for such completion the contractor shall be allowed a premium of \$35; also the following provision:

"(53) The contractor shall do such extra work as may be ordered in writing by the architect or engineer with the authorization of the commission. No claims for extra work will be considered or allowed unless said work has been so ordered by the architect or engineer, nor unless the commission shall approve such claim for extra work and certify in writing that in its opinion such extra work was necessary for the public interest, stating in the certificate its reasons."

And the further provision:

"(14) To prevent disputes and litigations, the architect or engineer shall in all cases determine the amount or quantity, quality, acceptability and value of the work and materials which are to be paid for under this contract, shall decide all disputes, questions, and doubts relating to the work and the performance thereof, and shall in all cases decide every question which may arise relative to the contract or to the obligations of the contractor thereunder. His determination and decision shall be final and conclusive upon the contractor and all whom he may employ to execute the various branches of the work, whether as subcontractors or otherwise, and upon all parties from whom materials may be purchased, either by the contractor or by any subcontractor. In case any question shall arise between the contractor and the city touching the contract, the estimate or certificate and decision of the architect or engineer shall be a condition precedent to the right of the contractor to receive any moneys under the contract."

Provision was also made that the contractor would be required to comply strictly with all the requirements of the building regulations and other ordinances of the city of Baltimore, and also the following provision was contained in both contracts:

"(48) The commission reserves the right to suspend the whole or any part of the work to be done hereunder, if it shall deem it for the interest of the city of Baltimore to do so, without compensation to the contractor for such suspension, other than extending the time for completing the work as much as it may have been delayed by such suspension."

The purpose of this building was to receive by gravity all the sewage from South and West Baltimore, and after treating it there to force it by means of gigantic pumps to the disposal plant some miles away. It

was necessary for carrying out this purpose to have the foundations unusually strong, and to insure that the following provision was made in contract No. 3.

"(68) It is expected that satisfactory material for the foundations will be found at El. 23, but the contractor shall carry the excavation to a greater depth wherever, in the opinion of the engineer, such greater depth is necessary to secure a suitable foundation. If, on the other hand, a satisfactory foundation is found at a less depth than El. 23, the excavation shall be discontinued at that depth, if directed by the engineer."

The contracts and specifications are contained in printed books covering over 180 pages, and as it would be impossible to reproduce them in full, we have confined ourselves to quoting those which we consider most applicable to this controversy.

The work on the substructure was begun on June 29, 1908, and the whole building completed August 24, 1911, and under date of August 25 and September 11, 1911, the architect and the engineer respectively certified to the commission that the number of days the contractor was in default under the contracts was 144¼ working days, at \$35 per day, and therefore subject to damages of \$5,083.75. The amount of money certified to be due under the contracts, less \$5,083.75, was paid over to the contractor.

Receivers were appointed for the Noel Construction Company, and this action was commenced by them on the 6th day of January, 1916, for the recovery of the amount retained as damages for failure to complete the work within the specified 420 working days, for extra work performed, damages incurred by the company through interference with the work and for the recovery of \$853.20 charged against the contractor for insuring the building after it had been accepted by the commission. The last item is conceded by the city to have been charged in error against the contractor and should be allowed to the plaintiff.

The trial court held that neither the certificate of the chief engineer nor the certificate of the architect was "technically a conclusive determination of the number of working days in which the Noel Construction Company was in default in completing the work to be done under the respective contracts in evidence," and under a prayer of its own left to the jury to determine whether the Noel Construction Company finished the contracts under or beyond the number of days limited by the contract. But also held that they were not entitled to recover for other claims other than the insurance, which was conceded.

From the ruling of the court, upon the prayers, in holding that the certificates of the engineer and architect as to the number of days in default were not binding and conclusive upon the contractor, the city excepted, and that question constitutes its appeal.

[1] At this date it cannot be questioned what is the effect of a provision in a contract expressly leaving to a third party the deter-

mination of questions such as were left in these contracts to the determination of the engineer and the architect. The rulings of this state and the courts of all other states in the Union, with the exception of Indiana, are uniform as to the effect of such a provision as in these contracts; that the decision of such person shall be final and conclusive upon parties to the contract, provided the decision concerns matters within the scope of the submission, and is not subject to review by the courts, if made by the third party in the absence of fraud or bad faith. *Mayor, etc., v. Ault*, 126 Md. 423, 94 Atl. 1044; *Mayor, etc., v. Talbott*, 120 Md. 363, 87 Atl. 941; *Hughes v. Model Stoker Co.*, 124 Md. 289, 92 Atl. 845; *Pope v. King*, 108 Md. 37, 69 Atl. 417, 16 L. R. A. (N. S.) 489, 15 Ann. Cas. 970; *Lynn v. B. & O. R. R. Co.*, 60 Md. 414, 45 Am. Rep. 741; 6 Cyc. 40.

Indeed, the soundness of this principle of law is not questioned by either of the parties, but the plaintiffs contend that the determination of these questions bearing upon the number of actual working days consumed in the work was not made by those authorized to make the decision, but was the result of influence of others. There is, however, no claim made that fraud or bad faith was exercised either by the engineer or the architect. The work on the substructure started on June 29, 1908, and was finished on March 21, 1910, covering a period of 632 days. The engineer certified that of that number of days 188 were charged against the contractor as actual working days. From June 29 to November 2, 1908, the work progressed satisfactorily, and 97½ days of the 188 were charged against the contractor during that period. At that time serious difficulty arose, growing out of interference, justly so made, by the building inspector of Baltimore city, who claimed that the excavation should go lower than it was planned to go. The controversy between the engineer and the building inspector was referred by the sewerage commission to an arbitration board. Many tests were made on behalf of the arbitration board and on behalf of the building inspector by driving piles, etc.

Of course, during all of this period great delay was caused the Noel Construction Company in carrying out the contract, and on April 27, 1909, the company wrote the engineer requesting an extension of time between November 6th and April 23d in which he claimed of the 143 days included between those dates he should be allowed an extension of 101 days, or, in other words, that he should only be charged with 42 actual working days. The engineer decided that from November 2, 1908, to April 22, 1909, the contractor should only be charged with 40 working days. It was decided to carry the excavation a considerable distance below elevation 23, in fact, to carry it to elevation 31 in some instances; and because of this necessary extra work during the months of June, July, August, September, and October

the engineer charged them with only 1½ actual working days. During the delay the engineer was called upon to decide many questions. Some of these questions he himself decided; others he referred to committees or to the sewerage commission. On questions of time extensions, however, he decided all himself, with the exception that once, in his absence, when the Noel Construction Company asked for a 3-day extension in August, 1908, because of a storm, the acting engineer referred the determination to the sewerage commission, which granted the extension.

The engineer, as of June 12, 1911, wrote to a special committee of the sewerage commission explaining how he arrived at the 188 working days which he charged to the contract for the substructure as follows:

"The foundations were completed and turned over to the architect for work on the superstructure on March 21, 1910, making a total of 632 days. Of this total period there would be deducted 102 days for Sundays and holidays, and 41 days lost on account of bad weather, making a total of 143 days to be deducted from the total time, leaving the possible number of working days 489. On account of delay due to the action of the building inspector and the removing of certain undesirable material encountered below 23, called for in paragraph 68 of the specifications, there was to be a further deduction of 301 days, leaving 188 working days chargeable to the contractor of the substructure. The contractor therefore is entitled to an extension of 301 days due to the reasons set forth, and I would recommend that this extension be granted. The superstructure being entirely under the jurisdiction of the architect, I have nothing to do with that matter."

As to the certificate of the architect the plaintiffs claim that it was invalid as to its binding effect because it was made up at the dictation of the city solicitor and others. We find from the record, however, that while it is true he had a conference with the city solicitor and members of the sewerage commission on October 26, 1911, and that a certificate was prepared for his signature to be antedated as of August 25, 1911, and that the architect practically rewrote and forwarded that as his certificate to the chairman of the sewerage commission, yet nevertheless the examination of the architect shows that he had no doubt as to the number of working days the contractor consumed on the superstructure, but that the doubt in his mind was caused by whether or not he could certify as to the number of days consumed on the substructure with which he had nothing to do. As supplementing his testimony on this point that he had no doubt as to the number of days consumed there was introduced a letter from him under date of July 1, 1911, long before he had filed any certificate, to the chairman of the sewerage commission as follows:

"Dear Sir: Replying to your inquiry of June 29, 1911, I beg to state that I have charged up against the Noel Construction Company on account of their contract for the superstructure of the sewage pumping station on Eastern avenue from March 22, 1910, to June 30, 1911

(inclusive) three hundred and thirty-one and a quarter days."

The number of days appearing in this letter is exactly the number of days he certified to in his final certificate, and really the important thing in his certificate. The fact that there were two contracts and the engineer was in charge of one, and the architect was in charge of the other, and the two contracts were being executed by the same contractor, and the fact that the contract provided that the work on both contracts should be completed within 420 days, rendered it unnecessary that the engineer should know of his own knowledge the number of working days consumed in the erection of the superstructure, or that the architect should know of his own knowledge the number of working days consumed in the construction of the substructure, but the important thing was that each should know and be able to certify to the actual number of working days consumed in the work he had in charge and under his personal supervision. The number of days for which the contractor was subject to damages or entitled to premiums resolved itself into a mere calculation of addition and subtraction. We are of opinion, therefore, that these certificates should have been given the binding force to which they are entitled under the law, and that there was error in refusing the fourth prayer of the city and in granting the court's independent instruction.

Having disposed of the question involved in the city's appeal, we will now direct our attention to those arising in the receivers' appeal.

The trial began on the 2d day of April, 1917, and the verdict in favor of the receivers was returned on the 8th day of May, 1917. Naturally a great mass of testimony was taken with the result that the record in this case is a very large one; so, in order to keep this opinion within reasonable limits, we will confine ourselves to stating our conclusions as reached from a careful reading of the record rather than setting out at length the testimony.

The plaintiff offered two prayers, one of which only was granted. The defendant offered 45 prayers, 34 of which the court granted, refusing the other 11. The defendant also filed two motions, both of which were granted by the court. The eleventh to the forty-fourth (inclusive) prayers of the defendant dealt separately with each claim of the plaintiff, other than the claim for the money retained by the city as liquidated damages for delays, seeking to withdraw those claims from the consideration of the jury. All of these prayers were granted by the court, thus eliminating from the jury practically all of the claims of the plaintiff, other than the liquidated damages. From the number of these prayers it is readily seen that the plaintiff made many claims. Many of these claims are for extra work perform-

ed and for which the contractor had no certificate as provided in section 53, as follows:

"The contractor shall do such extra work as may be ordered in writing by the engineer with the authorization of the commission. No claim for extra work will be considered or allowed unless said work has been so ordered by the engineer, nor unless the commission shall approve such claim for extra work and certify in writing that in its opinion such extra work was necessary for the public interest, stating in the certificate its reasons therefor."

The city's contention is that none of these claims can be allowed in the absence of a certificate from the commission approving such claims and stating its reasons for such approval.

The plaintiff contends that under section 14, where it is provided that in case of disputes between the city and the contractor the engineer's decision shall be final and conclusive upon the contractor, his reference of these questions to the sewerage commission for a decision made the conclusiveness of any such question inoperative. This proposition is not open to attack, as is shown in the cases we have cited above in reference to the city's appeal on the question of whether the certificates of the architect and engineer on the question of delays was admissible. But, although it is certain that these disputes about extra work were submitted by the engineer to the sewerage commission, it was his plain duty under section 53 to do so, for the claims could not be allowed without the commission should approve them, etc. Therefore to such a dispute as this we are of opinion that section 14 has no applicability.

[2] While, no doubt, the provision contained in section 53 was for the purpose of making the production of the certificate a condition precedent to the validity of any claim for extra work, yet in this case we do not think that it should be so held; for it is a well-recognized rule of law in this state and elsewhere that a provision of this character may be waived. *Filston Farm Co. v. Henderson*, 106 Md. 235, 67 Atl. 228; *Well Case*, 129 Md. 487, 99 Atl. 661, L. R. A. 1917C, 929; *Lynn v. B. & O. R. R.*, 60 Md. 404, 45 Am. Rep. 741; *Pope v. King*, 108 Md. 37, 69 Atl. 417, 16 L. R. A. (N. S.) 489, 15 Ann. Cas. 970; *McEvoy v. Harn*, 129 Md. 97, 98 Atl. 522; *Reid v. Weissner*, 88 Md. 237, 40 Atl. 877; 9 *Corpus Juris*, 760; 48 L. R. A. (N. S.) at page 576, notes under the heading "What Constitutes Waiver."

There is an abundance of evidence in the record tending to show that the course of dealing between the parties was on many occasions to ignore the provisions of section 53 about getting extra work orders before the commencement of the extra work. For instance, we will refer to testimony as to pumping, which was necessary because of the dispute between the engineer and the building inspector:

"The pumping had to be done; and it was said to go ahead and do it and there would be extra

pay for it, and not to wait for the order. We would often do that with extra work, and they would say that the order would come down and sometimes the order would come down and sometimes it would not. In this particular case I don't know whether they sent an order or paid for it or not."

[3] We are of opinion that, where the evidence tends to show that extra work was performed on the order of the engineer, or any of his subordinates, with the understanding that certificates would later be issued for such work, as we have said above was their course of dealing, there was a waiver of the provisions of section 53, and the issue should have been presented to the jury.

As we have pointed out above, it was necessary to carry the excavations much below that at first expected, and the engineer wrote to the Noel Construction Company on May 5, 1909:

"Gentlemen: It will be satisfactory to us for you to proceed with the excavation below 23 feet, according to the specifications at cost plus 10 per cent. The absolute cost of the value of the pumping machinery employed in pumping below 23 feet, to be paid for at the cost, plus 10 per cent. The cost of pumping and excavation above 23 feet, to be paid for at the cost plus 10 per cent. The cost of pumping and excavation above 23 feet to be segregated from all pumping and excavation below 23 feet.

"I will request the city to have electric light placed over the work so that you can proceed with your night work, which I wish you would do as promptly as possible."

[4] After the completion of that part of the work the inspector for the city omitted to include certain elements of actual cost. The contractor presented to the engineer itemized bills for these claims, but he referred them, without making any decision, to a committee of the sewerage commission, which never acted upon them. These items should have been presented to the jury.

[5] For the purpose of removing the excavated material the contractor had made arrangements with the harbor board for the use of Jones Falls, and had purchased from the city an old bridge which he removed to the edge of Jones Falls and placed in position there for the purpose of using it as a dumping pier of the material into scows. He used this method for some time, when he was notified by the harbor board that the position of the dumping pier interfered with the prosecution of another contract the city had, to wit, the erection of a sea wall along Jones Falls at the point, and was directed to cease that method of getting rid of the earth and mud. He immediately suspended this method and tried various other methods of disposing of the said material, but at increased cost. It is to recover this excess cost which constitutes one of his claims. We have been unable to discover any theory upon which this claim should be allowed. We find nothing in the record anywhere which even suggests that the city would provide or

maintain ways and means for assisting the contractor in disposing of this material. It was solely a matter for the contractor himself to decide upon at his own risk.

[6] Section 27 provides:

"The engineer will give all necessary lines, grades, elevations, etc., for the general guidance of the contractor, who shall conform his work thereto. He shall provide the engineer with such materials and assistance (except engineering assistance), as may be required to properly perform the services mentioned, and shall carefully preserve and maintain in proper position all marks given. Any work done without lines, levels, etc., having been given by the engineer, may be ordered removed and replaced at the contractor's sole cost and expense."

The plaintiff offered evidence tending to show that the engineer or one of his assistants in giving lines to the contractor for excavation for the foundation gave wrong lines, and claimed that all of that work had to be done over. We think under the above section that should have been submitted to the jury, providing the engineer refused to give an independent decision as to that claim.

The plaintiff's second prayer was properly refused for the reason that it sought to instruct the jury that, if they found that the engineer referred the decision as to the validity of any of the plaintiffs' claims for allowance for extra work, etc., to the sewerage commission for decision, then the plaintiffs are not precluded from recovery. This instruction would have been erroneous under what we have said above as to the necessity of the engineer getting the approval of the commission.

The eighth prayer of the defendant was granted, and we think incorrectly, for it is at least misleading.

[7] The two motions made by the defendant and referred to above were for the purpose of striking out all evidence tending to prove damages suffered by two of the subcontractors of the Noel Construction Company and were improperly granted. The contractor had every right to sublet any part or all of his contract with the city. In every contract of this magnitude the general custom is to sublet portions of it. These subcontractors were recognized by the city as the representatives of the contractor. They were the agencies by whom most, if not all, of the extra work was performed, and the compensation for which work is now claimed by the receivers. They have filed their claims with the receivers, and they have been approved.

There was no privity of contract between the subcontractors and the city, so, of course, they could not entertain separate suits against the city, but we can see no reason why the receivers, who act for all the creditors, should not include the claims of their agencies, for whose compensation they were responsible, in a suit brought upon the original contract.

[6] The first exception arises over the refusal of the court to admit in evidence time sheets relating to the value of extra work performed by one of the subcontractors. We think, following our ruling as to the liability of the city for the claims of the subcontractors, if it is shown that the extra work orders were on the promise that certificates would be issued, this evidence was admissible, and its rejection constitutes error. This is upon the assumption that the work for which the time sheets were offered were not in connection with the changed method of removing the earth. We say "assumption" because it is not very clear from the record exactly what character of work was shown by these time sheets.

[9] The second exception relates to the refusal of the court to permit a witness to state what labor was employed in removing the dumping pier. This, of course, was a proper ruling.

The third exception had to deal with the subject which we have heretofore discussed, that of depriving the contractor of the use of the dumping pier at the edge of Jones Falls. What we have already said upon that subject disposes of this exception, and we therefore hold that the exception should be overruled. The fourth exception should be overruled.

[10] The fifth exception relates to the introduction in evidence of extracts from the minutes of the sewerage commission. We do not see upon what theory their admission could stand.

The sixth and seventh exceptions relate to the motions made by the defendants to strike out all testimony showing damages suffered by the subcontractors and have already been discussed above.

We have not referred specifically to each of the prayers granted on behalf of the defendant for the reason that, since the case will have to be retried, the court in passing upon similar prayers will be governed by the principles which we have indicated control them.

Judgment reversed, case remanded for a new trial, each party to pay one-half the costs in this court, the costs in the court below to abide the final result.

Note Filed July 10, 1918.

A motion having been made for a modification of certain of the language contained in the foregoing opinion, it is deemed proper to add this note: The foregoing opinion does not, and was not intended to, hold that it lay in the power of every subordinate to vary the terms of a contract and bind the principal by such act; what the opinion does declare is, and is only, that where by a continued course of dealing the parties to a contract have ignored a provision of that contract not once, but repeatedly, the question of waiver is one proper to be submitted to a jury.

(123 Md. 170)

NEWBOLD v. NEWBOLD. (No. 80.)

(Court of Appeals of Maryland. June 20, 1918.
Motion for Reargument Overruled
July 30, 1918.)

1. EQUITY — 378—SETTING CASE FOR HEARING—ADMISSION.

Where case was set down by petitioner to be heard on bill and answer, he admitted truth of all matters stated in answer which were susceptible of proof by legitimate evidence, and it thereby became the evidence of the case.

2. DIVORCE — 245(2)—AWARD NOT OF "ALIMONY"—MODIFICATION.

Where court, in wife's divorce suit, pursuant to agreement of parties ordered husband to pay wife weekly allowance of \$80 during her life, award was not of "alimony," as recognized in Maryland, and will not be modified on husband's petition because wife has remarried.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alimony.]

Briscoe and Stockbridge, JJ., dissenting.

Appeal from Circuit Court, Baltimore County; Allan McLane, Judge.

"To be officially reported."

Suit for divorce by Eugene S. Newbold against Adelaide Passano Newbold, wherein respondent filed a cross-bill, resulting in decree for respondent on her cross-bill; petitioner later seeking relief from all obligation to pay alimony on the ground of respondent's remarriage. From decree dismissing his petition, petitioner appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

George Whitelock, of Baltimore (Whitelock, Deming & Kemp and Wm. Ewin Bonn, all of Baltimore, on the brief), for appellant. Frank G. Turner, of Baltimore, for appellee.

CONSTABLE, J. The appellant herein, in March, 1915, filed a bill for an absolute divorce on the ground of abandonment against the appellee herein. On June 21, 1915, the appellee filed her answer thereto, denying the allegations of abandonment, and on the same day filed a cross-bill for absolute divorce on the ground of adultery. The appellant did not prosecute his bill, and it was dismissed under date of July 19, 1915; neither did the appellant answer the cross-bill of his wife, but it was prosecuted by the appellee, and decree entered on the 14th day of August, 1915, divorcing her from the appellant a vinculo matrimonii, and awarding her the guardianship and custody of their minor child.

"And it is further adjudged, ordered, and decreed that the said complainant, Adelaide Passano Newbold, is entitled to receive by way of alimony, out of the said Eugene S. Newbold's estate, and the said Eugene S. Newbold is hereby ordered to pay unto Adelaide Passano Newbold, the complainant in the cross-bill, a weekly allowance of eighty dollars (\$80.00), to be computed from this 14th day of August, 1915, and payable thereafter on each and every Saturday, during the lifetime of the said Adelaide Passano Newbold."

On October 16, 1917, the appellant filed a petition, alleging that the appellee had remarried and become the wife of a certain John B. McCormick, and alleging that the said John B. McCormick had become liable for the support and maintenance of the said Adelaide Passano McCormick, and that the petitioner should be relieved from all obligation to maintain or support her, or to make any further payments of alimony for her support and maintenance, and further prayed by amendment that the court fix a proper allowance for the support and maintenance of the infant child of the parties. The appellee filed a demurrer to the petition, but the court overruled the demurrer and rescinded the decree as to alimony. Later the order of December 3, 1917, was rescinded, and an order overruling the demurrer with leave was filed.

[1] The case was then set down by the appellant to be heard on petition and answer. By doing this the appellant admitted the truth of all matters stated in the answer which were susceptible of proof by legitimate evidence. It therefore became the evidence of the case. Miller's Equity, §§ 255 and 256. The answer was quite a long one, and exceptions were filed to six of its paragraphs, five of which were stricken out by the court and exceptions to the six overruled. The paragraph left in dealt with the financial standing of the appellant. We will here reproduce some of the paragraphs that remained in the answer after the ruling on exceptions:

"Seventh. That in accordance with an agreement between counsel for the respective parties, made and concluded before the taking of testimony, evidence was not taken as to the proper amount or allowance to this respondent of the estate of the said Eugene S. Newbold, or the amount he should pay as alimony to this respondent, nor the amount properly payable by the said Eugene S. Newbold for the support, maintenance, and education of the child of this respondent and Eugene S. Newbold, as it was agreed that the allowance of eighty dollars (\$80.00) per week, to be computed from this 14th day of August, 1915, and payable thereafter, on each and every Saturday during the lifetime of the said Adelaide Passano Newbold, was a proper and reasonable allowance out of the estate and earnings of the said Eugene S. Newbold, as compensation to his wife, and as maintenance for her and their son, John Passano Newbold; it then being agreed that when the said John Passano Newbold should reach the age that he should be sent to school or college, that the said Eugene S. Newbold would then provide and pay to this respondent any additional sum which would be reasonably appropriate for such schooling or education.

"That when, in accordance with the rules of court, it was appropriate to submit this cause for decree, the solicitors for Eugene S. Newbold, pursuant to agreement and appointment with this respondent's solicitor, submitted the cause to the Honorable Frank I. Duncan for decree, on the 14th day of August, 1915, at which time the decree, prepared in so far as the amount of alimony and the payment thereof in accordance with the agreement between the parties, was presented.

"That at the submission for decree the said Eugene S. Newbold was represented by his

brother, David M. Newbold, Jr., Esq., solicitor, who then confirmed the agreement as to alimony by stating to the court that the provision as to alimony was satisfactory to the said Eugene S. Newbold and his solicitors.

"Tenth. This respondent, further answering the petition of Eugene S. Newbold, says that, while she was granted the guardianship and custody of John Passano Newbold, there was no provision in the decree of divorce directing payment by the said Eugene S. Newbold for the support of his son, as it was agreed between the parties before the taking of testimony that the payment of the agreed sum of eighty dollars (\$80.00) per week as alimony 'during the lifetime of the said Adelaide Passano Newbold' should cover and include the maintenance of the son of the said Eugene S. Newbold until he arrived at the age when he should be sent to school or college, at which time the said Eugene S. Newbold was to make greater payments to cover such natural added expenses.

"Twelfth. This respondent, now further answering the said petition of the said Eugene S. Newbold, says that the stipulation of eighty dollars (\$80.00) per week alimony to be paid 'during the lifetime of the said Adelaide Passano Newbold,' so inserted in decree of divorce, was so inserted pursuant to an agreement, made by and on behalf of this respondent and the said Eugene S. Newbold, and that the said payment of eighty dollars (\$80.00) per week was to continue during the lifetime of this respondent, out of which said payments this respondent was to support and maintain the said John Passano Newbold till he should reach the age when he should be sent to school or college, at which time the payments by the said Eugene S. Newbold were to be increased to meet such added expenses.

"Thirteenth. That the said Eugene S. Newbold is a person of large means and large income, derived from his salary as president, etc., of the City Illuminating Company of Philadelphia, as president, etc., of the American Street Lighting Company, as vice president of the Welsbach Company of Philadelphia, from property owned by him, and from various patented devices and appliances; this respondent being informed and believing, and therefore charging, that the annual income of the said Eugene S. Newbold is greatly in excess of twenty-five thousand dollars (\$25,000.00), and that the income of the said Eugene S. Newbold has been for years equal to said stated amount, and that his income and receipts will so continue."

The court asked a decree dismissing the petition, and the petitioner appealed.

[2] Having set out verbatim certain paragraphs of the answer, not much comment is necessary to demonstrate that this case falls directly within the ruling of this court. In the recent case of Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033, it will be recalled the former husband tried to be relieved from the payment of alimony to his former wife upon her remarriage. In deciding that case the opinion filed dealt thoroughly with the law relating to alimony in this state, also the authority of the courts to award alimony, also the power to modify provisions as to alimony in decrees, and also the power to incorporate in a decree the provisions of an agreement of the parties as to alimony approved by the court. In that case, as in this, the parties were in agreement as to the provisions for alimony the court should incorporate in the decree. In that case there was a written agreement, while in this the allegations of

the answer are to the same effect. We held in the Emerson Case, as we must in this, that what the court decreed was not alimony as recognized in this state, and, quoting from that case, we said as follows:

"Although the bill prayed for alimony, and the beginning of the agreement stated that on the question of alimony no testimony need be taken, but that the agreement should be followed, nevertheless, although they called it alimony, it was not alimony as understood and followed under the Maryland law. It was not alimony, as the court, in the absence of the agreement, would have decreed. A mere recital of the provisions shows that under our statutes and decisions no such decree could have been passed, if this appellant had not been in agreement upon it. It was a plain attempt upon his part to have allowed to his wife something more than, under the law, could have been allowed as alimony, and as the learned judge below said, we 'should blind ourselves to the fact if we should treat that arrangement as one of alimony.' If for alimony, why did he bind himself to pay these annual sums up and until the death of the wife, irrespective of whether or not she survived him? Was not that providing more than he could have been compelled to provide under the terms of alimony? It is settled in this state that alimony ceases upon the death of either of the parties. Wallingsford v. Wallingsford, 6 H. & J. 485. Why did he agree to surrender 600 shares of valuable stock to trustees, to enforce the payment of the sums during the life of the wife, and, in terms, only provided for their return to him at the death of the wife? Why the absolute transfer of all the furniture and the use of the Italian Gardens to the wife? None of these could have been decreed without his consent, and the conclusion is clear that he intended under this agreement to assure to his wife these provisions during the balance of her life, irrespective of any contingencies. The court having embodied his agreement in the decree, we are of the opinion that a court of equity should not disturb it."

What we said there applies with equal force to the present case, and we will therefore affirm the decree of the lower court.

Decree affirmed; the appellee to pay the costs.

BRISCOE and STOCKBRIDGE, JJ., dissent.

BURKENTINE v. STATE.

(Court of Appeals of Maryland. Dec. 13, 1917.)

Appeal from Circuit Court, Harford County; Harlan, Judge.

Argued before **BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.**

Harry S. Carver, of Bel Air, for appellant. Philip B. Perlman, Asst. Atty. Gen., and Albert C. Ritchie, Atty. Gen., for the State.

STOCKBRIDGE, J. The judgment of the lower court is affirmed.

HOWARD et ux. v. RANDALL.

(Court of Appeals of Maryland. Jan. 15, 1918.)

Appeal from Circuit Court, Anne Arundel County; Brashears, Judge.

Argued before **BOYD, C. J., and BRISCOE,**

BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

John S. Strahorn, of Annapolis, for appellants. Daniel R. Randall, of Baltimore, for appellee.

THOMAS, J. The order of the lower court is affirmed.

WESTERN UNION TELEGRAPH CO. v. VICTOR G. BLOEDE CO.

(Court of Appeals of Maryland. Nov. 15, 1917.)

Appeal from Court of Common Pleas of Baltimore City; Stump, Judge.

The facts of the case are stated in a former appeal, reported in 127 Md. 844, 96 Atl. 685.

Argued before **BOYD, C. J., and BRISCOE, BURKE, THOMAS, and URNER, JJ.**

W. Irvine Cross, of Baltimore, for appellant. John R. M. Staum and W. W. Parker, both of Baltimore, for appellee.

URNER, J. The judgment of the lower court is affirmed.

BRADFORD et al. v. MACKENZIE.

(Court of Appeals of Maryland. Feb. 20, 1918.)

Appeal from Circuit Court, Baltimore County, in Equity; Duncan, Judge.

The facts and full provisions of the will are stated fully in 131 Md. 380, 101 Atl. 774.

Argued before **BOYD, C. J., and BRISCOE, BURKE, THOMAS, STOCKBRIDGE, and CONSTABLE, JJ.**

Harry S. Carver, of Bel Air, for appellants. Ogle Marbury, of Baltimore (Thomas Mackenzie, of Baltimore, on the brief), for appellee.

CONSTABLE, J. The judgment of the lower court is affirmed.

GROVE v. FUNK et al.

(Court of Appeals of Maryland. Feb. 13, 1918.)

Appeal from Circuit Court, Washington County; Henderson, Judge.

Argued before **BOYD, C. J., and BURKE, URNER, STOCKBRIDGE, and CONSTABLE, JJ.**

Frank G. Wagaman, of Hagerstown (A. C. Strite, of Hagerstown, on the brief), for appellant. Alexander Armstrong, of Hagerstown (J. A. Mason, of Hagerstown, on the brief), for appellees.

CONSTABLE, J. The decree of the lower court is affirmed, with costs to the appellant.

IDDINS v. IDDINS.

(Court of Appeals of Maryland. Dec. 12, 1917.)

Appeal from Circuit Court of Baltimore City; Stump, Judge.

Argued before **BOYD, C. J., and BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.**

William Purnell Hall, of Baltimore, for appellant. William Colton, of Baltimore, for appellee.

URNER, J. The decree of the lower court is affirmed.

(117 Me. 565)

GAYTON v. GAYTON.

(Supreme Judicial Court of Maine. July 14, 1918.)

TRIAL ¶143—QUESTIONS FOR JURY.

Where plaintiff and two defendants flatly contradicted each other and there was nothing inherently improbable in plaintiff's testimony, the value of the testimony was a question for the jury, and not for the law court, and the jury's verdict for plaintiff must prevail.

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by Isaac E. Gayton against Dora Maud Gayton. On defendant's motion after verdict for plaintiff. Motion overruled.

McGillcuddy & Mosey, of Lewiston, for plaintiff. Newell & Woodside, of Lewiston, for defendant.

PER CURIAM. This was an action on a promissory note. The verdict was for \$105.32, being full amount of the note and interest. The execution and delivery of the note were not denied. The only question was whether the plaintiff, to whom the note was delivered, surrendered it to the defendants. Upon this issue there was an irreconcilable conflict of testimony, the plaintiff declaring that he did not surrender the note, and the two defendants testifying that he did. There are no circumstances or probabilities in the case which rendered the testimony of the plaintiff inherently false. The jury evidently believed the plaintiff. The value of the testimony was a question for the jury and not for the law court. The jury having passed upon it their decision must prevail.

Motion overruled.

(117 Me. 565)

COFFIN v. JOHNSON.

(Supreme Judicial Court of Maine. Sept. 7, 1918.)

NEW TRIAL ¶76(1)—EXCESSIVE RECOVERY.

On motion for new trial, although the court would have found less if the issues had been submitted to it in the first instance, yet where case was of character peculiarly within knowledge and experience of jury, it cannot be held that verdict was necessarily so excessive as to indicate passion or prejudice.

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Assumpsit by Benjamin H. Coffin against Ella M. Johnson. Verdict for plaintiff. On motion. Overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

McGillcuddy & Mosey, of Lewiston, for plaintiff. J. M. Rousseau, of Brunswick, for defendant.

PER CURIAM. This is an action of assumpsit to recover for services rendered dur-

ing a period of 5½ years. That services were rendered is not controverted. Their amount and value were the contested issues. The verdict was in the sum of \$1,772. Had these issues been submitted to the court in the first instance our finding would have been somewhat less. But we are unable to say that the conclusion of the jury in this case, which was of a character peculiarly within their knowledge and experience, was so grossly excessive as to indicate passion or prejudice on their part or a failure to appreciate the force of the evidence. The entry must therefore be:

Motion overruled.

(117 Me. 566)

SMITH v. MURRAY BROS. CO.

(Supreme Judicial Court of Maine. Sept. 9, 1918.)

NEW TRIAL ¶70 — VERDICT CONTRARY TO EVIDENCE.

Where the court is of the opinion that the evidence and inferences properly to be drawn therefrom are sufficient to warrant the jury in arriving at their verdict, a new trial on ground of verdict contrary to evidence must be denied.

On Motion from Supreme Judicial Court, Piscataquis County, at Law.

Action by Harry L. Smith, as Trustee in Bankruptcy of the estate of Charles W. Mitchell, against the Murray Brothers Company, to recover an alleged preference. Judgment for plaintiff, and defendant moves for a new trial. Motion overruled.

Argued before SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

H. L. Smith, of Dover, and J. S. Williams, of Guilford, for plaintiff. Phillips B. Gardner, of Bangor, for defendant.

PER CURIAM. This is an action on the case brought by plaintiff, as trustee in bankruptcy of the estate of one Charles W. Mitchell, adjudged a voluntary bankrupt, May 20, 1916, to recover for the benefit of the estate, the amount of an alleged preference made by bankrupt to the defendant on the 5th day of May, 1916. The trial of the case below resulted in a verdict for plaintiff, and defendant files a motion for new trial upon the usual grounds.

Upon a careful examination of the evidence the court is of opinion that the evidence and the inferences properly to be drawn from it are sufficient to warrant the jury in arriving at their verdict. Certainly it is not manifest that the jury acted from improper motives. See *Batchelder v. Bank*, 218 Mass. 420, 423, 105 N. E. 1052; *Donohue v. Dykstra* (D. C.) 247 Fed. 593, 594.

Motion overruled.

(89 N. J. Eq. 51)

DEVINE v. DEVINE. (No. 44/121.)

(Court of Chancery of New Jersey. June 8, 1918.)

1. HUSBAND AND WIFE §279(1) — AGREEMENT FOR SEPARATION—ACTION FOR MONIES DUE—EQUITABLE DEFENSES.

In the wife's action for the balance due under a separation agreement, the equitable defense of the wife's subsequent adultery is available to the husband.

2. HUSBAND AND WIFE §278(1) — SEPARATION AGREEMENT—VALIDITY.

It being the mutual right of husband and wife to live separate and apart from each other, a separation agreement, coupled with the husband's agreement to support the wife, is valid, but only so long as both acquiesce in the living apart.

3. HUSBAND AND WIFE §279(1) — SEPARATION AGREEMENT—RIGHT TO RECOVER—EFFECT OF ADULTERY.

Where the husband and wife made a separation agreement binding the husband to support the wife, and the wife committed adultery, the husband was not liable for the balance due under the terms of the agreement, since the agreement contained the implied condition that the wife should remain chaste.

Suit by Agnes Devine against Thomas A. Devine to recover balance due on separation agreement. Judgment for defendant.

This is a suit brought by a wife against her husband to recover money claimed as due by the terms of a written agreement, wherein the parties agreed to live separate and apart from each other and the husband agreed to pay to the wife \$15 per week. The following is a copy of the agreement:

"This agreement made by and between Mr. Thomas A. Devine, plumber, known as the party of the first part, and Mrs. Thomas A. Devine, wife, known as the party of the second part.

"It is mutually agreed that the said Thomas A. Devine, husband, party of the first part, will pay to his wife, Mrs. Thomas A. Devine, the party of the second part, the sum of \$15.00, fifteen dollars per week.

"Also the party of the first part must pay to the landlord the sum of \$15.00, fifteen dollars, for the rent of house No. 20 S. Georgia Ave., due on September 10, '15. It is also agreed that this shall be the last payment of rent by the party of the first part.

"It is also mutually agreed that the party of the first part will begin the payments of the \$15.00 weekly on September 18, '15, and the weekly payment shall continue to be paid on every Saturday following.

"It is further understood that the party of the second part shall remain away from the party of the first part's place of business; also shall not by any means annoy or otherwise interfere with the party of the first part.

"If this agreement is violated by the party of the second part the weekly payments shall cease.

Thomas A. Devine, Husband.

"Mrs. Thomas A. Devine, Wife.

"Harry H. Freed, Witness."

At the hearing it was conclusively established by way of defense that the wife committed adultery in August, 1916. The primary inquiry herein is whether the wife's adultery was operative to defeat her recovery of the stipulated weekly payments falling

due by the terms of the agreement subsequent to her adultery.

John F. X. Ries and Elwood C. Weeks, both of Atlantic City, for complainant. Bolte, Sooy & Gill and H. Walter Gill, all of Atlantic City, for defendant.

LEAMING, V. C. (after stating the facts as above). [1] It is urged in behalf of complainant that an equitable defense cannot be entertained in a suit of this nature; that the suit being solely for the recovery of money due under a contract, and being brought in this court because the law courts cannot entertain an action by a wife against her husband, this court is restricted to the same defenses that a law court could entertain, had there been a trustee to prosecute the action in a court of law in behalf of the wife. This view is suggested in *Buttler v. Buttler*, 57 N. J. Eq. 645, at page 654, 42 Atl. 755, 73 Am. St. Rep. 648, but is not made the basis of decision in that case. In a subsequent suit between the same parties (*Buttler v. Buttler*, 71 N. J. Eq. 671, 65 Atl. 485) the same question arose and was necessary to the decision of the case. It was there pointed out that it is not the incapacity of one spouse to sue the other at law which denies jurisdiction to a law court, but their incapacity at law to make a contract; that at law agreements between husband and wife are void, but in equity they will be recognized and enforced, if fair and fairly obtained. Accordingly it was there held that equitable defenses must be entertained in this court in suits of this nature. The same view was adopted in *Halstead v. Halstead*, 74 N. J. Eq. 596, 598, 70 Atl. 928. It seems impossible to doubt the soundness of the view that, where a spouse comes into a court of equity to invoke its established equitable powers to give recognition to a contract which is classed as void at law, such appeal for equitable relief necessarily calls into activity every recognized equitable consideration entering into the controversy that may aid a just determination of the rights of the parties. It is this enforcement of the rights of the parties in accordance with the inherent justice of the case which courts of equity are constantly striving to attain through the enforcement of the established rules of equity jurisprudence. But I think a solution of the present controversy may be reached without the aid of any rules which are classed as obtaining in courts of equity exclusively.

What effect upon the legal rights of complainant arising from this agreement is to be given to her adultery committed after the execution of the agreement?

In England the adjudications from an early date have been to the effect that the adultery of the wife, committed after the

execution of a separation agreement, will not deny to her the right of recovery of the stipulated periodical payments for her support falling due after her adultery, unless the agreement expressly provides that the payments shall continue to be made only so long as she remains chaste; that in the absence of such *dum casta* clause in the agreement no such clause will be implied.

Those adjudications cannot be appropriately disregarded, unless conditions are found to exist in this jurisdiction which deny to them the force they would otherwise possess. In that view a consideration of the English cases seems necessary.

The English authorities touching the question here propounded are the following: *Sidney v. Sidney*, 3 P. W. 269; *Winter v. Blount*, note to 3 P. W. 277; *Field v. Serres*, 4 B. & P. (1 B. & P. N. R.) 121; *Seagrave v. Seagrave*, 13 Ves. Jr. 439; *Scholey v. Goodman*, 1 Bing. 349; *Jee v. Thurlow*, 2 B. & C. 547; *Baynon v. Batley*, 8 Bing. 256; *Evans v. Carrington*, 2 De G., F. & J. 481; *Gandy v. Gandy*, L. R. 7 Pro. Div. 168; *Bradley v. Bradley*, 7 Pro. Div. 237; *Fearon v. The Earl of Aylesford*, L. R. 14 Q. B. Div. 792; *Sweet v. Sweet*, L. R. 1895, 1 Q. B. 12.

21 Cyc. 1597, 9 *Ruling Case Law*, 532, and 12 *English Ruling Cases*, 814, note, are to the same effect, but are wholly based upon some of the cases above cited.

An examination of these cases will disclose that one of the controlling circumstances on which the learned judges have based their conclusions is the fact, repeatedly stated, that in England the preparation of separation agreements has long been in the hands of skilled solicitors, who have thought it expedient to embody *dum casta* clauses in such agreements; from that circumstance the inference is drawn that, in the absence of that clause in a separation agreement so prepared, an implied condition that the wife shall remain chaste will not be inferred. The inference is not drawn that the parties intended that the wife should be privileged to commit adultery, for a provision in the agreement to that effect, or even an ascertained purpose of the parties to that effect, was held to render the whole agreement void (*Evans v. Carrington*, 2 De G., F. & J. 481, 492), but by reason of the customary use of the *dum casta* clause by skilled draftsmen its absence was deemed measurably operative to repel an implied condition which might otherwise have been thought necessarily present in agreements of that nature. The agreement here under consideration clearly dispels all force that has been given to considerations of the nature stated, for this agreement obviously has been drawn by the parties or by some person wholly unskilled in drafting agreements of any kind. So far as the English cases can be said to rest upon the inferences to be drawn from the custom of skilled draftsmen

of separation agreements, it seems clear that their force is lost in the present controversy.

[2] But an important radical difference is to be found between the English law and that of this jurisdiction, which appears to invade the very foundation of the decisions above cited, and further renders them inapplicable to our conditions. In England the contract of a husband and wife to live apart is not restricted by law to the period of their mutual assent, and the contract can be specifically enforced; either spouse, if without wrong, may by force of the contract maintain a bill to restrain the other from an action for the restitution of conjugal rights. See *Besant v. Wood*, L. R. 12 Ch. Div. 605, and cases there cited. In New Jersey separation agreements have no such force. Here married persons may agree to live separate and apart from each other, because it is their privilege to live in that manner so long as they mutually desire to do so, and the husband's agreement to support his wife during that period of time is in harmony with his lawful duty; but an agreement of separation cannot confer on either party the right to live away from the other against the will of the other. *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926; *Mockridge v. Mockridge*, 62 N. J. Eq. 570, 50 Atl. 182. By policy of the law the period for which they thus contract touching their separation is limited to the period of their future mutual assent to live apart. Accordingly, in the absence of wrongdoing on the husband's part, he may require his wife's return to his bed and board, and her refusal will not only constitute her an obstinate deserter, but will deny to her any right to support from him, notwithstanding the existence of an agreement wherein they have mutually stipulated to live apart. *Moores v. Moores*, 16 N. J. Eq. 275; *Power v. Power*, 65 N. J. Eq. 93, 55 Atl. 111; *Power v. Power*, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. Rep. 653.

[3] The wife's act of adultery while living separate from her husband pursuant to the terms of a separation agreement is thus operative to deny to her husband the right to require her return to him—a right preserved to him by our law—unless he condones an act which he is under no legal or moral obligation to condone. And the legal obligation of a husband to support his wife exists only so long as she shall remain chaste (*Bradbury v. Bradbury*, 74 Atl. 150), unless it shall be held that the burden of the agreement for support contained in a separation agreement survives that period.

It thus appears that in this jurisdiction, unlike England, the period of operation of the stipulation to live apart, however broadly expressed, cannot lawfully be extended or contemplated as intended to extend beyond the time when either party shall withdraw assent; that the husband's withdrawal of

assent to the separation brings into existence the duty of the wife's return; that her failure to return denies to her the right to further support, so far as the stipulations of the agreement touching her right to live away from her husband are concerned; that her adultery in like manner denies to her the right to further support, so far as the stipulations of the agreement touching her right to live apart from her husband are concerned. Accordingly the absence of a limitation as to time or event in the provisions of the agreement touching support, if held to entitle the wife to support notwithstanding her unlawful refusal to return, or notwithstanding her adultery which denies to her the right to return, must be deemed to relate to and include circumstances and conditions which the law does not permit the parties to contemplate in their stipulations touching their right to live apart. As the agreement to live apart necessarily reserved to both parties the right to withdraw from that engagement at any time without such right being expressed in the agreement, it would seem that the stipulation touching support, contained in the same agreement (which stipulation in such circumstances clearly contemplates separate domiciles which render the stipulated periodical payments for support necessary), must be understood as operative only within the legitimate field of operation of the primary stipulations of the agreement touching separation. So closely related are the engagements for living apart and for support that any appropriate recognition of established rules of construction appears to require that in a single instrument they should be read together and understood as dependent and coextensive in their operation and force; the termination of the contractual force of the engagement for separate domiciles should thus terminate the obligation contemplating and based upon the existence of that condition. The absence in the English law of this limitation upon the rights of the spouses to contract touching the period of their separation appears to impel the conclusion that the decisions of that jurisdiction are inapplicable to conditions here present. Moreover, any assumed contemplation of the parties that a virtuous wife may fall from virtue attributes to a virtuous woman an almost impossible and wholly unreasonable conception, and attributes to the husband a contemplation so unnatural and so at variance with the field of privilege which the law extends that the implied condition of chastity seems necessarily present in such agreements.

In this country *Babcock v. Smith*, 22 Pick. (Mass.) 61, and *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453, may be cited as indirectly bearing upon the question here involved. The former was a bill in equity for relief against the provisions of a marriage settlement be-

cause of the adultery of the husband. The view is there adopted that the conventional disposition of property in a deed of marriage settlement will not be disturbed. In the latter case it was held that the annual allowance for the wife's support as fixed in a separation agreement would limit and control the amount of alimony which the court could award the wife in her divorce decree against her husband. See dissenting opinion of the Chief Justice in this case, reported at end of *Clark v. Fosdick*, 118 N. Y. 18, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. Rep. 733.

In this state, in *Dixon v. Dixon*, 23 N. J. Eq. 316, a bill was filed by the husband to set aside a conveyance which had been made by the husband to his wife's trustee in settlement of her suit for maintenance. The ground for relief was the wife's adultery. On the motion for a preliminary injunction the wife's adultery subsequent to the conveyance was treated as admitted. It was there held by Chancellor Zabriskie that a deed of settlement of that kind, if good at its execution and delivery, would not be set aside for adultery or any misconduct of the wife afterwards. Some of the English cases above cited are there referred to in support of that view. The same view was adopted by Vice Chancellor Dodge, to whom the case was referred for final hearing. *Dixon v. Dixon*, 24 N. J. Eq. 133. In *Lister v. Lister*, 35 N. J. Eq. 49, the bill, filed by a husband, sought to set aside conveyances which he had made, or caused to be made, to his wife; the ground of relief in part being the wife's subsequent adultery. No separation agreement was there involved. The court found the conveyances to have been gifts to the wife, and held that her subsequent adultery afforded no ground for setting aside the conveyances. The same authorities cited in *Dixon v. Dixon*, *supra*, are there partially reviewed. In these New Jersey cases the effect of the subsequent adultery of the wife on executory stipulations for the wife's support contained in a separation agreement was in no way involved or considered. The conveyance which was sought to be set aside in *Dixon v. Dixon* was made long before the adultery was committed; there was clearly no total failure of consideration, and no basis for relief against the deed *pro tanto*.

I am convinced that the engagements of defendant for weekly payments to his wife for her support can only be understood in this jurisdiction as relating to such period of time as the parties should reside separate and apart from each other pursuant to and by reason of their mutual agreement for that purpose; that the engagements of defendant for weekly payments for his wife's support while so living apart from him must also be understood as accompanied by an implied condition that she remain chaste during that period of time.

(89 N. J. Eq. 110)

MARSH v. MARSH. (No. 44/229.)

(Court of Chancery of New Jersey. May 6, 1918.)

COVENANTS §108(2) — BUILDINGS — "FRONT FOUNDATION WALL."

While restrictive covenant against building on lot unless "front foundation wall" be at least 75 feet from street was not violated by porch within the 75-foot distance, it was violated by alteration of porch to erect second story thereon, forming substantially an addition to main building, although piers supporting the double-decked structure were not technically a foundation wall, since term "front foundation wall" does not necessarily imply solid wall, but includes anything which serves purpose of foundation wall.

Suit by Helen E. Marsh against Joseph A. Marsh. Decree for complainant.

Edwin B. and Philip Goodell, of Montclair, for complainant. Charles Jones, of Newark, for defendant.

LANE, V. O. The bill is filed to enforce the provisions of a restrictive covenant. Both complainant and defendant derive title from a common grantor, the executors of Erwin J. Orane. Orane owned a considerable tract of land along a street in Montclair known as Sunset Park North. There is no doubt but that there was a plan of development adopted by which it was contemplated that no house should be built upon any of the property, the main structure of which should be within 75 feet of Sunset Park North. In the deeds which were made, including that to defendant, there was this restrictive covenant:

"That no building shall be erected on said lot unless the front foundation wall of the said building is at least 75 feet from the front of the above premises on Sunset Parkway North."

The house of defendant is on the corner of Norwood avenue and Sunset Park North and faces Norwood avenue. The front foundation wall is parallel to Norwood avenue. Prior to the purchase by defendant of the premises in question, and prior to October, 1910, a dwelling house had been erected. There was attached to it a porch, resting upon piers, facing Sunset Park North, extending for a distance of approximately 14 feet, within the 75-foot distance referred to. No objection was made to this structure, nor do I think there could have been an objection made to it. Some time in 1917 defendant proceeded to make alterations which are now complained of. He filed plans with the Building Department of Montclair. These plans indicated that a foundation wall was to be placed under, and that a second story was to be erected over, the porch. After objection by the complainant, the plans were altered so that the foundation wall was omitted. Substantially, however, so far as outward appearances are concerned, the structure is to be as the plans originally contemplated.

There are three questions to be decided:

(1) What is the meaning of the restrictive covenant? (2) Does the proposed structure come within its inhibition? (3) Is the complainant estopped or guilty of laches?

First. I have no difficulty in construing the covenant. It reads:

"That no building shall be erected on said lot unless the front foundation wall of said building is at least 75 feet from front of above premises on Sunset Parkway North."

Construing it strictly, it seems to me that, if any part of the front foundation wall is within 75 feet of Sunset Park North, there is a violation of the covenant. If the defendant choose to build his building so that his front foundation wall fronts Norwood avenue rather than Sunset Park North, he must build it so that no part of it is nearer to Sunset Park North than 75 feet.

It seems to me that the reasoning of the Court of Errors and Appeals in the case of Howland v. Andrus, 81 N. J. Eq. (11 Buch.) 175, 86 Atl. 391, does not apply. In that case, while it is true that the physical location of the properties was similar to the location of the properties under consideration in this case, the covenant was substantially different. The deed under which the complainant obtained title to the property fronting on Wildwood avenue contained a restriction that any building should be "so located that the front line thereof shall not be nearer than sixty feet to the street line measured at right angles thereto." It contained a further provision that no other lots should be sold, except by deed containing the same restriction. The deed to the defendants of a corner lot on the corner of Wildwood avenue and Park street contained this restriction:

"The said houses to face on Park street on lots having a frontage of not less than one hundred feet, the front foundation wall of said dwelling to be at least fifty feet from the westerly side of Park street."

A map filed prior to the making of the deeds showed the corner lots facing Park street. Of this map the complainant at the time of his purchase had knowledge. Upon the defendants proceeding to erect a building fronting Park street, the side line of which, facing Wildwood avenue, would be within 60 feet of the street line, complainant filed a bill for injunction. The Court of Chancery granted the injunction, holding:

"For the purpose of the covenant the line of the dwelling 'fronting' toward the street from which the measurements are to be taken is to be considered as the 'front line' intended by the covenant, although this line might be in fact the side line of the dwelling."

The Court of Errors and Appeals, reversing, intimated that this construction did violence to the language used. It based its determination, however, upon the fact that at most the complainant's right to relief was doubtful, and that, being so, equity ought not to intervene. The covenant now under discussion is substantially different. It forbids

the erection of any building unless the front foundation of such building is at least 75 feet from front of said premises on Sunset Parkway North. In the Andrus Case the street from which the measurements were to be made is not indicated by name, but the covenants clearly refer to the street upon which the building fronts. In the case at bar the street from which the measurements are to be taken is named, to wit, Sunset Park North. Although the Court of Errors and Appeals said in the Andrus Case that, while the word "side" might be used in a generic sense to include "front," the word "front" as applied to a house is always specific, yet it seems to me that it may appear from the context that the user of the word may not have used it in the specific sense indicated by the Court of Appeals. Again referring to the covenant, the grantor says that the front foundation wall of the building must be at least 75 feet "from front of said premises on Sunset Parkway North." The grantor here clearly indicates that he is referring by the word "front" to that portion of the lot adjacent to Sunset Park North.

The clear purpose of the grantor as expressed in the covenant was to prevent the erection of a structure with foundation walls nearer to Sunset Park North than 75 feet.

Second. Does the proposed structure violate the restrictive covenant? I think it does. It may be that from a technical architectural standpoint, what is being erected is an upper porch. It is a fact that there are no "foundation walls," in the technical sense, under the lower porch. I have examined photographs of the structure in question, and it appears that defendant has in reality, so far as outward appearance is concerned, added two wings to his house. It is not contended that if the structure which is built on the other side of the house had been built on the side fronting Sunset Park North there would not be a violation of the covenant. So far as outward appearance there is no distinction between that portion of the structure which faces Sunset Park North and that portion of the structure built on the other side of the house. Yet defendant insists that, because he has induced the Building Department of Montclair to permit the erection of the structure facing Sunset Park North without a foundation wall, speaking technically, although it looks the same as the other, it is not within the terms of the restrictive covenant. I think that the language "front foundation wall" does not necessarily imply a solid wall (Cornell v. Bickley, 85 Iowa, 219, 52 N. W. 192), but includes anything which takes the place and serves the purpose of a foundation wall, and I think that the piers which support the double-decked structure are, within the meaning of the restrictive covenant, a part of the front foundation wall of the building, and, being within a distance of 75 feet from Sunset

Park North, there is a violation of the restrictive covenant.

I have considered the cases of *Walker v. Renner*, 60 N. J. Eq. 493, 46 Atl. 626; *Atlantic City v. Young Amusement Company*, 63 N. J. Eq. 831, 53 Atl. 168; *Fortesque v. Carroll*, 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79. The rules to be applied in the determination of cases such as this, as gathered from these cases, seem to be clear. The language of the covenant is to be strictly construed. If it has a plain meaning, it is to be enforced in that sense. If it has no meaning, it cannot be enforced. If it may mean either one of two things, it will be construed to mean that which is most favorable to the owner of the property. If complainant's right to relief be doubtful, equity ought not to intervene. But none of the rules laid down deprive the court of the power to construe the language used in the light of all of the circumstances. This very thing was done in *Walker v. Renner*, supra. Nor is the court obliged, in a case where to attribute a strict technical meaning to each word used would result in defeating the perfectly clear intent of the user of the language, to apply such strict technical meaning. The test is whether the construction put upon the language by the court is so clear as that by the acceptance of the deed containing the restriction the acceptor may reasonably be deemed to have understood and acceded to the terms of the restriction as so construed. *Fortesque v. Carroll*, supra.

The clear purpose of a restrictive covenant such as now under consideration is to prevent the erection of something which can be sensed by one of the senses. When the grantor used the language "foundation wall," he had primarily in mind, not the masonry forming the foundation, but the structure superimposed, or a structure ordinarily superimposed upon a foundation wall which would appeal to the sense of sight of a neighbor. To hold that a person under the terms of such a covenant may erect a main structure, which would ordinarily rest upon a foundation wall and be within the terms of the covenant, without a foundation wall technically speaking, and be without the terms of the covenant, would render the language of the restrictive covenant meaningless.

Third. Defendant insists that, because of the acquiescence of complainant and her predecessors in title in the existence of the lower porch so called, she is charged with laches, or is estopped from questioning the building of the proposed structure. There can be no claim that there was any laches after complainant ascertained that defendant intended to build the structure now being erected. The answer to the contention of defendant is that prior to the proposed changes the structure existing was in fact but a porch. The change proposes, not only the erection of a second story, but an altera-

tion of the lower porch. As I have before pointed out, as originally proposed there were to be foundation walls under the first porch. These walls were abandoned upon objection being made by complainant, and with the consent of the Montclair building authorities. While it is true that the roof of the structure as proposed is not a continuation of the roof of the main structure, yet it is so connected with the roof of the main structure, and the nature of the construction of the second story addition is such, as that to the eye the entire structure appears to be one main building. I do not think the complainant could have objected to the existence of the porch as it was prior to the alteration. I think the alteration has changed its nature so that the complainant may now object.

Decree for complainant.

Settle decree on five days' notice.

Throughout these conclusions the words "Sunset Park North" and "Sunset Parkway North" have been used to designate the same street. The reason is that in the documents dealing with the title the words have been used interchangeably.

(89 N. J. Eq. 182)

HILTON v. HILTON. (No. 19.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. TRADE-MARKS AND TRADE-NAMES §78 (1)—PROPERTY RIGHTS IN NAME.

The right of a man to use his own name in his own business is part of the natural and inalienable rights guaranteed by our Constitution, without which the right to acquire, possess, and protect property would be of little worth. Even in a case of unfair competition, the courts go no further than to restrain the use of a name, except when so marked as to distinguish it from a competitor, and this exception amounts to allowing the wrongdoer to continue the use of his own name, when it is so marked.

2. TRADE-MARKS AND TRADE-NAMES §79— UNFAIR COMPETITION—NATURE OF REMEDY.

The remedy by injunction in a case of unfair competition is a protective remedy, intended to protect the complainant in his property rights, not punitive to punish wrongdoing.

3. PARTNERSHIP §262 — DISSOLUTION—EFFECT OF—AGREEMENT.

When partners dissolve and put their agreement in writing, that writing measures their rights and obligations.

4. PARTNERSHIP §310 — DISSOLUTION — RIGHTS OF RETIRING PARTNER.

In an agreement of dissolution between partners, there was a sale of the good will of the business, but no agreement by the retiring partner not to engage in business. *Held*, that the retiring partner might carry on a rival business wherever he chose, and might push his business as any stranger or outsider might, even though this interfere with the business he has sold. *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932, approved.

5. GOOD WILL §6(2)—SALE.

The vendor of the good will of a business who has not covenanted or agreed not to compete, may seek for trade by any honest method, including public advertisement, or private ad-

vertisement among those who were not customers of the old business, but may not specially solicit the trade of those who were customers of the old business, and he may serve all who come of their own motion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Will.]

Appeal from Court of Chancery.

Suit by Philip Hilton against Joseph Hilton. From a decree advised by the Vice Chancellor (102 Atl. 16), defendant appeals. Remanded, with directions to modify.

Robert H. McCarter, of Newark (Sellick J. Mines, of Newark, on the brief), for appellant. John R. Hardin, of Newark, for appellee.

SWAYZE, J. The bill prays that the defendant be "restrained from using the name 'Hilton's' or 'Hilton' alone or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant, and that the business conducted by defendant is the same as or a part of the business conducted by complainant, from using any emblem or device resembling the trade emblem of complainant in any way in his business, and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant were manufactured or sold by complainant, and that the business conducted by defendant is the same as or a part of the business conducted by complainant." The evidence entitled the complainant to the relief prayed for. The learned Vice Chancellor, however, went further, and enjoined the defendant from "using the name 'Hilton,' either alone or in association with other word or words, for any purpose whatsoever, in any clothing business operated or conducted directly or indirectly by the defendant competitive with the clothing business operated or conducted by the complainant trading under the name and style of the 'Hilton Company,' and particularly from using the word 'Hilton's' or 'Hilton,' either alone or in association with other word or words, to describe or designate any retail clothing store or stores or the clothing therein sold or the business therein operated or conducted, now or hereafter operated or conducted, directly or indirectly, by the defendant in any city or cities in which the complainant, trading under the name and style of the 'Hilton Company,' now operates or conducts a retail clothing business."

The effect of this injunction is to preclude the defendant from using his own name in the clothing business in any city where the complainant conducts a retail clothing business. That this was meant to be its scope is shown by the respondent's defense of the decree, both orally and in his brief.

[1] The right of a man to use his own name in his own business is part of the natural and inalienable rights guaranteed by the very first clause of our Constitution, without which the right to acquire, possess, and protect property would be of little worth. Although the right is not safeguarded in England by any constitutional guaranty, it has found careful protection in the courts of justice. Of the numerous cases of unfair competition and fraud to be found in the reports, we doubt if a single case can be found where as broad an injunction as the present has been granted in a case of unfair or fraudulent trade, where, as here, there has been no contract or covenant restraining a man's business activities. Even in the Rogers Case, 71 N. J. Eq. 560, 63 Atl. 977, the injunction only went so far as to restrain the defendant from using his own name unless he stamped upon the goods the words, "not the original Rogers," or "not connected with the original Rogers." This exception, of course, amounted to allowing the defendant in that case, notwithstanding his previous fraudulent conduct, to continue the use of his own name if he would brand the goods as stated.

[2, 3] At least three reasons have moved the courts to this limitation of the restraint upon a man's use of his own name: First, the constitutional rights already stated; second, the public interest in having all citizens free to labor in the vocation to which they have been trained, with which they are familiar, or to which they are adapted—a consideration which has led the courts so often to declare even contracts void as in restraint of trade; third, the fact that the remedy by injunction is a protective remedy, intended to protect the complainant in his property rights, not a punitive remedy, intended to punish the defendant for his wrongdoing. In this present case there is a fourth reason. The parties, when they dissolved partnership, put their agreement in writing, and that writing measures their rights and obligations. At that time, under such an agreement as they made, the defendant had the right, as had been recently decided by this court in Snyder Pasteurized Milk Co. v. Burton, 80 N. J. Eq. 185, 83 Atl. 907, to engage in a competing business. The complainant must be assumed to know the law and to have known that such was the effect of the agreement. He was, moreover, advised by competent counsel. In this situation we cannot do otherwise than hold that the parties contemplated that the defendant might use his own name in the clothing business. He must, of course, refrain from representing his business to be that of the complainant, and from palming off his goods as the goods of the complainant. The present injunction in its full scope cannot be sustained because of defendant's unfair trading. Apparently an injunction exactly in accord with the

prayer of this bill would suffice for the complainant's protection.

[4] There we might leave the case but for the fact that in the dissolution of the partnership the defendant transferred to the complainant, along with the other assets, "all the name and good will of said business." The only name mentioned in the transfer is the Hilton Company, and the transfer of this name could not enlarge the complainant's right to the name "Hilton" or "Hilton's." If the name only had been transferred the argument would be irresistible that the names "Hilton" and "Hilton's" were omitted advisedly. The name, however, is not all that is transferred; the "good will" is included. We must therefore determine whether the complainant's rights are thereby enlarged. The fact that the bill does not contain any prayer for the protection of the good will, or prayer for general relief, does not shut us off from the inquiry. The bill was filed in 1917. By the new chancery rules (P. L. 1915, p. 194, Rule 47) relief other than that prayed for may be given without a prayer for general relief. The bill sets up the transfer, and the answer admits it so far as material to the present question. What rights then has the complainant by virtue of the transfer to him of the good will of the business? This depends on how good will is defined, and how much the words connote. Probably no one at this day would adopt the narrow definition of Lord Eldon. Business methods change with changing years, and with the expansion of business the meaning of business terms expands. The definition of Vice Chancellor Wood, afterward Lord Hatherley, in Churton v. Douglas, 28 L. J. Ch. 841, is broad enough for our present purpose, and has, in effect, been adopted in later cases, which have been approved and followed by us. Snyder Pasteurized Milk Co. v. Burton, 80 N. J. Eq. 185, 83 Atl. 907. "Good will must mean every advantage—affirmative advantage if I may so express it, as contrasted with the negative advantage of the vendor not carrying on the business himself—that has been acquired by the old firm by carrying on its business, everything connected with the premises, or the name of the firm, and everything connected with or carrying with it the benefit of the business." The distinction drawn by the Vice Chancellor between affirmative and negative advantage, as he calls it, is important. It was then, and apparently always has been, recognized that the sale of good will without more did not prevent the vendor from engaging in business in competition with the vendee. If the vendee desired to avoid that, he must require a contract not to engage in competition. This rule was so plain that it was taken for granted in this court, Richardson v. Peacock, 33 N. J. Eq. 597, and stated by Vice Chancellor Emery with his well-known care

and accuracy in *Newark Coal Company v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932, as follows:

"The vendor of a 'good will' who has not expressly restricted himself against carrying on the business, being permitted by law to carry on a rival business wherever he chooses, may push his business as any stranger or outsider might, even though this does interfere with the business he has sold, and the real question, therefore, is narrowed down to this: In thus pushing his rival business, what acts, if any, must the vendor be restrained from?"

[5] It was always conceded that the vendor in conducting the rival business might make his business known by the usual general appeals by public advertisement to the public generally. *Johnson v. Helleley*, 2 De G. J. & S. 446, 34 L. J. Ch. 179; *Hall v. Barrows*, 33 L. J. Ch. 204; *Labouchere v. Dawson*, 41 L. J. Ch. 427. It was at one time contended that the vendor might go farther, and solicit personally or by mail, by traveling men, or any other way. It was finally settled that such special solicitation would be restrained. The English cases are set forth by Vice Chancellor Emery in *Newark Coal Co. v. Spangler*, above cited, and the matter has been put at rest by the decision of this court in *Snyder Pasteurized Milk Co. v. Burton*, 80 N. J. Eq. 185, 83 Atl. 907. We there said:

"The defendant, having made no express covenant, may engage in a competing business."

We there restrained the defendant from soliciting customers of the former business, the good will of which he had sold. It is gratifying to know that the English rule adopted by us has the support not only of reason but of the weight of authority in other jurisdictions. The more recent cases are collected in a note to *Von Bremen v. MacMonnies*, 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293, in 21 Ann. Cas. 423. The New York Court of Appeals holds to our rule. The Supreme Court of Massachusetts takes a different view. Cases are collected in a note to *Foss v. Roby*, 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.) 1200, in 11 Ann. Cas. 571, but the cases cited in that note show that the great weight of authority is with our rule. On the one hand, then, the vendor, having the right to conduct a rival business, may, from the necessity of the case, seek for trade by any honest method, including public advertisement or private advertisement among those who were not customers of the old business, but he may not specially solicit the trade of those who were customers of the old business. The question still remains whether he may deal with the old customers, who may perhaps be attracted by their knowledge, from advertisement or otherwise, that he is in business. This question was left in doubt by what Justice Dixon said in *Richardson v. Peacock*. Sir George Jessel, in *Ginesi v. Cooper*, L. R. 14, Ch. Div. 593, 49 L. J. Ch. 601, enjoined a

vendor who had sold his good will from dealing with the old customers, and vindicated his action in his usual vigorous style. Afterward, in *Leggett v. Barrett*, L. R. 15 Ch. Div. 306, 51 L. J. Ch. 90, an injunction granted by him in accordance with *Ginesi v. Cooper* came before the Court of Appeals, and his order was reversed. Brett, L. J., said:

"The truth is, that to enjoin a man, or to prevent him by means of damages when he does it, against dealing with people whom he has not solicited is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which everybody in the country might have of dealing with whom they like. If they are induced by his solicitations, that is a different thing; but it seems to me that it would be quite wrong to imply any contracts that he will not deal with people who come of their own accord to deal, even though they were former customers."

The judges agreed that there was no authority for the extension of the relief attempted by the Master of the Rolls. The argument is unanswerable. It cannot be that every customer of a great department store, for instance, must be restricted in his choice of a place in which to trade merely because partners dissolve and one sells the good will to the other. The necessary corollary of the right to do business is the right to serve all who come of their own motion. Moreover, the rules of law must be practical, and it would be quite impossible for the proprietor even of a small business to be personally present in all parts of his establishment, prepared to turn away all the old customers, and of course no clerk can be supposed to know them, even if the proprietor can be.

The right to make known that one is in business by advertising addressed to the public generally is a necessary concomitant of the right to do business, without which that right would be hardly more than nominal. The reason for making a difference between such advertising and special solicitation is that the former is public and open to all; the latter is private and secret in a sense, and the vendor of good will has the advantage of knowing the customers, and, if permitted, could by reason of that knowledge, detract from the value of the good will he had sold.

No relief is open to the complainant, by reason of his purchase of good will, except an injunction against soliciting customers of the old business. No such solicitation was proved; no issue was made of it. In the present state of the case at any rate, no relief can be granted on that score.

The decree must be modified, and to that end the record remitted, in order that a decree may be entered according to the prayer of the bill. No costs will be allowed in this court. The respondent is entitled to costs in the Court of Chancery, since he gets the relief he prayed for.

(89 N. J. Eq. 319)

INTERNATIONAL SIGNAL CO. v. MARCONI WIRELESS TELEGRAPH CO. OF AMERICA. (No. 44/500.)

(Court of Chancery of New Jersey. July 8, 1918.)

1. COMPROMISE AND SETTLEMENT ¶12—INFRINGEMENT SUITS—CONSTRUCTION OF CONTRACT—"SELL."

The word "sell," in a contract settling infringement suits between two companies involving validity of patents for wireless telegraph or telephone inventions, whereby each party was to pay the other a percentage of the selling price of apparatus which it might sell, *held* to include a contract to sell.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sell.]

2. CONTRACTS ¶147(1)—CONSTRUCTION—INTENTION OF PARTIES.

In construing a contract, the cardinal rule is to ascertain the intention of the parties.

3. EVIDENCE ¶448—CONSTRUCTION OF LANGUAGE—SURROUNDING CIRCUMSTANCES.

If more than one construction of language is possible, surrounding circumstances may be considered.

4. CONTRACTS ¶154—CONSTRUCTION—INTENTION DOUBTFUL OR OBSCURE.

If the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either of the contracting parties, should be adopted.

5. PATENTS ¶216—CONTRACT TO PAY ROYALTIES—FAILURE OF CONSIDERATION.

Where possible invalidity of patents is a recognized factor leading to a contract for payment of royalties, there is no failure of consideration because the patents are afterwards held invalid.

6. COMPROMISE AND SETTLEMENT ¶6(1)—INFRINGEMENT SUIT—CONTRACT TO PAY ROYALTIES—FAILURE OF CONSIDERATION.

A contract settling litigation over patents, and whereby a party acquired the right to use over 100 patents, and was bound to pay a flat royalty on each set of apparatus sold, without any apportionment of such royalties, is not so separable as to permit a finding of failure of consideration as to 2 patents afterwards held invalid.

7. PATENTS ¶327—RES JUDICATA—VALIDITY OF PATENTS—"PROCEEDING IN REM."

A suit for infringement, wherein a patent was declared invalid, was not a "proceeding in rem," and does not prevent the same or a different plaintiff suing another defendant and establishing the validity of the patent on the same or different evidence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Rem.]

9. PATENTS ¶327—RES JUDICATA—VALIDITY OF PATENTS.

In a suit for royalties, the patents cannot be held invalid because of a judgment against their validity in another suit between different parties.

Suit by the International Signal Company against the Marconi Wireless Telegraph Company of America for an accounting under an agreement to pay royalties. Decree advised for complainant.

Lindabury, Depue & Faulks, J. Edward Ashmead, and Luther V. Stryker, all of Newark, for complainant. Griggs & Harding, John W. Griggs, and John W. Harding, all of Paterson, for defendant.

LANE, V. C. [1-4] The first question to be determined is whether the word "sell," used in the eighth paragraph of the agreement under consideration, is used in its strict legal sense, so that a transaction, to come within it, must have been accompanied with delivery or passing of title, or whether it is used in a sense which would include a contract to sell. That it may be used in either sense is settled. The cardinal rule to be applied in construing a contract is to ascertain the intention of the parties. If more than one construction of the language used is possible, the circumstances surrounding the transaction may be considered, as well as the written document. If the intention is doubtful or obscure, a construction should be adopted which is most fair and reasonable, and which will impose the least hardship upon either of the contracting parties. Citation of authority would be superfluous.

At the time of the execution of the contract on October 15, 1914, complainant and the defendant's predecessor claimed each to be the owners of numerous valid patents of apparatuses and processes employed in wireless telegraphy. Each claimed that certain of the patents of one infringed those of the other; that certain of the patents were invalid. There had been considerable litigation with respect to the contentions of the respective parties. The public were injured; the licensees of one were subjected to infringement suits by the other. The chaotic condition in which the situation stood is illustrated by the fact that the Circuit Court of Appeals for the Third Circuit had declared valid in an infringement suit 2 of complainant's patents (National Electric Signaling Co. v. Marconi Telefunken Wireless Tel. Co., 208 Fed. 679, 125 C. C. A. 647) and that the same 2 patents in another suit since the making of the contract have been declared invalid by the Circuit Court of Appeals for the Second Circuit (Klinter v. Atlantic Communication Co., 240 Fed. 716, 153 C. C. A. 514). On October 15, 1914, a contract was entered into in which there is a recital of the then pending litigations and the following statements:

"Whereas, it is desired, in the interests of the public, that said conflicting claims of each of the parties hereto against the other should be adjusted, and the right of each party to manufacture, sell, use, and lease to others to be used, the patented apparatus, so that users of wireless telegraph and wireless telephone apparatus may obtain the most efficient apparatus and will not be subjected to claims under the patents of one party by reason of the purchase, lease, or use of such apparatus from the other party; and whereas, the parties to this agreement are mutually desirous of settling and adjusting the controversy regarding the aforesaid patent rights which they respectively own, and of compromising the claims of the parties hereto against each other for past damages or profits arising out of any infringement of said letters patent of one party by the other, and of acquiring a license to transact its business under one or all of said patents owned by the other,

as well as of protecting their said respective patent rights or the monopoly thereof."

The right is given to each party to make, sell or cause to be sold, lease or cause to be leased, use or cause to be used, wireless telegraph and wireless telephone apparatus embodying the inventions of each and all of the patents enumerated and set forth in schedules annexed to the agreement. By the eighth paragraph there is to be paid by each party to the other 20 per cent. of the gross selling price of each set of wireless telegraph or wireless telephone apparatus which it may under the terms of the contract sell, including sales to the United States government. By the fourteenth paragraph it is provided that settlements should be made at certain stated times, and that the license fees and royalties should be paid on such sets as the parties had sold, leased, or otherwise disposed of under the agreement during the preceding three months, and for which it had received payment from its lessees, vendees, or licensees. By the nineteenth paragraph it is provided that the term of the agreement should extend until the 13th day of April, 1926, unless previously canceled or terminated in accordance with the provisions thereof, that either party might terminate or cancel the agreement at any time after the 15th day of October, 1918, by written notice, which cancellation or termination should become effective one year after the giving of the notice. The Marconi Company might at any time after October 15, 1915, and prior to October 15, 1918, terminate or cancel the contract by giving written notice, which cancellation or termination should become effective 90 days after giving of notice.

On March 1, 1917, pursuant to paragraph 19, the Marconi Company gave notice of cancellation or termination. The question is whether it must account for sets contracted to be sold, but not delivered, within the 90 days succeeding March 1, 1917, and the determination of that question, as I have indicated, depends upon the meaning of the word "sell" used in the eighth paragraph. If the construction sought to be put upon the word by the defendant be adopted, it follows that had the agreement run its natural course until April 13, 1926, the parties would not be obliged to account for any sets contracted to be sold prior to April 13th, but not delivered until afterwards. If the construction insisted upon by the defendant be put upon the language used in the contract, the defendant and all users of any sets of apparatus contracted to be sold during the term of the contract, but not delivered until after its termination, would be exposed to suits for infringement. If the complainant had, during the term of the agreement, entered into a contract of sale for an apparatus which would infringe the patents of the defendant, were it not for the agreement, and for some reason or other delivery was not to be made

for 4 months, and within 10 days after the contract was made the defendant gave a notice of cancellation, the complainant or its customer would be subject to suit for infringement. I cannot conceive that such a result was contemplated by the parties.

In view of the avowed purpose of the agreement to terminate litigation and to protect the public, I think that such a construction ought not to be adopted, unless it clearly appears from the instrument that the parties used the word "sell" in its narrow legal sense. That it was so used defendant insists is indicated by the fact that in the sixteenth paragraph, in providing for releases by the respective parties from claims for damages for alleged past infringements, the draftsman provided that the parties might continue the use of the apparatus which had at the date of the agreement "been delivered or contracted to be delivered to such vendees, lessees, or customers." It is said that the distinction recognized between delivery and contract of delivery indicates that the draftsman must have had in mind the distinction between a sale and a contract of sale. In the sixteenth paragraph, however, the parties were dealing with an entirely different subject-matter. They had in mind the physical situation of the apparatus. Having used the word "deliver," it immediately occurred that, to cover articles sold and not yet delivered, it was necessary to include the phrase "contracted to be delivered." They could not use the word "sell," which might have included either, for they were dealing with lessees; and they had in mind, also, that apparatus may have been parted with other than by sale or lease, for they included, not only "vendees and lessees," but also "customers." I can find no assistance from the sixteenth clause in construing the eighth.

By the twenty-eighth paragraph a special provision is made for the continuance of the payment of royalties or license fees upon apparatus leased prior to cancellation and termination, and it is argued that, because it was assumed necessary to include this specific clause, in order to continue liability as to leases made prior to the cancellation, it must be considered that the absence of such a clause with respect to apparatus contracted to be sold indicates that the parties did not intend a continuance of liability as to that. But here again the parties were dealing with a different subject-matter, and I can find nothing in this paragraph which assists me in defining what the parties meant by the word "sell." By the fourteenth paragraph payment is to be made at certain intervals for apparatus for which the parties had received payments from its lessees, vendees, or licensees, and it is intimated that the effect of this paragraph is that no royalty is to be paid except upon apparatus not only sold and delivered, but also paid for during the term of the agreement. Such a construction ought not to be put upon the contract unless

no other construction is possible. I think that the purpose of the thirteenth paragraph was merely to arrange a convenient method of settlement. *Singer Sewing Machine Co. v. Brewer*, 78 Ark. 202, 93 S. W. 755.

I find nothing in the written contract which requires me to hold that the word "sell" was used in the eighth paragraph in its technical sense. In common usage the word "sell" does not convey the idea that delivery has been made or title passed. It is used indiscriminately to convey the idea of a technical sale and a contract to sell. In business usage an article is said to be sold when an agreement has been made that it should be taken; and this, notwithstanding the fact that it may not at the time have been manufactured, and that when offered for delivery it may be rejected for noncompliance with specifications. To hold that the word "sell" was used by the parties in its ordinary sense would, I think, lead to a result by which the manifest intentions of the parties would be accomplished, and which would be most fair and reasonable. Not only would the parties, but the public as well, be most adequately protected. It is conceded that at best the meaning of the contract is doubtful. Purchasers of apparatus during the period of ninety days would be uncertain, whether they could be sued for infringement or not. Those who had been advised that they might purchase without being subject to suits would find, if the construction sought by the defendant to be put upon the contract be adopted, themselves open to attack. After the expiration of the ninety days, or the termination of the contract, whoever dealt with the parties would do so with their eyes open.

[5] It is next insisted for the defendant that, because the two patents of the complainant, the only ones which the defendant says it is using, have been held invalid by the United States Circuit Court of Appeals for the Second Circuit, there has been a complete failure of consideration, and they base their insistence upon a line of cases which hold that, where a contract is entered into for the payment of royalties based upon the assumed validity of a patent and the patent is afterwards declared invalid, there is no further liability under the contract. But in the case at bar that the patents might be invalid was a recognized factor which led to the making of the contract. The case is somewhat analogous to *Strong v. Carver Cotton Gln Co.* (Supreme Court of Massachusetts) 197 Mass. 53, 83 N. E. 328, 14 L. R. A. (N. S.) 274, 14 Ann. Cas. 1182.

[6] Nor do I think that the contract is so separable as to permit a finding that there was a total failure of consideration so far as these two patents were concerned. The defendant acquired the right to use over a hundred patents. No attempt was made to apportion the royalties. Defendant was obliged to pay a flat royalty upon each set of

apparatus sold. The consideration of the contract was not merely the right to use patents, but the settlement of disputes which had led to vexatious litigation.

[7] No evidence of the invalidity of the patent was offered, other than the record of the United States Circuit Court of Appeals in the case of *Kintner v. Atlantic Communication Co.*, 240 Fed. 716, 153 C. C. A. 514. But that proceeding was not a proceeding in rem, and it does not prevent the same or a different plaintiff from prosecuting a suit against another defendant and establishing the validity of the patent upon the same or different evidence. The fact that the complainant here was a party to the New York litigation is without significance.

[8] I have examined the cases cited by defendant, and find none which lead me to conclude that this court would be justified in holding that for the purposes of this suit the two patents were invalid merely because of the judgment in the *Kintner Case*. See *Pope Mfg. Co. v. Owsley* (C. C.) 27 Fed. 100; *Consolidated Roller Mill Co. v. Geo. T. Smith Middlings Purifying Co.* (C. C.) 40 Fed. 305.

I will advise a decree that the defendant is bound to account for apparatus sold, although not delivered, within the 90-day period.

(89 N. J. Eq. 562)

SMITH v. JONES et al.

(Prerogative Court of New Jersey. July 19, 1918.)

1. EXECUTORS AND ADMINISTRATORS §91 — LIABILITY OF ADMINISTRATOR—DUTIES.

The law exacts of an administrator only the utmost good faith, ordinary care and prudence, and reasonable diligence, and he is not liable for mere lack of judgment.

2. EXECUTORS AND ADMINISTRATORS §86(1) — CLAIM IN FAVOR OF ESTATE—ENFORCEMENT.

An administrator is not bound to enforce a doubtful or controverted claim, merely because the heirs think it is well founded, unless the heirs are willing to give indemnity for costs.

3. WITNESSES §188 — TRANSACTION WITH DECEASED PERSON.

On exception to account of administrator to hold him liable for amounts disposed of by intestate, persons to whom money was given should have been allowed to testify that money was a gift, under Comp. St. 1910, p. 2218; only parties to the action being disqualified by such statute.

Appeal from Orphans' Court, Warren County.

In the matter of the accounting of Clarence C. Smith, administrator of the estate of Mary P. Jones, deceased. From an order of the orphans' court, sustaining exceptions of J. Corbett Jones and another to the account, the administrator appeals. Exceptants file a cross-appeal. Appeal reversed, and the cross-bill affirmed.

George M. Shipman and Nicholas Harris, both of Belvidere, for appellant. William H. Morrow, of Belvidere, for respondents.

BACKES, Vice Ordinary. This appeal is from an order of the orphans' court surcharging the final account of the administrator with \$3,000. Mary P. Jones died in July, 1916, intestate, leaving a son, daughter, and two grandsons, children of a deceased son. After a contest between them for administration, the court appointed a stranger, Clarence C. Smith, who administered, and submitted his account for confirmation. The two grandsons filed an exception, setting up that the administrator had failed to charge himself with \$3,000, money of the defendant alleged to have been unlawfully obtained from her by her two surviving children shortly before her death. The exception was sustained, and this appeal was taken.

The proofs show that in December, 1915, the deceased received from the executor of her brother's estate, in part payment of her distributive share, a check, payable to her order, for \$3,000, for which she executed a release. Her son, James P. Jones, carried the check to her and returned the release. On January 18th he presented the check, bearing the indorsement of his mother, to the cashier of the Belvidere National Bank, and directed him to credit one-half of the amount to his account and the other to that of his sister, Margaret Warne, which was done. The deceased left a note, in her handwriting, found in the box containing her securities, stating that she had given the \$3,000 to her son and daughter. The administrator was the executor, who drew the check, and he was also cashier of the bank. The deceased was 86 years of age, and, although physically impaired, was, to use the language of one of her grandsons, "an exceptionally bright woman, of a splendid disposition and of fine intelligence." She lived alone with a maid, and conducted her household affairs well, and her financial transactions wisely, to the day of her death. The day before her death she went automobile riding with one of her grandsons, and was in good spirits. She had a "bad spell" in December, and her daughter, Mrs. Warne, came on from the West to attend her. In May following she had another. The illness affected her mind and memory for the time being, but when the spells had passed she became normal.

The two grandsons evidently had some intimation of the payment of the \$3,000, shortly after it was made, and they wrote to the executor, who confirmed their suspicion. They communicated with their Uncle James asking what had become of the money, and, his reply being unsatisfactory, one of them asked his grandmother point-blank whether she had given any of it to his uncle and aunt, to which she answered evasively that she thought she had given them some money, but she was not quite sure, and added, "I want you boys to have your share of that, too." In this conversation she called his attention to the fact that she held a note or

two of his father, amounting to about \$1,000, and suggested that "maybe it would be just as well to let it apply upon that," and that she would straighten it out the next time he came up. After the funeral, the grandsons persisted in their efforts to discover the \$3,000, but without success; their uncle and aunt refusing to inform them, stating that they had made a solemn promise not to tell. After the litigation over the right to administer, the administrator tried to restore peace and avert further litigation, and at the instance of Mr. Jones and Mrs. Warne offered to pay them \$1,000 in the closing of the estate, as their share of the \$3,000; but they refused to be reconciled. They requested the administrator to commence suit, which he failed to do, and, upon his failure to charge himself with the amount, they took exception.

There is no ulterior significance attached to the circumstances that the administrator drew the check as executor of another estate, and as cashier of the bank divided the proceeds. They were mere coincidents. Nor does it appear other than that, throughout the affairs, the administrator acted impartially and in good faith. He was selected by the court as administrator for his known probity. The orphans' court tried the exception upon the theory that the sole issue was whether there was a gift to the son and daughter, and that they were the real parties to the action. It rejected their testimony of the transaction with their mother, tending to show a gift, as incompetent under the statute, and ruled that, by reason of the enfeebled condition of the deceased and the confidential relation existing between her and her children, a presumption against the validity of the gift arose, which had not been overcome by proof that the gift was knowingly made and without undue influence on the part of the donees, following *Haydock v. Haydock*, 84 N. J. Eq. 570, 88 Am. Rep. 385.

[1] The court erred in adjudging the administrator liable, based upon its finding that there had been no gift, and also in excluding the testimony offered to show that a valid gift had been made. Whether the \$3,000 were assets of the estate, undisposed of, was a proper matter for investigation; but the conclusion reached by the court, upon the evidence before it, that the gift was invalid, and that the amount was collectible by the administrator, establishes but one factor towards his accountability. Before he could be condemned in damages, it was necessary to further find upon the proofs that it had been lost to the estate through his neglect. The law exacts of an administrator or trustee in the performance of his duty only the utmost good faith, ordinary care and prudence, and reasonable diligence. When these are fairly exercised, he is not responsible, even though loss ensues. The good faith of the adminis-

trator was not challenged, and lack of care and diligence formed no part of the considerations in the court below; and if the court had considered this phase of the case, it seems to me, it would not have been warranted in finding the administrator derelict in the discharge of his duty. The judgment of the court that the gift was invalid, and that the amount was an asset of the estate, to which the administrator was entitled, founded as it was on a rule of evidence based upon a wholesome policy, does not predicate lack of care or prudence in the administrator. His failure to determine the rights of the parties with legal nicety was not carelessness. He judged the matter as the average man would. Actual imposition or fraud upon the mother, by son and daughter, was not charged. Their character and standing forbid even an insinuation of this. It is to be assumed that in passing judgment the administrator had before him the circumstances that have been heretofore related, and also the additional facts testified to by the donees, which the court below excluded, but which I admitted over objection. By their testimony it appears that, when the son James gave his mother the check in December, she put it in her purse, and that when he called to pay her a visit on the 17th or 18th of January she gave it to him, stating that she desired it to be divided between himself and his sister. Both affirm, and believably, that the gift was voluntary and without the slightest suggestion on their part. With this explanation, supported by the note the old lady left, and her statement to her grandson, indicating that the gift to her two surviving children was to equalize the advancement to, or debt of, her deceased son, and the fact that the gift in itself was a perfectly natural one, was it unreasonable for him to conclude that the gift was perfect and the amount not recoverable by suit? I confess that I have grave doubt as to a successful prosecution. The question is not, "Did he err?" but, "Did the estate suffer harm through his unmindfulness of duty?" "So long as an executor acts in good faith, and with ordinary discretion, and within the scope of his powers, his acts cannot be successfully assailed. No man is infallible; the wisest make mistakes; but the law holds no man responsible for the consequences of his mistakes, which are the result of the imperfection of human judgment, and do not proceed from fraud, gross carelessness, or indifference to duty. * * * Indeed, he may do anything within the scope of his powers, without the least risk of personal liability for the consequences of his acts, provided he exercise the care and judgment of a man of ordinary prudence and sagacity. That is the test which the courts are required to apply in all cases." *Heisler v. Sharp*, 44 N. J. Eq. 167, 14 Atl. 624.

[2] The hardship of the judgment below is emphasized by the precariousness of the

claim. If a court of competent jurisdiction should declare the gift valid, a most embarrassing situation would be presented. The estate has not as yet suffered loss. The right of action is not barred, and the donees are responsible; in fact, sufficient remains in the hands of the administrator to insure payment in the event of a recovery. The decree below in respect of the exception, will be reversed, with directions that the grandsons be permitted to sue in the name of the administrator to recover the amount of the gift, upon filing a stipulation pledging their distributive portion of the estate to indemnify the administrator against costs. An administrator is not bound to enforce a doubtful or controverted claim merely because the heirs think it is well founded, unless they are willing to give indemnity for costs. *Sandborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *Harris v. Orr*, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815. The grandsons should conduct the suit, so as to remove further criticism of the administrator. In the case of *Thomas Lommason's Will*, Chief Justice Beasley, sitting in the Warren orphans' court, directed the exceptants to prosecute a claim held by the estate, upon giving indemnity, because the executor might be embarrassed in bringing the suit. The opinion has been lost, but the reason is recited in the order made January 16, 1865.

A cross-appeal was taken (rule 62, 100 Atl. xii) from so much of the decree as overruled an exception to a credit of \$57 paid to Mary Jones for services. The proofs sustain the claim, and the decree in this respect is affirmed. The appellant is entitled to costs.

[3] A few words as to the evidence of the donees, of conversations with their mother, concerning the gift, which was rejected as incompetent. It should have been received. The fourth section of the Evidence Act (C. S. p. 2218) provides:

"In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity: Provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate, which are pertinent to the issue."

It disqualifies only the parties to the action from giving testimony of conversations with the deceased, and does not extend to those who may be ultimately benefited by the result of the suit. The donees were not parties to the litigation, nor were they interested one way or the other in the outcome. The matter to be determined was whether the administrator should be charged with the amount of the check because of his failure of duty. To this the question of gift or

no gift, as between the estate and the donees; was merely incidental, and the right of the estate to recovery against them remained untouched and unenclosed by the judgment. The situation is not like that in *Smith v. Burnet*, 34 N. J. Eq. 219, affirmed 35 N. J. Eq. 314, the doctrine of which the orphans' court applied. In that case the executor failed to charge himself with certain insurance company stock and the dividends thereon, standing in the name of the deceased, which he claimed had been given to him by the testator. At the trial of the exceptions, the executor offered himself as a witness to establish the gift, and his testimony as to conversations with the testator in respect of it was excluded as incompetent, within the prohibition of the statute. *Van Wagenen v. Bonnot*, 74 N. J. Eq. 847, 70 Atl. 143, 18 L. R. A. (N. S.) 400, was an interpleader suit, filed by the stakeholder against the administrator of the donor and the donee, to determine the ownership of certain bank accounts. The testimony of the donee concerning transactions with the deceased relating to the gift, was held to be incompetent. In both these cases the testimony rejected was that of the parties to the proceedings who claimed the gift. In the case in hand, the thing in action was not the gift, but the damage arising from the loss of it. The parties to the action were the administrator, on the one hand and exceptants representing the estate, on the other, and if the administrator had offered to testify of conversations with his intestate, for the purpose of exonerating himself, he would have been barred upon the authority of the cases cited. The case of *Rairdon v. Sampson*, 67 N. J. Law, 346, 51 Atl. 696, is more nearly in point. There the administrator of *Rairdon* sued to recover wages of his intestate, and called the widow as a witness, who testified to conversations and transactions between the intestate and the defendant. She was vitally interested in the outcome of the suit, as sole distributee of her husband's estate; but the court declared that her testimony did not open the door to the defendant to give counter testimony of conversations and transactions with the deceased, because she was not a party to the action.

(39 N. J. Eq. 286)

BOURGEOIS et al. v. MILLER et al.
(No. 42/163.)

(Court of Chancery of New Jersey. July 15, 1918.)

(Syllabus by the Court.)

1. COVENANTS § 51(2) — RESTRICTIVE COVENANTS — "LIVERY STABLE" — "SALES STABLE" — "GARAGE."

A restrictive covenant in a deed against a livery or sales stable does not include a public garage.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Garage; First and Second Series, Livery Stable.]

2. NUISANCE § 3(11) — PUBLIC GARAGES — "NUISANCE PER SE."

A public garage is not a nuisance per se. Whether it is a nuisance in fact depends upon the manner in which it is kept and the business conducted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance Per Se.]

Suit by Annie Estell Bourgeois and another against Lewis Miller and others to restrain the construction of a public garage. Bill dismissed.

Bourgeois & Coulomb, of Atlantic City, for complainants. Babcock & Champion and Clarence L. Cole, all of Atlantic City, and Robert H. McCarter, of Newark, for defendants.

BACKES, V. C. This bill is to restrain the use of a building, in the course of construction, for a public garage. The defendants own a lot at the corner of Ocean avenue and Ninth street, in a residential and closely built up section of Ocean City, and upon it they intend building a one-story public garage, capable of housing from 70 to 100 automobiles. It is to be of brick construction, with a slag roof, supported by wooden trusses, rafters, and sheathing, cement floor, and framework windows and doors. Two 500-gallon gasoline tanks are to be sunk under the pavement of Ocean avenue, from which gasoline is to be supplied to automobiles by a pump on the outside of the building. It is to be lighted with electricity, and, as it is to be operated during the warm seasons only, no heating appliances are to be installed. The complainant Bourgeois owns the Normandie, a six-story frame hotel, opposite and across Ninth street, 68 feet away, and the complainant Frey owns the Traymore Hotel, a five-story structure in the rear of the proposed garage and 20 feet distant. Both are summer hotels, and open for trade from the late spring to the early fall only.

Upon the filing of the bill, and after a hearing, the defendants were restrained pendente lite from keeping within the building then erected on the lot, and of which the proposed garage is to be an extension, "any gasoline stored therein in barrels, automobile tanks, cans, or otherwise," and thereupon further building operations ceased. At that time there was an element in the case, which perhaps had some influence upon the court, that has since been eliminated. An ordinance of the municipality prohibited the erection of a public garage in the district in which the complainant's land is located, which was recently repealed by a vote of the people on a referendum under the Walsh Act (Act April 25, 1911; P. L. p. 462).

[1] One of the grounds upon which the complainants rest their claim to a permanent injunction is that the use of the building for a public garage will violate a general restriction contained in all of the deeds of the Ocean

City Association, the promoter of the town and the common grantor of all the lands within its boundaries, which provides:

"No building or any part thereof erected upon said lot or lots shall be used or occupied as a livery or sales stable, dye house, bone boiling or skin dressing establishment, soap, candle, glue, starch, lamp black, poudrette or fish guano manufactory, slaughter house, piggery or tannery nor shall any building be used or occupied as a drug store without the written consent of the said party of the first part hereto."

The argument is that the term "livery or sales stable" is the equivalent of, and comprehends, a public garage. It has been observed that a public garage is a modern substitute for the ancient livery stable (*Smith v. O'Brien*, 46 Misc. Rep. 325, 94 N. Y. Supp. 673), and that garages occupy with relation to automobiles the same place that stables do with relation to horses (*Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606); and the lexicographer says that "a garage is a stable for the storage of automobiles or other horseless vehicles" (*Century Dictionary*, 1906-8), but the definition manifestly does not meet that of a livery stable, "A stable where horses are kept for hire and where stabling is provided" (*Webster*). The restriction relates solely to the nature of the business, and not to the type of the building. An unsightly livery stable may be erected with impunity, and any lawful business, other than those proscribed, may be carried on without danger of infraction. It might even be permissible to put up a stable and rent stalls and storage for horses and wagons. The covenant aimed at the assembling of multitudes of horses, and was intended to rid the neighborhood of the annoyances of noise, odors, and flies usually centered about a livery stable, but the restriction is only upon the business calculated to bring about that result. Now, it may be that garages are more objectionable in a residential quarter than livery stables, and so are many other enterprises, as, for instance, a planingmill, machinery or boiler shop, streetcar barn, or railroad station (*Bridgewater v. Ocean City*, 62 N. J. Eq. 276, 49 Atl. 801), that are not under the ban. Public garages are not specifically interdicted. The inclusion in the covenant of specified objectionable trades excludes all other forms of lawful business. The livery or sales stable may have been the commercial predecessor of the public garage, but the covenant against the one is not therefore to be extended by implication to the other. A public garage is neither within the spirit nor the letter of the covenant. When the covenant was formulated, nearly 40 years ago, such a thing as a public garage was unknown; and it would require terrific stretching of the definition of a livery or sales stable to embrace "a place for housing automobiles."

It is not, however, required to go to this length in disposing of this phase of the bill, and relief must be denied if it appears that the complainant's right thereto is not clear.

That it is, at least, highly questionable whether the forbidden livery or sales stable includes a public garage, cannot be denied. Courts of equity do not aid one man to restrict another in the uses to which he may lawfully put his property, unless the right to such aid is clear. *Fortesque v. Carroll*, 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79. In that case Mr. Justice Garrison, speaking for the Court of Appeals, said that:

"It is well settled that, in cases where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, 'to doubt is to deny.'"

The reasons for the rule, as pointed out in the opinion, are—first, because restrictions of the lawful uses of property are against common right; and, second, because restrictions, in the framing of which a subsequent purchaser has had no voice, ought to be so clear that by the acceptance of the deed that declares them he may reasonably be deemed to have understood and acceded to them. *Howland v. Andrus*, 81 N. J. Eq. 175, 86 Atl. 391.

The other grounds of complaint are that the noises and odors of a public garage will be a nuisance; that asphyxiating fumes from partially burnt gasoline will be dangerous to life, and that gasoline in large quantities, in the supply tanks and in the automobiles to be stored in the garage, will be an ever-present menace to life and property. These are all purely questions of fact. The burden of proof is upon the complainants, and is all the more difficult to sustain because the dangers are merely apprehended. The proofs must establish, clearly and satisfactorily, that the business of a public garage in the immediate vicinity of the complainants' property is of such a character as to necessarily produce the mischief which the court is called upon to prevent.

[2] The nuisance feature, of noises and odors, was not pressed in the argument. The danger to life from asphyxiating gases is negligible. In starting machines there sometimes occurs a backfire, due to gross neglect in cleaning, or to an excess of gas, in common parlance called too rich a mixture, which emits a fume, said to be poisonous, causing asphyxiation if inhaled in sufficient quantity. That a fatality may happen under favorable circumstances is possible, but it seldom occurs, and then only in closed quarters, where the gas is generated and discharged. Automobiles do not, of course, normally back-fire at starting, nor do all start out of a public garage at the same time; but suppose that in the usual course of daily trade the average mishaps, in this respect, take place, is it at all likely that the fumes would set up the grave danger the complainants apprehend? Experience does not confirm it, nor is it established by the proofs. Employees and others in and about garages suffer no serious inconveniences from the gas, although they come directly in contact with it, and far less

is there possibility of harm to those in adjacent properties. Noisome fumes that escape from the building are taken up by the air, neutralized, and dissipated, so that there is little ground for alarm or fear that they will penetrate contiguous homes in such volume as to threaten health or life. The distance from the proposed garage to the complainants' hotels, 20 feet from the one and 68 feet from the other, gives ample clearing space and reasonable assurance against the danger causing the anxiety.

It remains to be considered whether the business is to be enjoined because of the danger from explosions. A public garage is not a nuisance per se, and the complainants do not contend that it is; they rest their right to relief expressly on the ground that the storing of large quantities of gasoline in tanks and in automobiles in the garage, in close proximity to their hotels, will subject them, their property, and their guests to an extraordinary hazard, to which they ought not to be obliged to submit. The principles upon which a court of equity acts in such a situation are informally discussed by Vice Chancellor Garrison in *O'Hara v. Nelson*, 71 N. J. Eq. 161, 629, 63 Atl. 836, and, were the circumstances the same, I would feel bound, authoritatively, by that case. There, upon a bill filed to enjoin a public garage, the keeper was restrained from filling automobiles inside the garage and from storing therein automobiles containing gasoline, on the ground of danger from explosions, in surroundings where the destruction of person and property would not nearly have approximated the damage that would ensue from a similar occurrence here. Whether a catastrophe would involve one or more persons or property of small or great value is, of course, beside the issue. An individual is as much entitled to protection as are communities. The question is whether, with reasonable care, a public garage can be conducted without danger of such a calamity. The learned Vice Chancellor, upon the facts before him, rules that it could not; but the evolution in the automobile field impels me to a different view. The inflammable and explosive properties of gasoline and its vapors, as described and compared with other explosives in the case cited, is borne out by the evidence before me, and need not be dwelt upon further; but an entirely different state of affairs exists to-day in the handling of gasoline as a garage commodity, and in its use as motive power of automobiles, than prevailed in 1906 when the *O'Hara Case* was decided. Such vast improvements have been made in both directions that the dangers at that time apprehended have been reduced to a minimum and the causes for alarm practically removed. The methods then employed are archaic now. Although only 12 years ago, the automobile was still in the formative and experimental

stages, and as much an object of curiosity as the aeroplane is to-day. Then there were but 13,000 in this state; now there are 137,000, and over 7,000,000 in the United States. Then, in a day's trip of 50 miles, the operator often spent more time on his back than he did at the wheel; "chauffeur" was a word of uncertain pronunciation; kerosene was used in the lamps; the self-starter, demountable rims, electric lights, the racer and the truck, the luxurious limousine and the practical Ford, were either not conceived or in the birthing; and with all of these the development of the motor mechanism has kept stride, until it has about reached the point of perfection. Leakage of gasoline is the result of inexcusable carelessness, or the purest accident. The accumulation of grease and dirt is due to the sheerest neglect. In these deplorable circumstances, fire may occur from a short circuit of the electric appliance; but only when the insulation is worn off. Gasoline contained in the ordinarily well-constructed and well-kept automobile is comparatively as free from danger of explosion as steam in a boiler. The lurking danger in the one is external; in the other, internal. Both can be guarded against by proper attention and reasonable care. To require automobile tanks to be discharged before storing is impracticable and would close down the business. But if, perchance, an automobile should take fire in a garage, followed by an explosion of the tank, the danger would be local, confined to the machine or the immediate surroundings.

There is no evidence before me throwing light upon the force of an explosion of a 20-gallon tank, but my investigation satisfies me that it would not be so great as to do harm beyond the garage itself; and if this be so, and I have learned nothing to the contrary, the complainants are without footing. It is said of gasoline that as an explosive the danger is 10 times greater than gunpowder. *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595. Yes, in the abstract; but not in the automobile. We recline unconcernedly in touring cars over a tank of gasoline; but it would indeed be a reckless spirit who would ride over a can of gunpowder, smoking. Instances of explosions of automobile tanks while in garages are extremely rare and isolated. The infrequent explosions generally follow violent collisions. Destructive fires from that source are at least as uncommon as formerly were fires in livery stables, and they were not regarded as common-law nuisances on that score. The housing of from 75 to 100 machines in a public garage would, admittedly, multiply the risk; but that would call for increased attention and care, which is not to be assumed would not be forthcoming.

Now, as to the danger from the supply tanks: The prevailing practice of former

days of filling automobiles was by decanting from open vessels, the danger from which, more than anything else, influenced the Vice Chancellor to grant the injunction in the O'Hara Case. This method has been abandoned. The tanks, sunk in the earth, either under the pavement or immediately inside of the door, are charged direct from the supply wagon, and automobiles are filled on the outside of the garage by an automatic measuring pump, through a hose. There is little or no escape of gas during either operation, and the chance of fire coming in contact with the supply tank is remote. This standard method, universally adopted as an economic as well as a safety measure, has long stood the test of reasonable assurance against explosion, and its capacity in that respect is no longer open to speculation. Granting that gasoline, unconfined, is inherently dangerous, so that the "greatest care is but the slightest assurance of safety," and that its explosive properties by far exceed those of gunpowder, it is not a permissible corollary that public garages are in the category of dangerous agencies to which powder magazines and nitroglycerine and T. N. T. plants belong.

In confirmation of the views I entertain that a public garage is not, of and in itself, a menace to contiguous life and property, and that whether it is a nuisance in fact depends upon the manner in which it is kept and the business conducted, I need only point to the myriad in operation throughout the land, erected in densely populated communities, amid and alongside hotels and hospitals, theaters and public buildings, and without casualty more than usual in ordinary trade and enterprise. Like in other towns, they are numerous in Ocean City, some in the business portion and others in the residential section of the complainants, surrounded by frame structures, private and quasi public, and with due care they have been managed for years without hurtful result to the adjacency. So free from danger is the automobile regarded that it is not uncommon practice to build a garage in the basement of dwellings. The residence adjoining the proposed garage is a sample. It may properly be said of public garages, as new institutions in our social and commercial life, as was once upon a time said concerning steam agencies:

"They are absolutely necessary to the progress of the community, and each member must suffer the incidental damage and liability to danger which arises from their nonnegligent use. They are not nuisances, if properly maintained and operated."

There was some evidence to support the complaint that a public garage would increase the complainants' fire insurance premiums and would also depreciate the value of their property. Mere diminution of the value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for

equitable relief. *Zabriskie v. Jersey City & Bergen Railroad Co.*, 13 N. J. Eq. 314; *Morris & Essex Railroad Co. v. Prudden*, 20 N. J. Eq. 530.

The bill will be dismissed, with costs.

TRIBUNE ASS'N v. SIMONDS et al. (No. 44/731.)

(Court of Chancery of New Jersey. May 2, 1918.)

1. MASTER AND SERVANT §59—TERMINATION OF EMPLOYMENT—GROUNDS.

That news association syndicates the writings of one of its editors independent of the contract of employment does not justify the editor in resigning where he has acquiesced therein.

2. MASTER AND SERVANT §7—CONTRACT OF EMPLOYMENT—TERMINATION.

A new verbal contract between a news association and one of its editors for war articles in the Sunday edition and for syndicating purposes held not to supersede a previous contract for editorial writing; it being independent, although of a kindred nature.

3. INJUNCTION §128—TERMINATION OF EMPLOYMENT—EVIDENCE.

In a suit by a news association to restrain one of its editorial writers from breaching his contract and working for another, evidence held to show that defendant was not justified in quitting his employment.

4. INJUNCTION §108 — PREREQUISITE TO SUIT—BREACH OF EMPLOYMENT CONTRACT.

Where an employé has left his employment without cause, his employer is not required, before suing, to enjoin him from working for another, to invite him to return, at least in the absence of showing by the employé that re-employment would be refused.

5. INJUNCTION §60—CONTRACT FOR SERVICES.

Where an editorial writer on war topics occupied a unique position because of great ability and knowledge, a news association with which he had a contract, and which had spent some \$35,000 in exploiting him, could obtain injunction to prevent his breaking his contract by writing for others.

6. INJUNCTION §23 — GROUNDS — BALANCING OF INCONVENIENCES.

An injunction to restrain an employé from leaving his employment and working for another will not be refused because of the balancing of the inconveniences; such doctrine applying only to motions pendente lite.

7. INJUNCTION §24 — GROUNDS — PUBLIC POLICY.

An injunction to restrain an employé of a news association from breaching his contract and writing editorials for another association will not be denied because his articles inculcating patriotism will not be disseminated throughout the country; complainant's circulation being equally large.

Suit by the Tribune Association against Frank H. Simonds and the New York Herald Company for an injunction to restrain breach of contract. Injunction granted as to defendant Simonds, and denied as to defendant New York Herald.

Theodore Strong, of New Brunswick, and Sackett, Chapman & Stevens, of New York City, for complainant. Andrew Foulds, Jr., of Passaic, and Lemuel Quigg, of New York

City, for defendant Simonds. Andrew Foulds, Jr., of Passaic, and R. W. Candler, of New York City, for defendant New York Herald.

BACKES, V. O. I have very little trouble in reaching a conclusion as to the court's duty upon this application to restrain the defendants. The facts are not in dispute, and the principles of law applicable are not obscure. The motion is before me on bill and affidavits and proofs taken in open court, and presents this situation:

The defendant Frank H. Simonds entered into a written contract with the complainant, the Tribune Association, in January, 1915, to serve it for a period of four years as an editorial writer, and as such to have charge of the editorial page of the New York Tribune, and authority over the hours of labor and terms of employment of other editorial writers, subject only to the direction of the editor in chief and the assistant editor of the paper. As a part of his undertaking, Mr. Simonds covenanted that he "will not write for or contribute to any other publication or periodical during the term of this agreement, except that he shall have the right to contribute to monthly magazines or to weekly magazines, which are not to be published in connection with or as part of any newspaper." This covenant is sought to be enforced, or rather the effort is to restrain its breach.

After Mr. Simonds entered upon his employment, in August following, he made an additional agreement with the complainant to write war articles for the Sunday edition of the Tribune, which were to be syndicated, and for this he was to receive, as he says, \$50 a week and a half of the profits of the syndication. Later the agreement was modified as to the compensation, whereby he was to receive \$85 per article. He remained in the employ of the Tribune until January, 15, 1918, when he severed his connection as editorial writer, by a formal letter of resignation. In February he bargained with the McClure Syndicate to write war articles for a year, at the rate of \$500 a week and a share of the profits of syndicating the articles when the profits reached the sum of \$13,000. The McClure Syndicate has been syndicating Mr. Simonds' articles since February, gradually increasing its subscribers, until they now number 73 newspapers, distributed throughout the United States, of which the defendant The New York Herald is one. Mr. Simonds is manifestly violating his covenant, unless it is made to appear that his contract of employment is at an end, by a mutual rescission, which, of course, is not pretended, or that he is absolved from a further performance because of such violation of the contract by the Tribune Association, as evinced an intention not to be further bound by its terms, or, because of such misconduct of the association, inimical to the relation of master and servant, as to make further per-

formance on the part of Mr. Simonds reasonably impossible. That there were such violations and misconduct and that Mr. Simonds was justified in not continuing under the circumstances is the substantial defense put forward and upon which I think the case must turn.

Before disposing of this question, I want to first make mention of two preliminary matters: One suggested, rather than urged, as a violation of the contract on the part of the complainant; the other, which has been pressed with considerable force, that the contract of employment is no longer in existence, having been superseded by a later one which has come to an end according to its terms.

[1] The first is that shortly after Mr. Simonds contracted with the Tribune, in April, 1915, the Tribune Association began syndicating his editorial writings, and continued to do so throughout the term of his service. While this may not have been a part of the arrangement, it does appear that he at all times acquiesced, and I fail to see how it can now be seized upon as having violated his rights; and I may add that it is not assigned by him, nor by his counsel, as having prompted him to quit his contract in January of this year. It had nothing at all to do with it.

[2] The other relates to the verbal contract of 1915, for contributions of war articles to the Sunday edition of the paper and for syndicating purposes. It is claimed that this was a new and superseding contract. It was a new contract, but as such it was distinct and independent of the existing one and in no respect took its place. The written contract involved the services of Mr. Simonds as an associate editor of the Tribune, while the verbal bargain was for another, though kindred, service, for which he was paid additional compensation. The written agreement was for a fixed term, while the oral agreement was indeterminate, being terminable on a two weeks' notice, and in fact it survived Mr. Simonds' resignation. He at no time treated it as altering or taking the place of the editorship contract, for, even after he resigned as editor, he continued to furnish copy for the Sunday syndicate articles, and he stopped writing them only after giving the stipulated notice. Now, the performance of the two contracts is entirely another matter. The subject of the two, it is true, was of the same general character—Mr. Simonds' observations on current war conditions—and the work on the Sunday syndicate contract, it was agreed, was to be permitted to take as much of Mr. Simonds' time from his editorial duties as was necessary; in other words, it was to be done in connection with it as an adjunct to it but this it cannot be said affected the two contracts as independent undertakings. Now, to return to the argument: The insistence is that, the written contract having been superseded by the verbal contract, and that inasmuch as the latter provided for a termina-

tion upon two weeks' notice, which has been given, Mr. Simonds is free. But, as the argument is built upon a faulty premise, it must fall of its own weight.

I will then take up the causes that led to the break. Mr. Simonds was with the Tribune for three years, and as we read his complaint, there were two specific matters, and two only, that caused him to abandon his employer, and upon which he rests his refusal to further live up to his contract. Without particularizing in his answering affidavit, he speaks of disagreements from time to time, but he specifically adverts to but two matters. One was a difference of views as to the treatment, editorially, of last winter's coal situation, in connection with the shutting down of breweries and moving picture houses; and the other was over the preferential placement of an editorial upon the Colgate soap litigation to that of an editorial tribute to the late Congressman Gardner. These two brought on the acute situation that led to Mr. Simonds' resignation, so far as his affidavit discloses details. But we are supplied with particulars of other instances, which perhaps Mr. Simonds had in mind as having caused friction, by the testimony of Mr. Rogers, the vice president of the association, and one of its managers. Mr. Rogers speaks of an occasion early in the war when Mr. Simonds thought it wise policy that the Tribune advocate an embargo upon shipments to the Allies. There was some discussion and disagreement of views, but the matter was settled amicably. There were other differences. Mr. Simonds questioned the advisability of publishing reports concerning the conduct of our soldiers abroad, and criticized the publication of a Milan dispatch relating to war conditions, which may have been unfounded in fact, and there may have been some more, but they were all of matters upon which honest minds differed and which reasonable men adjust. In the course of the argument counsel said that Mr. Simonds was constantly irritated; that Mr. Garret, one of the associate editors, constantly, so to speak, stuck pins into Mr. Simonds; but it seems to me that another metaphor would have been more appropriate, that Mr. Simonds was the magnet that drew the pins towards him. There is not a scintilla of evidence in the case that warranted the statement; on the contrary, the truth is that the entire managerial and editorial staff, including Mr. Ogden Reid, the editor in chief, and, as I understand, proprietor, or a member of the family that owns the paper, treated him with the utmost courtesy and consideration. They deferred to him, they humored him, and, as aptly said by counsel, they "nursed him." There is nothing in the affidavits disclosing that his judgment did not prevail whenever he asserted himself, subject to the direction of the editor in chief and the assistant editor. There were, of course, disagreements between Mr. Simonds and some of the

other members of the large staff of this influential newspaper, but they all arose from an honest expression of views, which, it would seem, Mr. Simonds could not always tolerate without irritation. Mr. Simonds is highly temperamental, an attribute of genius, and much, if not all, of the trouble arose from his temperamental indulgences. But this condition furnishes no valid excuse for his rash act, for, when the Tribune engaged him, it hired him for his editorial qualities minus his temperamental tendencies, which he should have repressed. However, the staff, generally appreciated his ability as a war observer and writer, and from time to time smoothed matters over, so that it may be said that past differences had very slight, or no, bearing upon the causes that provoked him to quit. This brings us to what I have called the acute-stage.

It seems an editorial had been prepared in which the coal situation was discussed in connection with the closing of breweries and moving picture houses. This was submitted to Mr. Simonds, who suggested that the subjects should not be combined, and that the importance of the coal situation demanded a separate discussion, and that it should not be subordinate to the less important subject of closing breweries and moving picture houses, and he asked Mr. Garret to write another in its place. There was no attempt made whatever to control Mr. Simonds' judgment. It was deferred to, and the article was not published. The next day Mr. Rogers and Mr. Garret stepped into Mr. Simonds' room to further discuss the matter with him. Mr. Simonds requested Mr. Garret to leave, and reproached Mr. Rogers for treating him as a servant and humiliating him in the presence of Mr. Garret, and announced that he was through and that he was going to quit. His grievance was purely fancied, and his resolution was unjust. Mr. Rogers considerably asked him to reserve final action until they could talk it over later, which he promised to do. Then quickly followed the second incident, which Mr. Simonds now says determined him in leaving. During the day an editorial had been written commenting on the Colgate soap litigation, which was to be the leader in the next day's issue. In the course of the afternoon word came of the death of Congressman Gardner, and one was written paying him tribute, which Mr. Simonds directed should be the leading editorial. In the next morning's issue the Colgate editorial had first place. The written resignation immediately followed. Now, it is clearly proved that there was no intention upon the part of any one to disobey Mr. Simonds' directions. In fact, the effort was to comply with his orders. The transposition of the editorials was clearly due to a misunderstanding of orders, but Mr. Simonds did not stop to inquire, and without more he sent in his resignation. No sensible man would say

that these trivial circumstances, as they have been disclosed by the affidavits, justified Mr. Simonds in severing his connection. He was oversensitive, and he possibly fancied that he was being overridden by some one else, but a sensible man would have inquired and investigated and put the blame where it belonged; he would not have thought himself injured to the point of resigning. Had he inquired, he would readily have discovered that the transposition of the editorials was the result of a misunderstanding, and not of disobedience of his orders.

[3] I find that the rupture was not brought about by the employer, and that the servant was not justified in quitting his service.

Now, as to the remedy: Counsel has advanced several reasons why this court should not interfere.

[4] The first is that the complainant has not offered to reinstate Mr. Simonds, and that without this, and to restrain him in the language of the covenant, would be against public policy. To be more precise, to restrain him would be to deprive him of making a living and the public at large of the benefits and advantages of his talents, to the injury of the public. It may be that this rule of public policy would prevail if it affirmatively appeared that the Tribune refused to restore Mr. Simonds to his position. I doubt very much that equity would extend its aid if in doing so the result would be that Mr. Simonds would be prevented from following his vocation, and I say here that, if an injunction goes against him, and he offers in good faith to return, and the Tribune declines to receive him, the injunction will be forthwith dissolved. But I know of no rule of law that called upon the complainant to invite Mr. Simonds to return to his labors before seeking the aid of the court to restrain him from breaching his contract, nor of any rule of pleading that requires an assertion of such an offer before equity will intervene. The maxim that "He who seeks equity must do equity" is not applicable as a matter of pleading. In circumstances like the present, where the servant left his employment without cause, it is his duty to return without invitation, and the presumption is that upon an application of this kind the complainant intends to fulfill its part of the contract. However this may be, when the point was raised in the course of the argument, leave was given to amend the bill by inserting a formal invitation to Mr. Simonds to return to his employment, and thereupon, when asked of counsel whether he would avail himself of it, there came an equivocal answer. So that point is out of the case.

[5] A second reason argued for withholding relief is that the complainant has suffered no irreparable injury. When the Tribune engaged Mr. Simonds in 1915, he had already an enviable reputation as an editorial writer,

and especially upon topics concerning the present world war. To more intimately familiarize himself with conditions and to enable him to write with a keener knowledge of affairs, the Tribune sent him to the seat of war, at an expense of \$8,000, and in all has spent some \$35,000 in exploiting him, so that to-day he occupies a unique position among war observers, and is one of the foremost and interesting writers upon that subject. His great capacity lies in his simplicity of description. He paints his word pictures so plainly that the ordinary reader may visualize the movements of the armies, and the entire local situation, and his broad and intimate knowledge of the subject insures confidence. In these respects his position among writers is unique. It seems to me it cannot be denied that by the loss of his talents, which were developed by the Tribune, and by the loss to it of his reputation, which that paper advanced at great outlay of money, serious damage has resulted. The Tribune has retained another famous war observer of international reputation, a Mr. Beloc, to fill the position Mr. Simonds occupied, but this is no answer to the charge that it has suffered irreparable injury by the loss of Mr. Simonds' services. Nor is the demonstration that the Tribune's circulation did not decrease, nor the Herald's circulation increase, after he changed his operations from the one to the other, proof that the complainant has not suffered loss. That is not at all a fair test. The test is: How much greater would the Tribune's income have been had Mr. Simonds remained with it? Upon the conclusion that I have reached that Mr. Simonds breached his covenant, the complainant could undoubtedly recover a judgment at law for a money damage, but what would that money damage be? How could it be established? How could it be ascertained, with any fair degree of certainty? For such an injury the legal machinery furnishes no adequate means of measuring the damage, and in such an event equity steps in to prevent the damage from becoming irreparable. This case presents a situation entirely different from the ordinary breach of a contract, where the injured party may go into the open market and supply his wants, and where the difference in cost measures the damage. Here the services engaged were of a peculiar character, and for the loss of which the damages are unmeasurable at law, and hence the preventive remedy.

[6] I am asked further not to grant an injunction, because of what is called the balancing of the inconveniences on a motion pendente lite. I may say it is only upon a motion of this kind that that doctrine is applied. Upon final hearing equity courts enjoin according to the right of the parties regardless of the inconveniences. Now, as we have seen, the Tribune is entitled under its contract to the services of Mr. Simonds and

the profits it would have enjoyed had he remained in its service. In the protection of these rights the Tribune is entitled to the aid of this court in so far as this court can afford protection. It, of course, cannot compel Mr. Simonds to labor for his employer, but it can restrain him from giving the benefit and advantage of his services, and the resulting profits, to another. Then, if the equities are with the complainant, why should this protection be withheld to the advantage of the transgressors? Because to enjoin Mr. Simonds would deprive him of greater income than he received from the Tribune, or because to do so would prevent the McClure Syndicate from reaping large profits from the labors of Mr. Simonds, which otherwise would belong to the Tribune? Certainly not. Mr. Simonds' circumstance is due to his ill-advised course, and the McClure Syndicate is not an innocent victim of the situation in which it now finds itself. It is true that since February, when Mr. Simonds agreed to write for the Syndicate, it has gradually increased its circulation, until its income now is at the rate of \$50,000 a year, but this apparently affluent condition was attained at the expense of the Tribune, and doubtless with full knowledge of the rights of the complainant; for it appears in the contract entered into between Mr. Simonds and the Syndicate it was stipulated:

"It is mutually agreed that in the event that any court of competent jurisdiction shall at any time during the period of the contract herein lawfully restrain the writer from writing, or the Syndicate from publishing the writings that are the subject of this contract, then and in that event, and during the period of the lawful obedience of either or both parties hereto to the said court's lawful orders, no action shall lie by either of the parties hereto against the other, and no claim of duty or damage be made by either party against the other by reason of either due and lawful observance of the said court's orders."

By that stipulation it would seem that Mr. Simonds and the McClure Syndicate knew or suspected the insecure footing of Mr. Simonds and contemplated or anticipated the present litigation. Now, as I have said, the only loss that Mr. Simonds can sustain is the increased compensation, and that of the McClure Syndicate its profits, and all derived through Mr. Simonds' illegal conduct and at the expense of the complainant. It does not appear that the Syndicate bound itself to furnish to its subscribers, for any fixed time, Mr. Simonds' articles, and that an injunction would entail further damage for breach of such contracts. But, even if this were so, I do not see how the injury to Mr. Simonds and the Syndicate, which they brought upon themselves, could equitably countervail the damages sustained by the complainant, or which will result to it, if relief be denied. In fact, I cannot see how the interest of the Syndicate can at all be, or

should be, considered upon this motion. At any rate, the inconveniences do not counterbalance those of the complainant, and a restraint cannot be denied on this score.

[7] Lastly, the court is called upon to exercise its discretion in the interest of patriotism, because, as counsel said:

"The loss to the world of Mr. Simonds' articles would be equal to that of the Huns entering Paris."

This is rather extravagant, but I accept it as an expression of counsel's appraisement of Mr. Simonds' ability. If there were no other means of disseminating the views of Mr. Simonds among the people of the United States concerning the present war situation than the McClure Syndicate, and a restraint upon its distribution would affect the interest of the American propaganda, there would be much force in the argument. If the McClure Syndicate were the only one in this country that could reach the 5,000,000 to 15,000,000 readers, as counsel states it does, the court would long hesitate before acting; for the court fully recognizes its duty and the obligation of the individual, in a crisis like the present, to submit to the public good; but the medium of the New York Tribune is just as efficient in disseminating such news. It had subscribers to its syndicated articles to the number of 200, and it stands ready to distribute as broadcast as any other syndicate the contributions of Mr. Simonds to the welfare of the people, and to aid the United States in the winning of the war.

If I should deny an injunction, the medium of dissemination would be the McClure Syndicate; if I grant it, I simply change the medium; and if the world loses the talents of Mr. Simonds and his genius and his efforts, the sin of omission will be upon his shoulders, and not upon those of the complainant.

I will grant an injunction in the language of the covenant, "that the said Frank H. Simonds be and he is hereby restrained from writing for or contributing to any other publication other than the New York Tribune," etc.

The motion to restrain the New York Herald will be denied.

(92 Conn. 667)

O'NEIL et al. v. MANUFACTURERS' NAT. BANK.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. BANKS AND BANKING §—183—DISCOUNTED NOTES—PAYMENT—FORGED RENEWAL NOTES.

Where bank discounted note for payee, and upon each partial payment by payee upon the indebtedness a forged renewal note for balance was given bank, the forged notes, being mere pieces of paper, in no wise affected liability of

original maker as evidenced by original note, which liability continued until indebtedness so evidenced was paid or discharged.

2. BANKS AND BANKING ¶183—DISCOUNTED NOTE—LIABILITY OF MAKER TO HOLDER.

Where note was discounted by bank for payee, the maker became primarily liable to the bank.

3. APPEAL AND ERROR ¶1071(6)—REVIEW—HARMLESS ERROR—COURT'S MARKING OF PARAGRAPHS IN FINDING.

Court's inadvertence in marking a paragraph of defendant's draft finding as "Not proven" did not affect the substantial merits of the case, although in irreconcilable conflict with counter finding and finding as made marked "Proven," where the paragraph involved the existence of an indebtedness over which there was no conflict.

4. BILLS AND NOTES ¶434—PAYMENT UNDER MISTAKE—FORGED RENEWAL NOTE.

Where note is discounted by bank for payee, who makes partial payments to bank upon the indebtedness, and upon each payment gives bank a forged renewal note for balance, the maker, after paying balance due, as evidenced by a forged renewal note, cannot recover from bank the amount paid, upon discovering renewal note was forged; the maker being liable to bank on original note for such amount.

5. APPEAL AND ERROR ¶230—WAIVER—DELAY IN OBJECTING.

Where defendant failed to present in its request for a finding any question of law which it desired to have reviewed, plaintiff, by failing to refer to omission when court made its findings, and permitting case to reach the argument upon appeal without objecting thereto, waived the objection.

Prentice, O. J., and Beach, J., dissenting.

Appeal from District Court of Waterbury; Walter D. Makepeace, Judge.

Action by William O'Neil and another against the Manufacturers' National Bank. Judgment for plaintiffs, and defendant appeals. Cause remanded, with directions to enter judgment for defendant.

James J. O'Keefe discounted at defendant bank a note for \$400, dated June 14, 1906, and payable two months after date, made by William O'Neil to him as payee, and indorsed by him and Dan O'Neil. Partial payments were made by O'Keefe upon this indebtedness, and with each payment the bank took from O'Keefe a note for the amount of the unpaid balance upon the preceding note, which in each case purported to be made by William O'Neil and indorsed by said Dan O'Neil and himself. On February 28, 1907, this indebtedness had been reduced to \$150, and a note for this sum purported to be made by William O'Neil to James O'Keefe as payee, and, indorsed by said O'Keefe and Dan O'Neil, discounted by the defendant bank. The bank received each of said notes from O'Keefe as payments for the preceding note without presentment or notification to William O'Neil or Dan O'Neil, and either canceled or surrendered to O'Keefe each said preceding note. The names of said William O'Neil and Dan O'Neil, on each of these notes except the orig-

inal note of \$400, were a forgery and each of these notes, except the original note of \$400, was executed by O'Keefe without the knowledge of either William or Dan O'Neil. On April 30, 1917, William O'Neil received notice that the note for \$150 was due, and he paid the same to the defendant bank. The signature of William O'Neil upon said note bears no resemblance to his real signature. The defendant bank negligently accepted each of the notes with forged names thereon in partial satisfaction of the preceding note. On the same day he paid this note William O'Neil discovered that his name on this note was forged, and demanded from defendant repayment, but this defendant refused.

Edward F. Cole, of Waterbury, for appellant. Andrew D. Dawson, of Waterbury, for appellees.

WHEELER, J. (after stating the facts as above). [1] The defendant bank was a holder of the original note in due course. From time to time a payment was made the bank upon its indebtedness, and a new note given the bank for what then remained due upon the original debt. The notes given subsequent to the original notes were forgeries as to the names of the maker, William O'Neil, and the indorser, Dan O'Neil. These forged notes cannot be held to have ever paid in full or in part the original indebtedness. They were mere pieces of paper, in no wise affecting the liability of the original maker to the bank. His liability to the bank was evidenced by the original note, and until the indebtedness so evidenced was paid or discharged it continued.

[2] As we read the finding, it is that \$150 of this original indebtedness was represented by the last forged note, and was due and unpaid at the time of trial. It must follow that the maker of the original note is still liable for this indebtedness, unless the defendant bank has discharged him from liability directly or by its course of conduct. The finding shows that there has been no direct discharge. The claim is made that the defendant bank, by negligently accepting this forged paper, has prejudiced the rights of the maker by preventing his successful action over against O'Keefe, the payee. The facts found do not support this claim. The maker was primarily liable to the bank, and, so far as we know, he has no action over against the payee, O'Keefe.

[3] The appellee presses upon us his contention that there is a serious and irreconcilable conflict between the paragraphs of the draft and counter finding, as marked "Proven" and "Not proven," and the finding as made. It is quite true that there is some conflict, arising, we presume, through inadvertence of the trial court, in the marking

of these paragraphs. But we do not think this conflict affects the substantial merits of the case. The appellee correctly interprets the situation; the defendant's case does depend upon the finding of the existence of an obligation arising at the time of the making of the original note for \$400, but on the immediate point of the existence of the obligation there is no conflict. The trial court marked "Not proven" the paragraphs specifying the existence of an obligation on the part of the plaintiffs, who were not only the maker, but O'Keefe, the payee and indorser, as well. In all probability the trial court had in mind the fact that the liability of O'Keefe as indorser upon the original note no longer existed, since he received no notice of protest of this note while the liability of the maker, William O'Neill, continued. He was under no obligation to pay the forged note for \$150, and it is clear that he paid it under a mistake. It does not follow that he is entitled to recover the sum paid. At this time he in fact owed the bank the sum which this note purported to represent.

[4] A condition precedent to the recovery of money paid by mistake is a finding that the receiver ought not in good conscience to retain it. The circumstances surrounding this payment do not make such a finding permissible. *Mansfield v. Lynch*, 59 Conn. 327, 22 Atl. 313, 12 L. R. A. 285. Since this amount is due on the indebtedness evidenced by the original note the bank may at any time recover it. The folly of compelling the bank in this action to repay the maker the \$150 paid on the forged note, and immediately pay back to the bank the same sum, is apparent. The injustice of penalizing the bank with a bill of costs and the vexation and cost of maintaining another action indicate the injustice of compelling it to now return the sum received upon the forged note. The plaintiff William O'Neill has not suffered through the acceptance of this forged note by the bank, nor by his payment of the face of the note, since his payment liquidated his indebtedness due the bank, created at the time of the making of the original note.

[5] The appellee claims that the appeal should be dismissed, because the defendant failed to present in his request for a finding any questions of law which it desired to have reviewed. The trial court has made its finding without reference to this omission by the appellee, and he has permitted the case to reach the argument upon the merits of the appeal before raising the point. It is a sufficient answer to the claim to point out that it is too late to make it.

There is error. The cause is remanded, with direction to enter judgment for costs in favor of the defendant. The other judges concurred, except PRENTICE, C. J., and BEACH, J., who dissented.

(32 Conn. 705)

NEW HAVEN BANK NAT. BANKING ASS'N v. JORDAN CO. et al.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. BILLS AND NOTES ~~§~~360—RENEWALS OF NOTES.

A renewal note is a new and independent contract, and the holder thereof is prima facie a holder in due course; the relation of the parties being in no way changed.

2. BILLS AND NOTES ~~§~~379—ACCOMMODATION INDORSERS—LIABILITY.

Accommodation indorsers on notes are liable to the holder, even if the holder knows that they are accommodation indorsers.

3. BILLS AND NOTES ~~§~~379—RENEWALS—LIABILITY OF INDORSERS.

Knowledge of the holder of a renewal note that the several indorsers expected other accommodating parties, who indorsed the initial note, to indorse, did not release the actual indorsers.

4. BILLS AND NOTES ~~§~~369—INDORSERS—LIABILITY.

The liability of indorsers to the holder of a note is not affected by any agreement between the indorsers not appearing upon the note.

Appeal from Superior Court, New Haven County; Donald T. Warner, Judge.

Action by the New Haven Bank National Banking Association against the Jordan Company and others. Demurrer to the answer was sustained, and defendants appeal. No error.

In an action against the defendants as maker and indorsers of a promissory note, the defendants other than the maker of the note filed answers admitting the execution of the instrument and due notice of nonpayment, and set up in substance the following: That the note in suit was a renewal note, the first being dated the 10th of May, 1916, the next the 10th of July, 1916, the third the 11th of October, 1916, and the note in suit the 11th of January, 1917. That the note of the 10th of May, 1916, was also indorsed by one B. M. Hibbard. That Hibbard died solvent between May 10 and July 10, 1916, and that administration was granted on his estate before July 10, 1916, and that plaintiff knew it before that date. That each of the notes of July 10th, October 11th, and January 11th, and others for the same obligation which antedated them, was negotiated by the maker with and discounted by the plaintiff, for the maker's use, and that the defendants, understanding that said notes were renewals, indorsed each of them in the reasonable belief and expectation that the estate of Hibbard would, with defendants, indorse the same before the plaintiff would discount them for the maker. That the defendant knew, or should have known, that the several notes took place of the old notes, and that plaintiff took the note of July 10, 1916, without the indorsement of Hibbard's estate, and without informing the

defendants, and that the plaintiff, without informing defendants, delivered the note of May 10th to some unknown person, who delivered the same to the Hibbard estate, and that the plaintiff took no steps to hold the Hibbard estate liable for the indorsement of Hibbard on the note of May 10th, and that the Hibbard estate now has possession of said note of May 10th, and claims to be free from all liability because of the same. The plaintiff demurred to the answer, and the superior court sustained the demurrer.

James P. Pigott, of New Haven, for appellants. Henry Stoddard, of New Haven, for appellee.

SHUMWAY, J. (after stating the facts as above). The holder of the note is on the pleadings *prima facie* a holder in due course, and the indorsers, contesting their liability, in order to prevail, must allege and have the burden of proving at least one of the following facts: That the note was not complete and regular on its face. That the plaintiff did not become the holder of the note before it was overdue. That the plaintiff did not take the note in good faith and for value. That the plaintiff, at the time the note was negotiated to it, had notice of some infirmity in the instrument or defect in the title of the person negotiating it. Negotiable Instruments Act (Laws 1897, c. 74).

[1-3] The defendants' answer will be searched in vain to find any such allegation or its equivalent. The averment that the note in question was a renewal of a note for like amount does not change the relation or liability of the parties in any particular. Indeed, the law knows no "renewed negotiable note," though that term is often used to denote a transaction wherein a note is used to pay and discharge a prior note of like tenor, without the payment it may be of any money. But, however, the holder of such a note is the holder in due course. The contract is a new and independent one, and does not differ from the one implied in law upon the initial note. The defendants have alleged that the plaintiff surrendered a note bearing date May 10, 1916, made by the Jordan Company, and indorsed by these other defendants, with one B. M. Hibbard, and that Hibbard's indorsement was prior to that of the defendants O'Brien and Stone, and the defendants indorsed the note in suit in the expectation that the Hibbard estate would also become an indorser. The expectation on the part of the other indorsers that some representative of the Hibbard estate would indorse it is not a sufficient defense to this action. That fact does not constitute any infirmity in the note, or defect in the title of the one negotiating it. A note in the form of this one is negotiated when it is indorsed and delivered by any holder to the transferee,

and it makes no difference that the indorser is an accommodating party, so far as affecting the liability of such indorsers to the holder in due course. Even if such holder knows that one or all of the indorsers are accommodating indorsers, that does not change the indorser's liability. So, also, mere knowledge or reasonable belief on the part of the holder of the note that the several indorsers expected other accommodating parties to indorse it, even if the expectation is not realized cannot relieve the other indorsers of their obligation.

[4] The liability of the indorsers to the holder of the note is not affected by any agreement among the indorsers not appearing upon the note; therefore the right of cosureties to a contribution or the effect of the release of one surety upon the obligations of the others has no application in the case now before the court, whatever may be the rights and liabilities of the indorsers as between themselves.

There is no error. The other Judges concurred.

(24 Conn. 682)

SACHS v. NUSSENBAUM et al.

(Supreme Court of Errors of Connecticut.
July 28, 1918.)

1. APPEAL AND ERROR \S 77(1)—ORDERS APPEALABLE—"INDEPENDENT PROCEEDING"—"FINAL JUDGMENT."

An application under Gen. St. 1902, \S 857, to secure the reduction or dissolution of an attachment of real estate is an "independent proceeding," and the disposition of the application is a "final judgment" within Gen. St. 1902, \S 807, allowing appeals therefrom.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. APPEAL AND ERROR \S 842(1)—ORDERS APPEALABLE—QUESTION OF LAW.

Proceedings under Gen. St. 1902, \S 857, 858, for relief where attachments are alleged to be excessive, rarely present appealable questions because usually involving question of fact only, but an order may be based upon a decision in a matter of law as, for example, the question whether the judge has exceeded his authority.

3. PRINCIPAL AND SURETY \S 155—ACTIONS ON BOND—PLEADING.

A complaint in an action on a bond is insufficient as against the surety unless it shows that a condition precedent to liability has been satisfied.

4. ATTACHMENT \S 250—PROCEEDINGS TO REDUCE AMOUNT.

On application under Gen. St. 1902, \S 857, to secure the reduction of an attachment, the judge cannot examine the complaint to test its sufficiency to state a cause of action as against any defendant.

Appeal from Superior Court, Fairfield County; William M. Maltbie, Judge.

Application under Gen. St. \S 857, by the defendants in an action by Barnith Sachs against Jennie Nussenbaum and another to secure the reduction or dissolution of an attachment of real estate. From a judgment

dissolving the attachment as to the real estate of one of the defendants, plaintiff appeals. Error, and order of dissolution set aside.

Jennie Nussenbaum and Fanny Silverman are, respectively, principal and surety upon a bond given to the appellant December 20, 1917, pursuant to a judicial order and in substitution for a mechanic's lien for \$8,300 filed by him against the property of the principal obligor which was thereupon dissolved. The condition of the bond, after reciting the nature, existence, and amount of the lien, proceeds as follows:

"Now, therefore, if the said Nussenbaum shall pay or cause to be paid to Barnith Sachs or his assigns any judgment that may be rendered against her by any court of competent jurisdiction not exceeding the amount of \$8,300, the amount claimed under the lien with interest and costs, on demand, then this bond shall be void, otherwise to remain in full force and effect."

On December 31, 1917, Sachs instituted an action against the obligors on the bond, both principal and surety. The complaint set out the existence of the lien, its dissolution, and the substitution therefor of the bond in suit pursuant to an order of Judge Curtis. Judgment was asked (1) upon the bond in such an amount as the court might adjudge to have been secured by the lien with interest and costs and (2) for \$10,000 damages. In this action real estate of both defendants was attached. They thereupon brought an application under section 857 of the General Statutes to Judge Maltbie, and pursuant to that application the plaintiff was summoned to appear before him as prescribed in the statute and for the purposes therein specified. He appeared and after a hearing Judge Maltbie ordered that the attachment, in so far as it concerned the property of Jennie Nussenbaum, stand as made and that the attachment made of the property of the defendant Silverman be dissolved for the reason, in substance, that no apparent claim against her was stated in the complaint since she could not be made liable until a court had determined the amount secured by the lien and there had been a failure to pay it. The plaintiff, desiring to appeal from the order in so far as it directed the dissolution of the Silverman attachment, requested Judge Maltbie to make a finding of facts. The appellees thereupon filed their objections to compliance with such request claiming that no appeal would lie from the order. The objections were overruled, a finding made, and thereafter this appeal taken.

Frank L. Wilder, of Bridgeport, for appellant. Robert E. Deforest, of Bridgeport, for appellees.

PRENTICE, C. J. (after stating the facts as above). [1] On the threshold of this case we are met with the question of this court's jurisdiction raised by the appellee's objec-

tions to the allowance of an appeal from the order of dissolution. They then insisted, and now insist, that our statute authorizes no appeal from such orders. The statute governing the situation presented is section 807 of the General Statutes. It is there provided that:

"When the jurisdiction of any matter or proceeding is or shall be vested in a judge of the superior court * * * any party to such matter or proceeding who feels aggrieved by any of the decisions or rulings of such judge upon any questions of law arising therein, may appeal from the final judgment of said judge in such matter or proceeding, in the manner hereinbefore provided for an appeal from the judgments of said courts respectively, to the Supreme Court of Errors," etc.

Two conditions are thus fixed as conditions precedent to the right of appeal, to wit: First, that final judgment in such matter or proceeding has been rendered; and, second, that the judge has made a ruling or decision involving a question of law.

The proceeding before Judge Maltbie was one seeking relief from a claimed excessive attachment made in an action brought to the superior court. As such, jurisdiction over it was confined to a judge of that court. Rev. Gen. Stat. § 857. The court in which the action in connection with which the attachment was made was without power to act in the matter, and under the statute could not be given such power. The proceedings before Judge Maltbie were therefore not only in fact and form but also of necessity entirely independent of that action and not incidental to it. It began with the bringing of the application and ended with the order of dissolution. When that order was made, the matter was at an end, and the proceeding and parties were, save for the possibility of appeal, out of court. The order could not be regarded as in any sense an interlocutory one made in progress of the pending suit. That progress was not concerned with or in any way affected by it. The order made final disposition of a judicial or quasi judicial proceeding authorized by statute, and therefore was a "final judgment" within the meaning of our statutes regulating appeals. *Barber v. International Co.*, 74 Conn. 652, 657, 51 Atl. 857, 92 Am. St. Rep. 246; *Bunnell v. Iron Bridge Co.*, 66 Conn. 26, 37, 33 Atl. 533; *Fayerweather v. Monson*, 61 Conn. 431, 440, 23 Atl. 878.

[2] It is evident from a reading of section 857 and the following section that proceedings for relief in cases where attachments have been made which are alleged to be excessive will rarely present an appealable question. From the limited nature of the issue they present, the order made in them must in the great majority of cases involve the determination of questions of fact only and be conclusive. By possibility, however, the order may be based upon or involve a decision in a matter of law; as, for example, one as to the extent of the authority con-

ferred upon the judge and as to whether that authority has not been exceeded. That is the situation in the present case as the appellant presents it.

[3] While the reasons of appeal call in question the judge's power to do what he did, they do not in terms state the appellant's real grievance. Upon the face of their statement they appear to rest upon the proposition that the judge erred in concluding upon an examination of the complaint that the action, in so far as it concerned the defendant Silverman, was prematurely brought and that no judgment thereon under the facts disclosed could be obtained against her. Had it been open to the judge to pass upon the sufficiency of the complaint, we could not agree that his action was erroneous, as claimed by the appellant. The surety's obligation to the plaintiff was one solely on the bond which he signed. The extent of it was fixed by its terms and cannot be enlarged. Those terms create a condition precedent to her liability. The complaint fails to show that that condition had been satisfied. It was therefore insufficient to support a judgment against her.

[4] But that by no means ends the matter nor exhausts the question of power to which the plaintiff has appealed although not aptly. His real grievance, if he has one, arises from the fact that the judge in the exercise of the power conferred upon him by the statute did not limit himself to an inquiry as to whether or not the attachment made was excessive, in that the value of the property attached exceeded the plaintiff's apparent claim, but went further and subjected the complaint to an examination as upon demurrer to discover whether or not it stated a good cause of action against the applicants and whether or not in his opinion a judgment could be rendered against them in the action brought, and made his order upon his conclusion reached after such examination. This possible grievance underlies those set out in terms in the reasons of appeal and may fairly be said to be involved in them.

The statute, which prescribes the duty and power of the judge to whom applications for relief from excessive attachments are made, defines the conditions under which such relief may be given by him thereon. Those conditions are that the value of the property attached so far exceeds the plaintiff's apparent claim as to be excessive. When it is remembered that the application for relief is not to be made to the court having jurisdiction of the action to which the attachment is incidental or for that matter to any court, but to a judge sitting in chambers and powerless to adjudicate in the cause which is not before him, and when the long-accepted liberal policy of this state in the matter of attachments is borne in mind, there can be no doubt as to the meaning and intent of the language which the statute employs and as to the scope of the authority thereby conferred.

The subject-matter of the inquiry, which the judge is empowered to make as furnish-

ing the basis of his action, is limited to a comparison between the value of the property attached and the plaintiff's apparent claim. In arriving at the amount of this apparent claim, the judge is authorized to summon the plaintiff before him and call upon him to state under oath what its amount is, that he believes it to be justly due, and to furnish a bill of particulars or circumstantial statement of it. Doubtless he is also vested with authority to so far take cognizance of the complaint in the action as to inform himself not only of the demand for damages therein but also of the extent of the recovery which the plaintiff seeks and claims. In these ways he may seek to gain a true measure of the plaintiff's claim as it really is. But that is a very different thing from making a judicial examination of the complaint to test its sufficiency as a statement of a cause of action. That is for the court before which the action is pending to do in proper course, if so required. The office of the judge before whom the application is pending is to discover the amount of the plaintiff's apparent claim, and not to pass upon its legal validity or to weigh the chances of recovery upon it. Our statutes of long standing permit one who, however mistakenly, claims that he has a right of action against another, to institute an action against him and as ancillary to that action to make an attachment to secure his recovery. The validity of the claim made is left for the determination of the court. Until that determination is made the attachment may not be attacked upon the ground that the plaintiff has failed to state a claim which will stand the test which, in the course of the progress of the action, will be applied to it.

The language of section 858 furnishes a striking indication that the dissolution of an attachment for the weakness of the plaintiff's claim upon which he is seeking recovery was not within the legislative contemplation. It assumes that the plaintiff has an apparent claim, and the redress provided for is such release of attached property as will prevent the value of the property attached being so much in excess of that claim as to render it excessive. There is no suggestion of a discharge by the judge of an attachment in its entirety which would be the only logical relief if it was intended to afford relief in cases where the legal insufficiency or invalidity of the plaintiff's claim was disclosed upon the pleadings. Dissolution is provided for only in the event that the attaching creditor fails to appear in response to the citation to him. Under all other conditions it is the reduction of the attachment or release of a portion of the attached property which is spoken of.

A cogent reason in support of the limited provisions of the statute is to be found in the harsh consequences which might readily follow if attachments might be dissolved for no other cause than that the plaintiff's attorney had failed to draft a good complaint, or one which the judge mistakenly considered in-

sufficient. These consequences are too apparent to justify specific enumeration.

In the present proceeding, Judge Maltbie did not dissolve the attachment against the surety's property, for the reason that he found it excessive as being for an amount unreasonably large to secure the judgment against her which the plaintiff claimed to be entitled to or which might properly be rendered against her if the facts set out in the complaint would under the law sanction a recovery, but on the sole ground that an examination of the allegations of the complaint convinced him that the plaintiff could not have judgment for any amount against the defendant Silverman. In so doing he acted in excess of his powers.

There is error in so much of the order as dissolves the attachment made of the property of the applicant Silverman, and the same is set aside. The other Judges concurred.

(33 Conn. 57.)

MERLINO v. CONNECTICUT QUARRIES CO.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

1. MASTER AND SERVANT \S 371—WORKMEN'S COMPENSATION—INJURIES "ARISING OUT OF EMPLOYMENT."

Where a quarry employé stopping at a commissary maintained with the employer's consent was struck by a stone thrown from a blast and killed, the injury arose out of the employment, being within the danger zone created by the employer's business.

2. MASTER AND SERVANT \S 375(2) — WORKMEN'S COMPENSATION — SCOPE OF EMPLOYMENT.

A quarry employé, killed by a stone thrown by a blast after working hours while stopping at the commissary to converse with a fellow workman, was killed within the scope of his employment, where the commissary was maintained by the employer for the purpose of supplying the wants of the workman, and there was an implied invitation for workmen to stop there on their way home.

3. MASTER AND SERVANT \S 380—WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT.

Where a workman stopping at the commissary on his way home was struck by a stone thrown from a blast because of his failure to obey a rule to seek shelter when warned by a whistle, the failure to obey the rule, although perhaps negligence was not willful misconduct constituting a defense under the Workmen's Compensation Act.

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Proceeding under the Workmen's Compensation Act by Ernesto Merlino for compensation for the death of her husband opposed by the Connecticut Quarries Company, employer. Compensation was awarded. On appeal to the superior court the judgment was vacated, and the claim dismissed, and claimant appeals. Error, and cause remanded.

This is a proceeding under the Workmen's Compensation Act (Pub. Acts 1913, c. 138) by

Ernesto Merlino, widow and dependent of Eugenio Merlino, against the Connecticut Quarries Company. Merlino was employed in a quarry conducted by the employer respondent, and quit work at 5:30 p. m. when the quitting whistle blew. He went down a pathway to a commissary, situated upon premises controlled by the employer, carrying with him four empty boxes for firewood. At the commissary Merlino talked for a minute or two with another workman, declined an invitation to drink a glass of beer, and picked up his child, who had come to meet him. He then proceeded along a road leading to his dwelling. The commissary was conducted by an individual to whom the respondent gave the use of the land for that purpose, in order that his employes might obtain supplies at a point convenient to their work. It was the custom of the employer respondent to fire blasts about 10 minutes after work ended for the day, a warning being given by blowing a whistle five times, when it was expected that employes within the danger zone would seek shelter. On the afternoon in question the warning whistle was blown about 4 minutes after the quitting whistle blew, and the blasts were fired several minutes later. Merlino had then reached, on his way home, a point from 15 to 60 feet from the commissary, where he was killed by a stone thrown by the blast. Nearly 10 minutes elapsed between the quitting whistle and the blast, and Merlino might easily have been out of danger, if he had not stopped at the commissary, and had not incumbered himself with the boxes and child. The neighborhood of the commissary was more or less dangerous while blasting was going on. The commissioner awarded compensation, and the superior court, on appeal, vacated the award and dismissed the claim.

Peter Trenchl and J. Frank Sullivan, both of New Haven, for appellant. Harrison Hewitt and Charles E. Clark, both of New Haven, for appellee.

BEACH, J. (after stating the facts as above). [1, 2] The injury arose out of the employment, at a place within the danger zone created by the business of the employer. That being so, the only question remaining is whether it was fairly consistent with the performance of the contract of employment that Merlino should be at or about the place at or about that time. In *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D, 86, we pointed out that, where an injury arising from a risk of the business is suffered while the employé, though not doing the work for which he was employed, is still doing something which the employer has expressly or tacitly consented that his employes might do, incidentally to their employment, at that time and place, the injured employé is within the scope of

his employment. That rule is applicable to this case, and it leads to the inquiry whether the respondent had consented that his employes, on quitting work, might stop at the commissary, and so remain within the danger zone created by the business, for the space of 10 minutes after the quitting whistle blew.

While there is no explicit finding on this precise point, it is a necessary inference from the findings that the employer had so consented. Thus it is found that the advantage which the employer derived from the commissary was that it supplied the wants of its employes at a point convenient to their work and their homes, and that the commissary and the cellar under the commissary and the west side of the commissary afforded shelter from flying rock. It is also found that at the sound of the warning whistle it was the duty of employes who were not out of range to seek shelter, and general instructions had been issued to that effect. There is no finding which indicates that the commissary was not customarily open for business at quitting time. The necessary inference from this state of the record is that employes were expected to patronize the commissary in going from their work, and that the resultant probability of their presence near the commissary while blasting was going on was recognized, and to some extent provided for, by the rule about taking shelter.

[3] Merlino's failure to obey this rule was a careless and perhaps a negligent omission; but it was not such serious and willful misconduct as amounts to a defense under the Workmen's Compensation Act. The superior court based its judgment, vacating the award upon the proposition that, because the employer had given the men ample time to leave the danger zone after stopping work, he was absolved from liability for injury to one who—unhindered by any agency beyond his own control—remained on the premises beyond the time allowed him to depart. This is another way of stating the fundamental rule that the employer's liability under the act is coextensive with and limited by the contract of employment; but, as applied to this case, it fails to take sufficient note of the fact, pointed out in *Mann v. Glastonbury Knitting Co.*, supra, that the contract of employment includes all incidental terms which may have become annexed to it by the consent of the employer.

In this case the employer co-operated in the maintenance of a commissary, kept open at quitting time within the danger zone created by its business, and in effect it invited its employes to stop there on their way home. Under these circumstances, it cannot fairly be denied that one who met his death, because he was thus induced to linger a few minutes within the danger zone,

was fairly within an agreed incidental term of his contract of employment.

There is error, and the cause is remanded, with direction to set aside the judgment vacating the award, and to enter judgment affirming the award of the commissioner. The other Judges concurred.

(261 Pa. 36)

MARTIN v. SOUTHERN PENNSYLVANIA TRACTION CO.

(Supreme Court of Pennsylvania. April 3, 1918.)

1. STREET RAILROADS §117(22)—DEATH OF PEDESTRIAN—QUESTION FOR JURY.

In an action against a street railway for death of plaintiff's husband in attempting to cross a highway, evidence held not to warrant court in disposing of the case as a matter of law on the issue of contributory negligence.

2. DEATH §103(3)—ACTION FOR WRONGFUL DEATH—NEGLIGENCE—QUESTION FOR JURY.

In action for death of plaintiff's husband, where from one part of her testimony it appeared that deceased was guilty of contributory negligence, but from another part that he was not, and there were no other witnesses, the case was for the jury.

3. NEGLIGENCE §122(2) — CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In action for personal injuries, plaintiff is not required to disprove contributory negligence, but only to make out a case clear of it.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Emma O. Martin against the Southern Pennsylvania Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, O. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

J. B. Hannum, of Chester, for appellant. Henry J. Scott, of Philadelphia, and Albert Dutton MacDade, of Chester, for appellee.

STEWART, J. On the evening of January 14, 1915, the plaintiff's husband, accompanied by herself, was walking to his home from Darby, using the sidewalk along the highway upon which the defendant's line of electric railway is operated. In attempting to cross over the highway, upon a crossing in common use, he was struck by an approaching car on defendant's line, and so seriously injured that within a short period thereafter he died in consequence. The action was by the widow to recover damages from the traction company, and the negligence charged consisted "in running the car at a high and unlawful rate of speed, failing to give proper signals of warning of the approach, and in failing to have the car under such control that it could be brought to a stop within a reasonable distance." The case was submitted to the jury, and a verdict for plaintiff returned in the sum of \$8,500. A motion for a new trial and for judgment non obstante followed. The court di-

rected that a remittitur be filed as to all of the verdict in excess of \$5,500, otherwise making absolute the motion for a new trial. The remittitur was filed, and defendant then appealed.

[1] The specifications of error are confined to the refusal by the court of defendant's second point, which asked for binding instructions, and the refusal of its motion for judgment non obstante. Together these raise but a single question: Does the evidence submitted by the plaintiff show a sufficient cause of action clear of contributory negligence? If it does, binding instructions were impossible, and the case was necessarily for the jury.

[2] First, as to the negligence of the defendant. The plaintiff herself was the only witness to the occurrence. Waiving for the present the contradictions in her testimony as to the immediate circumstances—afterwards to be referred to—she testified that the accident occurred at about quarter of 6 in the evening, and that it was dark; that she saw her husband as he approached the track in his attempt to cross over; that before making the attempt he stopped where he had a view of the track so far as the darkness of the evening would permit; that he looked both up and down the track, and that she did the same, but neither could see a car approach; that both listened and heard nothing to warn any one; that neither gong was sounded nor whistle blown; and that when the husband had advanced over the nearest track he was struck by a car running at great speed. She further says she was following her husband and was within two feet of the car when he was struck. Another witness, Lance, testified that he passed over the crossing in advance of plaintiff's husband, and that he had barely got across when the car that struck plaintiff's husband passed at a speed which he—formerly a locomotive engineer—estimated at about 25 miles an hour; that before he entered on the crossing he looked and listened, saw no car approaching, and heard no signal or any warning. This was the testimony offered by the plaintiff. Aided by the presumption that the deceased had exercised proper vigilance in attempting the crossing, it would be quite sufficient to establish a prima facie case of negligence. Did it disclose a case clear of contributory negligence? That depends entirely upon which of the conflicting statements plaintiff makes as to the place where she was standing with respect to her husband before and when the collision occurred is accepted as the true narrative. In one place she says that she was within two feet of the car and the husband immediately in advance of her, while in another place she says the husband had left her on the sidewalk and had started to cross the street when she looked and saw him struck by the

car; that he was then on the first track while she was back on the sidewalk a half dozen steps away from the crossing where she says they had stopped, looked, and listened. The witness on further examination testified that she and her husband both stopped just where they came to the point where he started to cross, looked both ways, and saw no car. In view of this indefiniteness and uncertainty it was not for the court to deduce a conclusion that the deceased was negligent in the choice of a place at which to stop and look. Rather it was for the jury to decide where the actual place was.

[3] The case of *Ely v. Pittsburgh, O., C. & St. L. Ry.*, 158 Pa. 233, 27 Atl. 970, is exactly in point. There the contradictions in the plaintiff's testimony were no less marked than here with respect to the opportunity he had of seeing the approaching train which collided with him. Mr. Justice Mitchell in his review of that case said:

"This testimony was contradictory, and the net result of it by no means clear. On part of it he was plainly entitled to go to the jury; on the other part equally plainly he was not. Under these circumstances the case must go to the jury, whose province it is to reconcile conflicting statements, whether of the same or different witnesses, or to draw the line between them and say which shall prevail. Had the testimony referred to a subject as to which the burden of proof was on the plaintiff, the result might have been different, for the court is not entitled to submit evidence which will merely enable a jury to guess at a fact in favor of a party who is bound to prove it. But in cases like the present, the plaintiff is not required to disprove contributory negligence, but only to make out a case clear of it. Unless, therefore, his negligence appears affirmatively, he is entitled to go to the jury on the general presumption against it, and so likewise where the evidence is conflicting as it was here. The weight of the evidence appears to us very clearly against the plaintiff on this point, but that was for the jury and the court below."

That was the condition here. The weight of the evidence appears to us very clearly against the plaintiff on this point, nevertheless the presumption against negligence and the conflict in the evidence necessarily carried the case to the jury.

The assignments are overruled, and the judgment is affirmed.

(261 Pa. 72)

HARRIS CHEMICAL CO. v. F. W. TUNNELL & CO., Inc.

(Supreme Court of Pennsylvania. April 3, 1918.)

SALES — 152 — REFUSAL TO PERFORM — RIGHTS OF SELLER.

In action for breach of executory contract for sale of potash, time for delivery expiring July 1, 1915, potash to be delivered as ordered by buyers, where only one shipment was ordered and no further shipment directed until the afternoon of June 30th, and there was no time left for delivery, defendant could cancel the contract, and plaintiff could not recover for failure to deliver.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Harris Chemical Company, to the Use of Peters, White & Co., against F. W. Tunnell & Co., Incorporated. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKE, FRAZER, and WALLING, JJ.

John Arthur Brown and Henry P. Brown, both of Philadelphia, for appellant. John Weaver, of Philadelphia, for appellee.

STEWART, J. The transaction out of which this controversy arises is evidenced by a written contract entered into March 29, 1915, under the terms of which the defendant company sold to the plaintiff company 300 tons muriate of potash of a certain refined quality at the price of \$200 per ton, to be delivered f. o. b. Pennsylvania Railroad shipper's works, Philadelphia, in carload lots of not less than 15 tons, as ordered out by buyers. The contract contains the following provision:

"Buyers to give the seller reasonable notice of all shipments wanted. Final shipments under this contract to be completed by May 30, 1915, and any balance unshipped on the latter date through failure of buyers to furnish instructions, may, at the option of the sellers, be either shipped on this contract or canceled."

By supplemental contract dated May 21, 1915, the time for delivery of the potash was "extended until and completed by July 1, 1915, instead of May 30, 1915, as given in the original contract." On April 30th following the execution of the original contract, defendant shipped, upon order of the plaintiff, 15 tons of the amount sold. Plaintiff never ordered further shipment until June 30th following, and none was meanwhile shipped. On the date last mentioned plaintiff notified the defendant by writing that it had disposed of the remaining 285 tons which it had agreed to take under contract of March 29th and the extension of May 21st, and had assigned all its interest therein to Peters, White & Co. The writing thus concludes:

"This will be handed to you by Mr. Ellis Jackson representing Peters, White & Co., who will make the necessary arrangements with you, either for shipping or for holding on storage for their account."

This communication was delivered by Mr. Jackson on the morning of the 30th of June. Under same date, but not delivered until about 4 o'clock in the afternoon, this further communication was delivered to the defendant company:

"Gentlemen: We learn from Mr. Ellis Jackson, the representative of Peters, White & Company, of New York, with considerable astonishment, that you have refused to recognize the assignment which we made to that firm of our contract with you, so far as the balance of 285 tons of muriate, under our contract of March 29, 1915, with you and the extension thereof is

concerned. We now notify you that in view of the fact that we have sold this product to Peters, White & Company, your refusal to deliver may result in a claim or suit against us for breach of contract and that if you persist in your refusal it is our intention to hold you to the repayment of any damage we may suffer thereby. In order that there may be no misunderstanding we now give you notice, in which Mr. Jackson representing Peters, White & Company joins, to ship the balance of this material, 285 tons in accordance with the terms of the contract to Peters, White & Company, New York City, New York, who will take up the sight draft with bill of lading and certificate of analysis attached, in accordance with the terms of that contract. If you do not comply with this request we again call your attention to the fact that we will hold you strictly responsible for any loss that may accrue. You may, of course, have any reasonable time in which to make the shipment. [Signed] Harris Chemical Company, by Edward J. Hasse, Treas. Ellis Jackson, Representing Peters, White & Company."

Under date of July 1, 1915, the defendant Company replied to this communication as follows:

"Harris Chemical Company, Gentlemen: Your letter of the 30th ult., which is also signed by Ellis Jackson representing Peters, White & Co., was received by us between 4:30 and 5 o'clock p. m. yesterday. Under the terms of the contract dated March 29, 1915, and the supplement dated May 21, 1915, it is our privilege to cancel it in so far as it relates to any balance of muriate of potash unshipped by July 1st, because of the failure on your part to give us such notice as would reasonably enable us to ship by that date. Your letter was the first notice received by us that you desired shipments to be made of the balance of 285 tons of muriate of potash, and it cannot be considered as 'reasonable notice or all shipments wanted' as provided in the contract. We, therefore, exercise our option to cancel the contract for the balance of the 285 tons of muriate unshipped. [Signed] F. W. Tunnell & Company, Inc."

The present action was brought 25th of August following, to recover from defendant \$15,675, for alleged breach of contract, the plaintiff claiming this to be the difference between the contract price of the potash and the market price of the same at the time of the alleged breach, with interest added. The trial resulted in a verdict for plaintiff in the sum \$5,765.33. A motion was filed by defendant for a new trial, since withdrawn, also for judgment non obstante on the whole record, which was refused, and judgment accordingly was entered on the verdict. The appeal brings nothing before us for our consideration but the refusal of the court to sustain the defendant's fifth point, which asked for binding instructions.

While the issue was single, namely, whether the plaintiff gave defendant reasonable notice of the shipment it wanted—the delivery of 285 tons of the potash remaining unshipped—this inquiry can be met only as some unascertained facts are first determined. The first and most important inquiry must be to ascertain just when the demand for shipment was made. The plaintiff averred in its statement of claim filed that on the morning of the 30th of June the use plaintiffs notified the defendant company of the assign-

ment, and demanded immediate shipment of 285 tons of muriate of potash, which the defendant refused to deliver; and that again during the afternoon of the 30th of June the use plaintiff made another demand upon the defendant to deliver the said 285 tons, which the defendant again refused to deliver. It seems to be conceded that plaintiff's right to demand shipment continued until the expiration of June 30th, at midnight, conditioned, however, that there was left sufficient time between the hour when the demand was made and midnight of the same day to reasonably admit of a fulfillment by defendant of its contract obligation, which was to deliver f. o. b. in cars upon the railroad sidings at its plant, 285 tons of muriate of potash consigned to the plaintiff. In view of the second question, which is yet to be considered, the practicability of making this delivery in the time intervening between the demand and the close of the last hour of the day, the importance of fixing definitely when the demand was first made becomes apparent. There was no disagreement as to the fact that in the afternoon of that day, between 4 and 5 o'clock, a written demand for the shipment was made. Defendants insist that this was the first and only demand. In support of plaintiff's averment that the demand was made during the morning of the 30th, plaintiff called to the stand Mr. Ellis P. Jackson, who, as their representative in the transaction, had visited the defendant company at its place of business, to negotiate with respect to certain details, on the 29th as well as 30th of June. Whatever conversation occurred touching the shipment of the 285 tons occurred between Jackson and one or other of defendant's firm. Upon Jackson's testimony, and that alone, plaintiff relied to show an order for shipment given during the morning of the 30th. How far this testimony fell short of the purpose for which it was offered may be seen in witness' answers upon cross-examination. He was asked this question, "Did you give shipping instructions on the morning of June 30th?" His answer was, "I was there prepared to give shipping instructions." The examination proceeded:

"Q. Did you give shipping instructions on the morning of June 30th? A. Mr. Tunnell sort of turned me down so flatly that I didn't have a chance to give any. Q. You did not give any shipping instructions? A. I was there prepared to. I was their representative for that purpose. I could have a certified check there and paid for the whole stuff. Q. I asked whether or not you gave shipping instructions on the morning of June 30th? A. I didn't have a chance to give them. Q. Then you didn't give them? A. If I didn't have a chance to give them I did not give them. Q. I understand the first shipping instructions were given in the second letter of June 30th? A. Yes. Q. That was presented when? A. That was presented in the afternoon. I judge about half past 3 or 4 o'clock."

Here we have express and repeated denials by the person, who, as claimed by the

plaintiff, made the demand during the morning of the 30th for shipment, that during the conversation he made any such demands, and the positive statement that the first demand was made by the letter which he said he delivered between 3 and 4 o'clock of the afternoon. There was not a particle of evidence outside the testimony of this witness in the whole case in support of the plaintiff's claim.

We come now to the second inquiry: Was it reasonably practicable for the defendant company, between the time when it was served with the demand, about 4 o'clock on the afternoon of the 30th, to comply with the demand then made by having on board of cars at its sidings, ready to be shipped, 285 tons of potash? The words "reasonable notice" as they occur in the contract can admit of no other meaning than we have here given them. They can have no reference to anything but the time required to load the particular shipment demanded upon the cars at defendant's siding. The time required would manifestly depend on the size of each shipment; what would be reasonable time for shipment of 15 tons would manifestly not be reasonable time for shipment of 285 tons. The surroundings of the parties at the time of making the contract, and the subject-matter of the contract, are always admissible to ascertain the intention and understanding of the parties, if the expression in the contract be in any measure disputed. These, as said in *Bole v. New Hampshire Fire Ins. Co.*, 159 Pa. 53, 28 Atl. 205, form a sort of context which may be resorted to if there is any question to aid in arriving at the meaning of the contract. As we read this contract, it is entirely free from ambiguity, and can be read intelligently without recourse to extraneous conditions. We derive from the language used, with respect to the mutual obligations assumed, a covenant on the part of the buyer to receive and pay for 300 tons of muriate of potash, at such times, previous to the 1st day of July, 1915, and in such manner as the buyer may direct, giving to the seller reasonable notice of the demand, to the end that the seller might have reasonable opportunity, in view of its appliances and facilities—assumed to be such as are ordinarily in use—to meet its covenant, which was to place f. o. b. on cars upon such railroad sidings as it had in its plant for shipping the potash ordered. We see nothing in the contract to indicate that other facilities than those regularly employed by the seller in such cases would have to be supplied to expedite the shipment of any order received. The contention of the defendant is that notice of the demand for the shipment of 285 tons of potash, received at 4 o'clock on the afternoon of June 30th, did not afford reasonable time, within the meaning we have given these words, for the shipment to be made within

the period fixed by the contract, and that its default in making the shipment is chargeable solely to the delay of plaintiff in giving notice of its demand for the shipment. On the other hand, the plaintiff insists that the notice of the demand was given in ample time to admit of its shipment within the period. With respect to this inquiry the burden rests on the plaintiff, since it is always for the plaintiff to show performance of the contract by himself when he seeks to recover for a breach of the other. The case was so proceeded with, the plaintiff introducing the question. He who seeks to compel performance by others must show his right to ask it by showing his own performance of all that is preliminary. Mint's Appeal, 128 Pa. 163, 18 Atl. 509. It is this principle that governs in cases where the action is for breach of contract. If the contract, as here, discloses prior conditions to be performed by the plaintiff, and on which defendant's performance depended, there can be no recovery except as the plaintiff avers and proves performance on his part. The first witness interrogated on the subject was Frederick W. White, one of the partners in the use plaintiff's firm. On cross-examination he was asked this question:

"I understand you to say that in your opinion it would be possible for Tunnell & Co., receiving notice to ship on June 30th, in the morning we will say, at the first visit at 10 o'clock to have shipped during the day of June 30th the 285 pounds of potash? A. I do not know what their facilities are."

The cross-examination thus proceeded:

"Q. I understand you to say that you are prepared to testify that Tunnell & Co., having received a notice of this kind, we will say on June 30th, could have delivered 285 tons of potash on June 30th? A. I think they testified that they made no efforts themselves to get the car. Q. I am asking you what you are prepared to testify to? A. I do not know what their facilities are. I have never been to their factory. I have testified that there are factories that could deliver a large quantity of muriate of potash in a few hours. Q. You are not familiar with the Tunnell Company's factory? A. I have never been in their factory. Q. You do not mean to tell us that Tunnell & Co. would have been able to deliver after the receipt of the notice on June 30th the balance of 285 tons on June 30th? A. I just told you I have never been to their factory, and I do not know what facilities they have. Q. You cannot give us any opinion on that point? A. I do not know anything about it."

The next witness interrogated was Ellis Jackson. On cross-examination he testified as follows:

"Q. Do I understand you to say that you think Tunnell & Co. could have delivered 285 tons of potash shipped on cars on June 30th after the receipt of that notice between half past 3 and 4 o'clock? A. We shipped soda ash, which is the nearest thing to bicarbonate of potash that I know, which comes in 250-pound bags, and we have repeatedly shipped in one day's notice 400 to 500 ton. This is the same kind of stuff exactly, and if I had sold 285 tons of soda ash, and somebody called me on the 30th of June, I would have got off as

much as I could, and if I didn't get it all off that day, I would the next. It is the intent of these things it seems to me is the right sort of thing. Q. Do you think Tunnell & Co., I will repeat, could have prepared and shipped 285 tons of muriate of potash between half past 3 and 4 o'clock on June 30th at the close of the working day on that date? A. That is an hour and a half.

"The Court: It is midnight of that day. The legal day is midnight. Q. We will say midnight. A. I have worked until away in the morning. For an hour and a half you could not do it. Q. From 2:30 to midnight? A. They could have gotten 200 tons off by that time. Q. By midnight? A. Yes."

This was the whole of the testimony offered by the plaintiffs on this branch of the case. Its insufficiency is seen at once. Neither witness professed any knowledge of the facilities of the defendant company. The answer of the witness last named seemed to imply an acknowledgment of the impracticability of making the shipment by midnight when he said:

"If I had sold 285 tons of soda ash and somebody called me on the 30th of June, I would have got off as much as I could, and, if I didn't get it all off that day I would the next"

—overlooking and disregarding the fact that under this contract the defendant company was not obliged to put any of the potash on board the cars after midnight of the 30th, since the contract had then expired, and the parties had been left to their remedies. No more could the requirement of the contract have been met by loading a part of the shipment required than by loading none. We have no hesitancy in pronouncing as matter of law, viewing with greatest liberality the evidence offered by the plaintiff that it failed to show such performance of the obligation it assumed under the contract with respect to notice of its demand for shipment as entitled it to recover in this case. The court below should have so held. It was error, therefore, to refuse defendant's request for binding instructions.

The judgment is reversed, and judgment is now entered for defendant.

(70 N. H. 20)

STATE v. BYRON.

(Supreme Court of New Hampshire. Rockingham. June 29, 1918.)

1. BASTARDS \S 16—SUPPORT.

The father of a bastard is not entitled to the custody or the services of the child, and is therefore not chargeable with his support, in the absence of statute or contract, giving the right or imposing the duty.

2. BASTARDS \S 17½, New, vol. 12 Key-No. Series—SUPPORT.

Where the father of a bastard child has not been ordered, in proceedings brought for that purpose, under Pub. St. 1901, c. 87, to pay for the support of the child he cannot be convicted, under Laws 1913, c. 57, § 1, for willful neglect or refusal to support.

Transferred from Superior Court, Rockingham County; Allen, Judge.

Arthur Byron was indicted for nonsupport of his illegitimate child, and the question whether the prosecution could be sustained was transferred in advance of trial without a ruling. Case discharged.

William H. Sleeper, of Exeter, Co. Sol., for the State. Scammon & Gardner, of Exeter, for respondent.

WALKER, J. The statute upon which the prosecution is based (Laws 1913, c. 57, § 1) is as follows:

"Any person who shall without cause, desert or willfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances, or any, person who shall without lawful excuse desert or willfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate minor child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime and on conviction thereof shall be punished by fine not exceeding three hundred dollars (\$300) or imprisonment for a term not exceeding fifteen months, or both such fine and imprisonment in the discretion of the court."

[1] The respondent claims that, as he has not been adjudged guilty under the bastardy statute (P. S. c. 87, § 1), and ordered to contribute toward the support of the child, he cannot be found guilty of deserting or neglecting or refusing to support the child, under the statute quoted. That the father of a bastard is not entitled to the custody or the services of the child, and is not chargeable with its support, in the absence of a statute or contract giving him the right to the custody or imposing upon him the duty of support, cannot be seriously controverted. *Hudson v. Hills*, 8 N. H. 417; *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499; *Plymouth v. Haverhill*, 69 N. H. 400, 401, 46 Atl. 460; *Friesner v. Symonds*, 46 N. J. Eq. 521, 527, 20 Atl. 257; 7 C. J. 955.

[2] But by section 4 of the act for the maintenance of bastard children (P. S. c. 87) he may be ordered, upon proceedings brought for the purpose, to pay a reasonable sum to the mother or to the selectmen of the town liable for the maintenance of the child, to be applied for such maintenance. A statutory duty is thus imposed upon him, under the order of the court, to support his illegitimate child. *Brown v. Mansur*, 64 N. H. 39, 40, 5 Atl. 768. It is unreasonable to assume that the Legislature of 1913 intended to create another and independent statutory duty of support. One purpose of the statute was to make it a crime for a person to fail to support his or her illegitimate minor child under the age of 16 years who may be in destitute circumstances, when such person is under a legal duty to care for the child, or when in the language of the statute no "lawful excuse" exists for the parent's neglect. Clearly it would be a "lawful excuse," if it appeared in a given case that the respondent, though he might be the natural parent of the

child, was under no legal duty to furnish it with adequate support. It was not the legislative intention to impose a new and independent duty upon the fathers of illegitimate children, but to recognize and enforce such duties of maintenance as already existed. If, for instance, the respondent in bastardy proceedings has performed the order of the court by paying to the mother certain sums of money for the support of the child, a reasonable construction of the statute would not authorize a criminal prosecution against him for neglect to support the child found to be in needy circumstances; for no such legal duty would rest upon him. When no duty of support rests upon the father, the statute was not intended to apply; and in such a case no crime is committed. In the case of the father of a legitimate child, from whom the mother has obtained a divorce, custody of their child, and alimony for the support of herself and child, it would seem that he would not be liable to prosecution, if the needs of the child were not provided for by the mother. Other instances might be suggested, tending to show that it was the violation of an existing legal duty of the parent that the enactment of the statute was intended to prevent by declaring it to be a crime.

As, therefore, it appears that the respondent was under no legal duty either by statute or contract to support the child, of which he is alleged to be the natural father, the prosecution cannot be sustained. Case discharged. All concurred.

(79 N. H. 520)

HAYWOOD v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Belknap. June 29, 1918.)

RAILROADS §348(10) — **CROSSINGS** — **CONTRIBUTORY NEGLIGENCE**.

In an action for death at a railroad crossing, evidence held sufficient to sustain finding that plaintiff was not negligent, in that he relied upon the customary conduct of the defendant in running its trains at a certain speed over the crossing.

Transferred from Superior Court, Belknap County; Sawyer, Judge.

Action by Harold E. Haywood, administrator of the estate of William E. Pickard, deceased, against the Boston & Maine Railroad. Verdict for plaintiff. Transferred upon defendant's exceptions. Exceptions overruled.

Shannon & Tilton, Frank M. Beckford, and Charles B. Hibbard, all of Laconia, for plaintiff. Jewett & Jewett and Theo. S. Jewett, all of Laconia, for defendant.

PEASLEE, J. The evidence in this case is somewhat conflicting, and presents opportunity for widely differing conclusions as to what Pickard's conduct was at and just before the time of the accident. The question

argued is whether a finding could be made which would be consistent with the exercise of due care on his part.

He was 13 years old. It could be found that he was familiar with the crossing; that it was the defendant's rule to limit the speed of trains at that point to 15 miles an hour, while on this occasion the speed was 35 miles; that as Pickard walked across the track he looked at the approaching train, and had no idea that he was in danger; and that another step would have put him in a place of safety. The plaintiff's case is thus brought within the rule that due care can be found from the party's reliance upon the customary conduct of others. *Minot v. Railroad*, 73 N. H. 317, 61 Atl. 509; *Id.*, 74 N. H. 230, 66 Atl. 825.

No question is made as to the sufficiency of the evidence of the defendant's fault, and the case was properly submitted to the jury.

Exceptions overruled. All concurred.

(79 N. H. 53)

POPE et al. v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Belknap. June 29, 1918.)

1. RAILROADS §481(1) — FIRES — ACTION — EVIDENCE.

That the occupants of plaintiff's buildings, claimed to have been burned by defendant railroad, used liquor to excess, sold it on the premises, concealed in the hay in the barn, and had been seen to search for it with a lighted match, is relevant to the issue of cause of the fire.

2. TRIAL §55—RECEPTION OF EVIDENCE—EXCITING PREJUDICE.

The test of whether evidence should be excluded because calculated to excite prejudice is whether the prejudice is undue.

3. TRIAL §55—RECEPTION OF EVIDENCE—EXCITING PREJUDICE.

The issue of whether evidence is calculated to excite undue prejudice, relative to excluding it for that reason, is one of fact.

4. APPEAL AND ERROR §992—RECEPTION OF EVIDENCE—EXCITING PREJUDICE.

There being evidence to sustain the court's findings that admitted evidence would probably aid the jury in its search for the truth, exception to its admission as calculated to excite prejudice must be overruled.

5. TRIAL §133(1)—MISCONDUCT OF COUNSEL—QUESTION OF FACT.

Whether counsel was guilty of misconduct in asking incompetent questions, and, if so, whether it produced the verdict, are questions of fact.

6. APPEAL AND ERROR §1060(2) — HARMLESS ERROR—MISCONDUCT OF COUNSEL—FINDINGS.

Verdict will not be set aside because of any misconduct of counsel in asking incompetent questions, unless it be found that this produced the verdict.

7. APPEAL AND ERROR §930(2)—PRESUMPTION—OBEYING INSTRUCTIONS.

It will be assumed, in the absence of a finding to the contrary, that the jury obeyed the court's instruction to pay no attention to what counsel said.

8. APPEAL AND ERROR §1050(1)—REVIEW—RELEVANT HEARSAY.

It is not usual for the Supreme Court to disturb a verdict merely because a witness was asked a question calling for relevant hearsay; the objection being to form, not substance.

9. TRIAL §110—MISCONDUCT OF COUNSEL—REPETITION OF QUESTION.

Ruling that defendants could not show what witness had heard about a woman setting a fire is not a ruling that it could not show by competent evidence that she set the fire, so that the further question whether witness knew of the woman is not an offense against the law of the trial.

10. APPEAL AND ERROR §206(2)—IRRESPONSIVE ANSWER—OBJECTION AT TRIAL.

The Supreme Court will not disturb a verdict merely because of incompetent matter in irresponsible answer; but instruction to disregard it must have been requested.

Transferred from Superior Court, Belknap County; Sawyer, Judge.

Action on the case by J. Frank Pope and another against the Boston & Maine Railroad for burning of plaintiffs' buildings. Verdict for defendant, and case transferred on plaintiffs' exceptions to evidence and remarks of defendant's counsel. Exceptions overruled.

Sweeney & Cox, of Lawrence, Mass., Stevens, Couch & Stevens and Martin & Howe, all of Concord, and Owen & Veazey and Charles B. Hibbard, all of Laconia, for plaintiffs. Jewett & Jewett and Theodore S. Jewett, all of Laconia, for defendant.

YOUNG, J. [1-4] The evidence admitted subject to exception was relevant to the matter in issue; that is, the facts the occupants of the plaintiffs' buildings used liquor to excess, sold it on the premises, concealed it in the hay in the barn, and had been seen to search for it with a lighted match, all tended to the conclusion that they might have set the fire in question. The objection, and the only objection, that can be urged against the admission of these facts, is that they were calculated to excite prejudice. The test to determine whether evidence should be excluded for that reason is to inquire whether the prejudice it excites is undue. The issue raised by that inquiry is one of fact, consequently the plaintiffs' exception to the admission of evidence must be overruled, for it cannot be said there is no evidence to sustain the court's findings that this evidence would probably aid the jury in its search for the truth.

[5-8] A witness the defendant's counsel was cross-examining testified, without objection, that he had heard that one of the occupants of the plaintiffs' premises burned another set of buildings; but, when counsel asked him if he had heard she did it by throwing a lamp at the man with whom she was living, the plaintiffs objected, and the court sustained their objection, and directed

(133 Md. 208)

the jury to pay no attention either to what the witness said he had heard or to the question objected to. The plaintiffs contend that what the defendant's counsel did rendered the trial unfair and that the verdict should be set aside for that reason. Whether the defendant's counsel was guilty of misconduct, and, if he was, whether it produced the verdict, are both questions of fact. If he knew when he asked these questions that they were incompetent, and asked them for the mere purpose of prejudicing the jury against the plaintiffs, the court should discipline him; but it does not necessarily follow from the fact, if it is a fact, that counsel was guilty of misconduct, that the verdict should be set aside. Whether that should be done depends on how the court finds the fact as to whether his misconduct produced the verdict. But, whatever the fact may be, this exception must be overruled as the case stands, for the court directed the jury to pay no attention to what counsel said, and it will be assumed, in the absence of a finding to the contrary, that the jury obeyed the court's instruction. In short, the fact, if it were the fact, this woman burned another set of buildings by throwing a lamp at the man with whom she was living was relevant to the issue of the cause of the fire in question, and it is not usual for this court to disturb a verdict merely because a witness is asked a question which calls for relevant hearsay, for such an objection is to form, not substance.

[9] The plaintiffs also complain because defendant's counsel asked a witness whether he knew there was such a woman at the time of the fire in question. They based this complaint on the proposition that the court had ruled that what happened at the other fire was inadmissible, and that this question was an offense against the law of the trial. The difficulty with this contention is that it is not founded on fact. What the court ruled was that the defendant could not show what the witness had heard about the woman setting the other fire, not that they could not show she set it by competent evidence.

[10] They also complain of the witness' answer to this question. The answer was irresponsible, and this court will not disturb a verdict merely because incompetent matter is brought to the jury's attention in that way. If they thought the answer was prejudicial, they should have asked the court to instruct the jury to disregard it. *Wheeler v. Contocook Mills*, 77 N. H. 551, 94 Atl. 265. No reason has been suggested, and none is apparent, why the plaintiffs' exception to the opening statement of defendant's counsel should not be overruled.

Exceptions overruled. All concurred.

DAVISON CHEMICAL CO. OF BALTIMORE COUNTY v. BAUGH CHEMICAL CO. OF BALTIMORE COUNTY.
(No. 35.)

(Court of Appeals of Maryland. June 20, 1918. Motions for Rehearing and Modification of Opinion and Mandate Denied July 30, 1918.)

1. CONTRACTS §147(1)—CONSTRUCTION.

In arriving at the intention of the parties to a contract, the court must regard the language employed, the subject-matter, and the surrounding circumstances.

2. SALES §69—SALE OF ACID—CONSTRUCTION OF CONTRACT—"CHAMBER ACID."

"Chamber acid," in a contract for the sale of sulphuric acid, to run a number of years, held to refer to sulphuric acid made from pyrites, almost universally employed in the manufacture of acid phosphate, to the production of which alone the seller's plant was adapted, to the knowledge of the buyer.

3. SALES §181(11)—DUTY OF SELLER—SUFFICIENCY OF EVIDENCE.

In suit by one chemical company against another to compel specific performance of contract to deliver sulphuric acid, evidence held to show defendant exercised all reasonable diligence in efforts to secure pyrites necessary to enable it to comply with obligation to plaintiff.

4. SALES §150(1)—PRODUCT OF PLANT—DUTY OF SELLER.

Where a chemical company contracted to deliver to another company sulphuric acid, the product of its plant, it was not required to purchase acid from other manufacturers in order to make deliveries, but was bound to make every reasonable effort to secure raw material wherewith to manufacture it, and to pay any reasonable sum necessary.

5. SALES §172 — OBLIGATION OF SELLER—COST OF RAW MATERIAL.

Where a chemical company contracted to sell sulphuric acid made from pyrites by it at a given price, the fact that the price of pyrites arose sharply thereafter, on account of war conditions, did not release the company from its duty to perform.

6. SALES §181(11)—DUTY OF SELLER—DILIGENCE—EVIDENCE.

In suit for specific performance of a contract to deliver sulphuric acid, evidence that other manufacturers were able to secure some pyrites as raw material is not conclusive evidence that defendant company, by reasonable diligence, could have obtained enough ore to meet its obligations.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

Suit by the Baugh Chemical Company of Baltimore County against the Davison Chemical Company of Baltimore County. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Harry N. Baetjer and Charles McH. Howard, both of Baltimore (Venable, Baetjer & Howard, of Baltimore, on the brief), for appellant. Frank R. Savidge, of Philadelphia, Pa., and W. Irvine Cross, of Baltimore (Lee S. Meyer, of Baltimore, on the brief), for appellee.

THOMAS, J. The appellee, the Baugh Chemical Company of Baltimore County, plaintiff below, is a corporation engaged in the manufacture of acid phosphate, and its plant is located in Baltimore county, Md., and the appellant, the Davison Chemical Company of Baltimore County, is a corporation engaged in the manufacture of sulphuric acid, and its plant is also located in Baltimore county. The chief materials used in the manufacture of acid phosphate, the product of plaintiff's plant, are sulphuric acid and phosphate rock, and for a number of years prior to the year 1913, the plaintiff had purchased the sulphuric acid required in the manufacture of its acid phosphate from the defendant. Sulphuric acid is made from sulphur, and originally, or in the early days, the raw material employed in the manufacture of that acid was native sulphur or brimstone. After the discovery of the sulphur bearing ore called pyrites, containing about 50 per cent. of sulphur, it became the raw material generally used in the manufacture of sulphuric acid, particularly the low grade of acid used in the making of acid phosphate. Just when this change from brimstone to pyrites took place is not definitely fixed by the evidence in the case, but the lower court in its opinion stated that it was between 1880 and 1890. The chief supply of pyrites was imported from Spain, the supply from the Canadian mines and mines in this country being very small, and those mines were generally owned or controlled and their product consumed by companies engaged in the manufacture of acid or acid phosphate.

In the early part of 1913, the plaintiff and defendant began negotiations for the purchase and sale of sulphuric acid, which resulted in a contract executed by them the 28th day of April, 1913, by which the plaintiff purchased from the defendant from 30,000 to 50,000 tons, of 2,000 pounds each, of sulphuric acid per year, of the quality designated "chamber acid ranging from 50 degrees to 54 degrees Beaume," to be delivered at the plaintiff's works at Canton, or to Baugh & Sons Company, Norfolk, Va., for a period of five years beginning January 1, 1913, and ending December 31, 1917, for the sum of \$5.75 per ton. The contract provided that the plaintiff should declare on the 2d of January of each year what amount in excess of the minimum amount of 30,000 tons it would take that year, and that the deliveries of sulphuric acid should be made as nearly as possible in equal weekly installments, and also contained the following provisions:

"Fire, accident or strike, in the work of any of the parties herein mentioned; obstruction to navigation, accident to acid, barges, war, insurrections or other uncontrollable causes rendering buyers unable to receive or sellers unable to deliver, shall be good and sufficient reasons to make this contract inoperative during the period of necessary repairs, reconstructions, or continuance of the difficulties."

Immediately following the execution of the contract, the price fixed thereby was by agreement reduced to \$5 per ton. In pursuance of the provisions of the contract, the plaintiff elected to take 50,000 tons of acid per year, and it appears that the deliveries of the acid were accordingly and regularly made by the defendant during the years 1913 and 1914 and until some time early in the year 1915. During the year 1915, the defendant failed to make full deliveries to the plaintiff, and in February, 1916, the plaintiff filed a bill in equity to compel the defendant to perform its contract. The defense in that suit was that by reason of a breakdown in its plant, and other causes, the defendant had not been able to make full deliveries to the plaintiff and other parties to whom it had sold sulphuric acid, and that it was therefore compelled to make a proportionate distribution of the product of its factory among them. In disposing of the case on May 18, 1916, Judge Bond said that the evidence produced showed that there had been much interruption in the defendant's factory, due to accidents and breakdowns in its plant during the year 1915, "and up to this time," which cut down its capacity to an "extraordinary extent"; that as the defendant's contracts would have necessitated a full normal working of its plant, it was incapable by reason of such interruption of filling all of them; that the principle of "prorating" should govern and determine the rights of the parties when the output is involuntarily reduced was in that case conceded; that the suspected improper preference of later buyers over the plaintiff had not been established by the evidence, and that he would sign an order dismissing the petition for a preliminary injunction. The case was never pressed to a final hearing, and the bill was later dismissed by the plaintiff, and on the 10th of November, 1916, the plaintiff brought suit at law against the defendant to recover damages for the nondelivery of acid in accordance with its contract up to and including June, 1916.

Interference with the importation of pyrites caused by the war, and which had diminished the normal supply during the year 1915, had largely abated during the fall of 1916 and the early part of 1917, and by reason thereof, and the extra efforts made by the defendant in anticipation of difficulty in obtaining the ore, it had, in March, 1917, accumulated at its plant about forty-eight thousand tons. About that time, however, just preceding the entrance of this country into the war, the interference with navigation occasioned by the German U-boat campaign became very serious. The companies with which the defendant had contracted for delivery of the ore, and whose contracts contained a clause similar to the clause in the contract between the plaintiff and the defendant which we have quoted, notified the defendant that they would be compelled

to suspend deliveries. After receiving this notice, and after making efforts to secure further deliveries of ore from the parties with whom it had contracted and from other sources, the defendant notified the plaintiff and all others with whom it had contracts for delivery of sulphuric acid that after the exhaustion of its accumulated stock of pyrites it would not be able to make deliveries of the acid contracted for, and would have to take advantage of the clause in its contract with the plaintiff authorizing a suspension of deliveries. At the same time the defendant stated that it would continue its efforts to secure pyrites, and continue to deliver to them their proportion of acid from any pyrites that it might be able to obtain, and offered to install in its plant brimstone burners, and to furnish the plaintiff and other parties to whom it had contracted to furnish acid, with brimstone acid, provided they would agree to pay the increased cost of the brimstone acid delivered in lieu of acid made from pyrites. All of the parties with whom the defendant contracted accepted the offer of the defendant and entered into agreements accordingly except the plaintiff, and on the 25th of September, 1917, the plaintiff filed in the court below a bill of complaint against the defendant, in which it prayed:

"(a) That a decree may be passed commanding the said Davison Chemical Company of Baltimore County to specifically perform, keep, and observe the several promises and agreement in the aforementioned contract set out to be performed, kept and observed, and commanding and directing the said defendant corporation, its officers, agents and servants, to make, during the time covered by said contract, the deliveries of acid to this plaintiff required by said contract.

"(b) That an injunction may issue, strictly enjoining and prohibiting the said Davison Chemical Company of Baltimore County, its and each of its officers, agents, and servants, from delivering during the terms covered by its said contract with the plaintiff any sulphuric acid to any parties with which it has entered into contracts on or subsequent to May 7, 1915, while said Davison Chemical Company of Baltimore County is in default as to the delivery of any part of the sulphuric acid to which this plaintiff is entitled under said contract.

"(c) And that a preliminary injunction may issue, strictly enjoining and prohibiting the said Davison Chemical Company of Baltimore County, its and each of its officers, agents, and servants, from discriminating against the plaintiff in the distribution and delivery among its customers of the sulphuric acid manufactured by it from whatever raw material, and from withholding from this plaintiff any part of the fair and accurate pro rata share of the sulphuric acid manufactured by it until the further order of this court."

On the same day the court passed an order, directing a preliminary injunction to be issued, requiring the defendant to "proceed forthwith to fulfill the contract between the complainant and the defendant dated the 28th day of April, 1913, in accordance with its terms," and providing that "the deliveries be at the rate of 50,000 tons a year, and that said deliveries be made weekly from this date, said deliveries to be made as nearly as

possible in equal weekly installments of 961 tons each. Provided, however, that if in each and any week commencing from the date of this order the defendant is unable to produce the entire output which it is normally capable of producing, or if for any justifiable cause the defendant is compelled to pro rate its weekly output among its customers, then the defendant may abate the number of tons furnished to the complainant in each week in the same proportion that the deliveries in such week to defendant's other customers are abated." The order further required the defendant to "continue to make such deliveries until such contract is fulfilled, or until the further order" of the court.

The defendant answered the plaintiff's bill, and moved that the preliminary injunction be dissolved, and the testimony in this case was taken at the hearing of that motion. Upon the evidence produced at the hearing, and on the 3d day of December, 1917, the court overruled the motion to dissolve the injunction, and in accordance with the application of the plaintiff modified its order of September 25, 1917, granting the injunction to the extent of limiting the deliveries of sulphuric acid by the defendant to December 31, 1917, or the further order of the court. Nothing further appears to have been done in the case until it was submitted for final decree upon bill, answer, and evidence taken at the hearing of the motion to dissolve, and, the parties having agreed that after the issuing of the preliminary injunction on the 25th of September, 1917, and until December 31, 1917, the defendant had delivered to the plaintiff sulphuric acid at the rate of 50,000 tons per annum, the court passed the following decree, from which this appeal was taken:

"It is therefore, this 12th day of March, 1918, by the circuit court No. 2 of Baltimore city, adjudged, ordered, and decreed that the defendant under its contract with plaintiff and the evidence adduced was obliged to specifically perform and carry out said contract with plaintiff from the date of the filing of the bill on, and to deliver to plaintiff between September 25 and December 31, 1917, both inclusive, sulphuric acid at the rate of 50,000 tons a year and as nearly as possible in equal weekly installments of 961 tons each, irrespective of the raw material from which the said acid might be made, and that the injunction heretofore granted in this case on the 25th day of September, 1917, as modified by the order issued on the 3d day of December, 1917, be and it hereby is made perpetual."

The defense relied on by the appellant is that under its contract with the plaintiff of April 28, 1913, it was not required to deliver acid made from brimstone, and that it was unable by reason of the war to obtain the necessary amount of pyrites to fulfill its contract with the plaintiff and other parties with whom it had contracted to deliver acid or acid phosphate, it was entitled, under the provision we have quoted, to suspend the deliveries of acid to the plaintiff to the extent of its inability to secure pyrites. The

contention of the appellee is that the appellant was bound to deliver the acid to the amount specified in its contract, regardless of whether it was made from brimstone or pyrites, and, further, that the appellant by a proper effort could have obtained a sufficient amount of pyrites to enable it to comply with its contract. The learned court below took the view that by reason of the conflict in the testimony as to the meaning of the words "chamber acid" the evidence produced by the defendant was not sufficient to establish a usage and to show that the trade meaning of the words "chamber acid" was acid produced from pyrites, and further held that the evidence showed that the defendant had not exercised due diligence to secure sufficient pyrites to enable it to fulfill its contract with the plaintiff, and that it had not made an effort to procure acid from other manufacturers of acid for that purpose. The effect of the preliminary injunction was to require the defendant, during the period between the 25th of September and the 31st of December, to supply the plaintiff with sulphuric acid made from brimstone or pyrites, at the rate of 50,000 tons a year, without regard to its ability to procure pyrites.

The pleadings, exhibits, and testimony in the case cover about 800 pages of the printed record. It would necessarily greatly prolong this opinion to undertake to discuss this evidence, and we shall not attempt to do more than state the conclusion we have reached after careful examination of it.

[1, 2] It is apparent that the first and important question in the case involves the construction of the contract between the plaintiff and defendant of April 28, 1913. A large part of the evidence was offered for the purpose of showing the meaning of the words "chamber acid." The witnesses produced by the plaintiff testified that they mean acid manufactured by the chamber process from either pyrites or brimstone, while the evidence offered by the defendant tends to show that at the time the contract of 1913 was executed they were generally understood by those engaged in the manufacture or sale of acid and acid phosphate to mean the low grade of acid manufactured from pyrites by the chamber process. The precise question, however, to be determined is, What is the meaning of the words "chamber acid" as used in the contract between the plaintiff and defendant? In the case of *Saunders Co. v. Duck-er*, 116 Md. 474, 82 Atl. 154, Ann. Cas. 1913 C, 817, this court said:

"It is an established canon of construction that: 'In order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted as to their meaning and application; and the contract must be so construed as to give it such effect and none other, as the parties intended at the time it was made.'"

Contracts "must receive a reasonable construction so as to give effect to the intention of the parties thereto, and so as to carry out rather than defeat the purposes for which they were executed. They should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design; nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability fairly within the scope or spirit of their term." And in the case of *Schlens v. Poe*, 128 Md. 352, 97 Atl. 649, the court said:

"It is therefore the duty of the court to construe them (resolutions)—to ascertain the intention of the parties—and that intention must be gathered from the language of the resolution read in the light of the circumstances existing at the time. The rule of construction, as stated in *Nash v. Towne*, 5 Wallace, 699 [18 L. Ed. 527], is this: 'Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and the correct application of the language to the things described.'"

The evidence in the case shows that in 1913 the defendant had been furnishing the plaintiff the acid used in the manufacture of its acid phosphate for a great many years; that with one or two minor exceptions sulphuric acid of the quality used in the manufacture of acid phosphate, and sold for that purpose, was made from pyrites ore, which contains about 50 per cent. of sulphur, by the process known as the chamber process, and that only about 5 per cent. of the brimstone or sulphur sold in this country was used for acid making, and that that per cent. of brimstone employed in making acid was used in the production of what was known as a high grade acid or brimstone acid, which was used for purposes other than the manufacture of acid phosphate. Dr. Grosvenor, one of the plaintiff's witnesses, testified that in 1913 the amount of brimstone or sulphur used in the manufacture of sulphuric acid was only about 5 per cent. of the raw material used for that purpose. The evidence further shows that the cost of the brimstone or sulphur in 1913 was about \$22.50 per ton, while the cost of pyrites containing an equal amount of sulphur was about \$11 a ton, and that the cost of the brimstone required to make one ton of acid was \$5.15, while the cost of the pyrites necessary to make one ton of acid was \$2.60 a ton. The undisputed evidence also shows that the officers of the plaintiff were at the time considering the advisability of manufacturing the sulphuric acid necessary for its own plant, and knew what it would cost to produce it, and that they were familiar with the construction of the defendant's plant, and knew that it was at that time only adapted to the production of sulphuric acid from pyrites. In view of this evidence it is impos-

sible to escape the conclusion that when the plaintiff and defendant used the words "chamber acid" to describe the subject-matter of their contract, they did not refer to acid made from brimstone, which they both knew the defendant could not produce in its plant as then constructed, and could not furnish at the contract price of \$5 per ton. Whether, therefore, strictly and technically speaking, chamber acid may be said to include acid made by the chamber process from either pyrites or brimstone, if we are to give effect to the well-established canon of construction to which we have referred, arriving at the intention of the parties, it would seem reasonably clear that the contract referred to the kind of sulphuric acid that was almost universally employed in the manufacture of acid phosphate, and to the production of which the defendant's plant was adapted, and which alone the defendant could have furnished at the price agreed upon.

It would be giving the contract a strained and unreasonable construction to assume that the defendant obligated itself to deliver 50,000 tons of brimstone acid per year, through a period of five years and commencing at a date anterior to the date of the contract, when it knew and the plaintiff knew it could not do so except at a loss per ton equal to about one-half of the price agreed upon.

In regard to the second proposition, the evidence shows that in 1913 the capacity of the defendant's plant was about 170 tons of sulphuric acid per year; that about the time it executed the contract with the plaintiff the defendant entered into a contract with the Pennsylvania Salt Manufacturing Company by which the latter company agreed to furnish the defendant "as near as possible in equal monthly quantities, delivered alongside vessels at Curtis Bay, Baltimore, Md., their entire requirements of sulphur as pyrites, for use in their works at and near Baltimore, estimated as eighty thousand (80,000) tons of twenty-two hundred and forty (2,240) pounds, for the calendar years of nineteen hundred and fifteen, sixteen, seventeen and eighteen (1915, 16, 17 and 18); said ore to be Spanish smalls or fines from the Rio Tinto Company's mines, to be shipped from port in Huelva, Spain, and to average from forty-six (46) to forty-eight (48) per cent. of sulphur"; that the 80,000 tons of pyrites per year to be delivered by the Pennsylvania Salt Manufacturing Company would have been sufficient to produce 180,000 tons of sulphuric acid per year, and that that company had been supplying the defendant with its entire requirements for many years prior to 1913, and had never in the past failed to do so; that the defendant also entered into a contract with the Naylor, Benzon & Co., Limited, of London, for 140,000 tons of pyrites ore, to be delivered during the years 1917, 1918, 1919, and 1920, a contract with the Pyrites Company, Limited, of London, for 20,000 tons of pyrites to be de-

livered during the years 1915 and 1916, and a further contract with the Pyrites Company Limited, for 25,000 tons of pyrites, to be delivered during the year 1917; that the total importation of pyrites was about 1,300,000 tons per year, and that of that supply the three companies mentioned imported about 1,000,000 tons per year. It further appears from the evidence that after the defendant received notice from these companies in the spring of 1917 that, owing to the U-boat campaign and their inability to secure the necessary tonnage, they would have to suspend the deliveries of pyrites ore under their contracts, the president and officers of the defendant made repeated and weekly visits to New York to see the representatives of the companies mentioned to induce them to make deliveries, and that they also investigated the possibility of obtaining Canadian and domestic pyrites, and found that it was impossible to secure any ore from that source; that they went to see the representatives of other importers of pyrites ore, and were unable to obtain from them any deliveries; that to induce the representatives of the importers mentioned and other importers of pyrites to make deliveries they agreed to pay any additional freight charges that might be necessary to secure the requisite tonnage; and that the only pyrites they were able to obtain between April 20th and the time of the institution of the present suit consisted of two cargoes, one cargo from the Pyrites Company, which was delivered in June, 1917, and one cargo from Naylor, etc., Company, delivered in July, 1917, both of which cargoes were used by the defendant in the manufacture of acid, and the acid was distributed among the parties with whom it had contracts, including the plaintiff.

The evidence produced by the defendant tends to show that a number of other manufacturers of sulphuric acid or acid phosphate were able to secure pyrites, but it also appears that many of them were comparatively small manufacturers, and that in a number of instances they owned or controlled the domestic or Canadian mines from which they obtained the ore, and all of the evidence tends to show that there was great scarcity of pyrites during the time in which the plaintiff was unable to secure deliveries other than the two cargoes mentioned.

The learned court below in its opinion referred to the fact that it did not appear that the defendant had instituted legal proceedings to compel the Pennsylvania Salt Manufacturing Company to comply with its contract, or that it had attempted to purchase sulphuric acid from other manufacturers with which to meet its obligation to the plaintiff.

In the case of *Herrmann v. Bower Chemical Mfg. Co.*, 242 Fed. 59, 155 C. C. A. 3, where the contract under consideration contained a clause like the clause in the contract

between the plaintiff and defendant, the Circuit Court of Appeals approved the following instructions of the court below:

"Now, where a party enters into a contract providing for the delivery of certain articles of merchandise, he is obliged to use diligence to supply himself with sufficient quantities to carry out the terms of his contract, if he can do that in the exercise of due diligence. * * * So that the questions for you to consider under all the evidence are whether you are satisfied from the evidence that the defendant did use the diligence which I have stated, that is, the diligence which a reasonably prudent man, in good faith, desiring to carry out the terms of the contract, would exercise, in obtaining supplies necessary to proceed with the manufacture and delivery of the prussiate of potash."

In the case of *Simpson Bros. Corporation v. John R. White & Son (C. C.)* 187 Fed. 418, the court said in reference to a clause of a similar nature in a building contract:

"In interpreting a clause of this character in a construction contract like that before us, due regard must be had to the circumstances and to the ordinary course of business in contemplation of the parties at the time of the execution of the contract," and that a contractor, in such a case, is required to show that he had exercised ordinary diligence to secure the materials.

In the case of *Jessup & Moore Paper Co. v. Piper (C. C.)* 133 Fed. 108, the court, dealing with a contract containing a clause excusing performance where the fulfillment of it was prevented by strikes or by hindrances beyond the control of the parties, said of the defendant:

"It is bound to carry out its contracts even with that clause in, so far as, at all events, to put forth all reasonable and proper exertion to overcome whatever hindrance may be offered to the carrying out of its contracts. * * * If * * * they could have obtained the cars for delivery to the plaintiffs by arrangement with the railroad company, they were bound to make it. They were bound, in other words, to do whatever was reasonable and proper to overcome whatever hindrance existed with regard to this car supply; and, if they failed to do whatever was reasonable and proper, whether it be the expenditure of labor and exertion, or the reasonable expenditure of money, then they have failed in the discharge of their duty, and to that extent they would be liable to respond to the plaintiff in damages. But if there was a scarcity of cars, a shortage of cars, and it was beyond their power—explaining as I have what their duty in that respect was—if it was beyond their power to remove that hindrance, if they gave the plaintiff its ratable share of cars during the period in question, then they certainly have discharged all their duty with reference to that part of the claim that they could be called upon to discharge."

In the case of *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 453, L. R. A. 1916F, 1, the Supreme Court of California said:

"The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity available for use. The defendants were not binding them-

selves to take what was not there. And, in determining whether the earth and gravel 'were available,' we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents, then, it was impossible for defendants to take it. 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.' 1 *Beach on Contracts*, § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligations more expensive than they had anticipated, or which would entail a loss upon them. But where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."

[3-6] Applying the principles stated in the cases referred to to the facts of this case, we think the evidence shows that the defendant did exercise all reasonable diligence in its efforts to secure the pyrites necessary to enable it to comply with its obligation to the plaintiff. The contract of the defendant was to deliver to the plaintiff the product of its plant, and the defendant was not required to purchase acid from other manufacturers in order to make deliveries to the plaintiff. It was bound to make every reasonable effort to secure the pyrites, and to pay any reasonable sum necessary to enable it to do so. The fact that the price of pyrites ore was greatly in excess of the amount that it had contracted to pay for it did not relieve the defendant of its duty to perform its contract. The evidence tending to show that other manufacturers of acid or acid phosphate had been able to secure some pyrites is not conclusive evidence that the defendant, by the exercise of reasonable diligence, could have obtained sufficient quantities of the ore to meet its obligations, or sufficient to overcome the positive evidence adduced by the defendant to show that it made every effort to obtain the ore.

The case of *Wilson & Co., Limited, v. Tenants*, reported in 1 K. B. (1917) 206, referred to by the court below, was reversed on appeal by the House of Lords, and in the opinions of the majority of the Justices it was held that the evidence showed that the defendant was, within the meaning of the contract under consideration, prevented or hindered, because the cutting off of the German supply during the war left the defendant unable to secure enough of the articles to fill all of its contracts and supply its ordinary business. L. R. App. Cas. (1917) 495.

It follows from what we have said that the preliminary injunction should have been dissolved, and we must therefore reverse the decree from which this appeal was taken.

Decree reversed with costs, and bill dismissed.

(182 Md. 836)

MAIN v. MAYOR, ETC., OF HAGERSTOWN et al. (No. 5.)

(Court of Appeals of Maryland. Feb. 27, 1918.)

1. MUNICIPAL CORPORATIONS — 225(4) — POWERS — SALE OF REALTY — EASEMENT.

A grant of power to the moderator and commissioners of a town to sell realty authorizes them to grant an easement appurtenant to the realty sold.

2. EASEMENTS — 61(8) — INTERFERENCE — INJUNCTION — PLEADING.

Bill to enjoin interference with an easement need not allege irreparable injury in terms if the facts alleged show that the damage will be irreparable.

3. EASEMENTS — 61(2) — INTERFERENCE — INJUNCTION.

Interference with an easement of light in a warehouse by the use of an alley for storage purposes will not be enjoined where the light is not materially obstructed so as to make the premises materially less available for beneficial use.

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Suit by Martin L. Main against the Mayor and Council of Hagerstown and another, to enjoin interference with an easement. From a decree for defendants, complainant appeals. Affirmed and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Levin Stonebraker and J. A. Mason, both of Hagerstown, for appellant. Alex. R. Hagner, of Hagerstown, for appellees.

STOCKBRIDGE, J. Acting under the authority granted by Act 1813, c. 121, the moderator and commissioners of Hagerstown acquired a lot in that town upon which to erect a market house. It developed that the land purchased was more than was required for the purposes of the market, and by Act 1821-22, c. 66, legislative authority was given to the officials of Hagerstown to sell a portion of the ground so acquired. Thus authorized, they sold to George Brumbaugh the eastern half of the lot. In the deed conveying the property to Mr. Brumbaugh, there was included a covenant reading as follows:

"And the said moderator and commissioners for themselves and their successors in the office further covenant, grant, promise and agree to and with the said George Brumbaugh, his heirs and assigns, that they the said moderator and commissioners and their successors will secure to the said George Brumbaugh, his heirs and assigns, all the benefits and advantages of the light of the doors and windows in the brick buildings which the said George Brumbaugh has erected on the portion of the lot or parcel of ground hereby bargained and sold and which are on that side of said buildings which adjoins the said market space. And the said moderator and commissioners for themselves and their successors further covenant, grant, promise and agree to and with the said George Brumbaugh, his heirs and assigns, that no house, building, edifice or superstructure of any description whatever shall ever be erected on the market

space aforesaid within ten feet of the houses which have been erected by the said George Brumbaugh on the portion of the aforesaid lot of ground hereby bargained and sold to the aforesaid George Brumbaugh. And that the said space of ten feet shall be forever kept open and clear and free from all obstructions for the better securing to the said George Brumbaugh, his heirs and assigns, the benefits and advantages of the light to the aforesaid doors and windows."

It will be observed that the effect of this covenant was to grant to Brumbaugh, his heirs and assigns, an easement of light on the west in favor of the building which might be erected by him. It did not include an easement of air or a right of way.

Upon the remaining portion of the lot the Hagerstown officials erected a market house, and left open a space of 10 feet between the lot conveyed to Brumbaugh and the east side of the market house. The easement granted by the deed mentioned has been a source of litigation, the latest phase of which is the present bill of complaint.

In 1875 a proceeding was had in the circuit court for Washington county by which the assignee of Mr. Brumbaugh sought to establish an easement to a right of way over the 10-foot space, but failed to do so, and the bill then filed by Mr. Kauffman was dismissed by Judge Alvey sitting in that court, and no appeal was taken from his decree. In that case, as in this, the town officers apparently placed some reliance upon the ground that the grant of the easement was an ultra vires act. So far as this case is concerned, the same contention, again set up by the defendant might well be regarded as *res adjudicata*, but that does not seem necessary in the establishment of the defendant's case, and the ground assumed by the judge from whose decree the present appeal is taken is clearly sound.

[1] That ground is that a grant of power of sale necessarily carries with it a grant of power to transfer an interest less than an absolute one. The act of 1821 left to the discretion of the moderator and commissioners the amount of the lot acquired which should be sold, and it was clearly within their power to grant an easement appurtenant to the portion which they did in fact sell.

The bill filed in the present case recites that Martin L. Main, by virtue of sundry mesne conveyances, became the assignee of the lot sold to Brumbaugh. It recites the covenants in the deed already quoted; complains that the mayor and council of Hagerstown have caused to be placed in the 10-foot open space certain "trestles, timber, boards, and structures of wood and other articles" used by those attending the market. The bill then charges that the articles mentioned are obstructions upon the 10 feet, and constitute a breach of the covenant, and closes with the following prayers:

"(a) That the defendants, their servants and agents, and all persons acting by their authority, may be enjoined and prohibited from causing or permitting the articles mentioned in the fifth and sixth paragraphs of this bill of complaint to be placed or stored upon the open space mentioned in said bill of complaint.

"(b) That a mandatory injunction be issued by this honorable court requiring the defendants, their servants and agents, and all persons acting by their authority, to remove, or cause to be removed, from said open space the articles mentioned in the said fifth and sixth paragraphs of this bill of complaint."

These recitals have been made in some detail for the reason that it is nowhere alleged or suggested in the bill, that the light of the building belonging to Mr. Main has been interfered with, nor that the injury suffered by him is irreparable, and the testimony in the case shows rather that what the plaintiff is seeking is to establish his right to an easement of right of way over the 10-foot space then a question of light, or of light and air.

[2] It is not necessary in a case of this sort that irreparable injury should in terms be alleged, but it is necessary that there should appear in the bill such facts as make it apparent to the court that the damage will be irreparable, going to the destruction of the estate of the plaintiff in the manner in which he has been accustomed to enjoy it. *Baughner v. Crane*, 27 Md. 36; *Gilbert v. Arnold*, 30 Md. 29; *Davis v. Reed*, 14 Md. 152; *Blaine v. Brady*, 64 Md. 373, 1 Atl. 609.

The cases in which an injunction have been granted are such cases as *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368, in which the owner of a farm having a large canning establishment thereon was held entitled to an injunction to prevent the removal of the machinery, the deprivation of which would destroy his canning business; *Scully v. Kose*, 61 Md. 408, where an injunction was granted to restrain the removal of ore from an ore bank, on the ground of the permanent injury to the property; and *Douglass v. Rigglin*, 123 Md. 18, 90 Atl. 1000, which arose over the right of way in an alley that the defendant was repaving in a manner to effectually prevent the plaintiff's use of the same in the manner in which she had been accustomed to use it.

It is always to be borne in mind, in considering this case, that the only subject with which it is concerned is a question of light. The bill makes no reference whatever to the light, but it does appear in the testimony of the case and is the one grant mentioned in the covenant.

In *Attorney General v. Nichol*, 16 Ves. 342, Lord Eldon says:

"There is little doubt that courts will not interpose upon every degree of darkening ancient lights in windows; there are many obvious cases of new buildings darkening those opposite them, but not in such a degree that an injunction could be maintained."

The rule thus laid down was followed in England in such cases as *Winstanley v. Lee*, 2 Swanson, 336, and *Sutton v. Lord Mont-*

ford, 4 Sim. 550. In *Van Bergen v. Van Bergen*, Chancellor Kent held that to justify the granting of an injunction there must be—

"that sort of material injury to the comfort and existence of those who dwell in the neighboring house which requires the power to prevent as well as remedy the evil."

The English rule was early followed in this country in *Wilson v. Cohen*, Rice, Eq. (S. C.) 80, and in numerous cases since that time. It does not affirmatively appear in these cases that there was a covenant distinctly relied upon, and the existence of such covenant is urged by the plaintiff in the present case as conclusive of the rights of the parties.

There are two clearly defined lines of cases in this country where a covenant is involved. In Massachusetts there are several cases which hold that, if there be a covenant, that fact alone is determinative of the question. A typical case of this character is the case of *Brown v. O'Brien*, 168 Mass. 484, 47 N. E. 195; and less strongly, but still tending in the same direction, *Lattimer v. Livermore*, 72 N. Y. 181. The other line is that the interference with the light, even in cases of a covenant, must be such as to inflict some material injury upon the enjoyment of the property.

In *Hagerty v. Lee*, 45 N. J. Eq. 1, 15 Atl. 399, there had been the reservation in a deed of light and air to the plaintiff, and it was held that, if it had been made to appear that the interference with the plaintiff's windows would result in his substantial loss of light and air, he would have been entitled to an injunction; but as that condition of affairs did not appear, and as his right under the reservation to maintain windows overlooking these lands, which were not necessary for light and air, had at the time not been settled at law, the injunction which had previously been granted should be dissolved.

In *Clawson v. Primrose*, 4 Del. Ch. 643, it was said:

"A court of equity will restrain the obstruction of lights, by the erection of adjoining buildings, only when the privation of light and air by a proposed erection will be in such degree as to render the occupation of the complainant's house uncomfortable if it be a dwelling house, or if it be a place of business materially less beneficial than it had formerly been."

The case of *Hennen v. De Veny*, 71 W. Va. 629, 77 S. E. 142, L. R. A. 1917A, 524, was decided by a divided court. In that case a lot had been conveyed for church purposes, with a covenant that no building should be erected within 10 feet. The church passed to commercial uses. The majority opinion says that:

"The rule is well established that if the covenant benefits the land to which it relates, and enhances its value, the easement created by it becomes appurtenant to the land and passes with it"

—and it cites in support of this conclusion the cases of *Salisbury v. Andrews*, 128 Mass. 336; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Brew v. Van Deman*, 53 Tenn.

(6 Helsk.) 433; and *Herrick v. Marshall*, 66 Me. 435.

As a deduction from all the cases, the general rule is laid down as follows in 14 Cyc. 1218:

"Equity will enjoin any obstruction of an easement of light and air which will materially impair the complainant's enjoyment of his property, or which is in violation of a covenant in the deed by which he holds. Where plaintiff fails to show that he will suffer a substantial deprivation of light or air by the threatened obstruction, the injunction should be denied."

The reasons for this rule are well stated in *Lattimer v. Livermore*, 72 N. Y. 181, in which case there was a covenant for light and air, and the court said:

"If * * * this covenant had ceased to be of any substantial value to the plaintiff, she would not be permitted in equity to enforce it, simply to annoy and damage other people; but so long as * * * this covenant remains of substantial value to her, and she has in no way extinguished or released her easement, she must be permitted to enforce it."

This would appear to be the reasonable rule to follow to prevent a hold-up.

[3] What are the facts as they appear in the present case? The plaintiff has six windows and a door on the first floor of his west wall, and the same number of windows on his second and third floors, and one small window opening into the basement. The exhibits filed in the case do not show that the open space between the market house and Mr. Main's warehouse is of attractive appearance, or has been beautified to any large extent by the town authorities of Hagerstown. But the question is whether the *light* of the plaintiff has been obstructed so as to materially interfere with the light in the plaintiff's warehouse. The exhibits, while they show planks and boards resting against the warehouse occupied by the plaintiff, do not show them as resting against his windows, or being such as would diminish the illumination of his place.

It is in evidence that two of the windows have been partially and permanently closed up on the inside by the plaintiff; that as to the other four there are curtains which can be raised or lowered, and that against some of the windows the furniture in the premises of the plaintiff is regularly backed up. This interference with the light by the act of the plaintiff, or the plaintiff's tenant, is much more serious than the temporary placing against his wall of trestles, tables, planks, or other paraphernalia connected with the market, and these market appurtenances are not permanent in their character, but liable to be moved at any time for their use in connection with the market.

The remaining window, the small window in the basement, it is testified, and not contradicted, has been at times filled up by putting a box into the opening on the inside, by the tenant, the effect of which is to deprive the plaintiff's basement of a greater

amount of light than any interference therewith on the part of the defendant, and these facts, all taken together, emphasize the limitation upon the right under the covenant for light, that the deprivation must be of such a character as to render the premises materially less available for beneficial use than they had formerly been.

The further fact that these proceedings were instituted without notice to the mayor and council of Hagerstown to remove the alleged obstructions, together with the entire absence from the bill of any allegations of an interference with the light of the plaintiff, all tend to the conclusion that there has not been any such deprivation as to materially affect the plaintiff, or the plaintiff's tenant, in their use of the building. If such a case had been made out, it would have been a proper one under the covenant of the deed for interference by a court of equity; but the proof in this case, and the allegations of the bill, are not sufficient for the granting of the relief prayed.

The decree below will accordingly be affirmed and bill dismissed.

Decree affirmed and bill dismissed, with costs.

(133 Md. 137)

RASST v. MORRIS. (No. 32.)

(Court of Appeals of Maryland. June 20, 1918.)

ABATEMENT AND REVIVAL §8(4)—CONTEMPORANEOUS SUITS.

An action at law to recover value of counterfeit currency, given as part payment on purchase price of property, and a suit in equity to have the purchase money declared a lien on the property sold, could both be maintained at the same time; the relief sought not being the same.

Appeal from Circuit Court of Baltimore City; Morris A. Soper, Judge.

"To be officially reported."

Bill by Leon Rasst against Abbott Morris. From an order dismissing the bill, the complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Guion Miller, of Easton (Bartlett, Poe & Claggett, of Baltimore, on the brief), for appellant. J. Royall Tippet, of Baltimore (Richard B. Tippet & Son, of Baltimore, on the brief), for appellee.

BRISCOE, J. This appeal brings for review an order of the circuit court of Baltimore city dated the 20th day of March, 1918, dismissing the appellant's petition and refusing to require the appellees to elect whether he will prosecute a suit at law, in the superior court of Baltimore city, or one instituted by him in equity, in the circuit court of Baltimore city, against the appellant. By an inspection of the record, it appears that the suit at law was instituted in the superior court of Baltimore city on the 12th day of

January, 1916, to recover the sum of \$19,400 on a contract, under which the defendant paid to the plaintiff the sum of \$19,400, in Carranza Mexican currency, and which currency after having been delivered, was found to be counterfeit, and of no value, and which it is alleged the Mexican government had declared to be counterfeit. The suit in equity, in the circuit court of Baltimore city, it will be seen, was filed in that court on March 13, 1916, and sought to have the balance of the purchase money, due under the contract, dated September 10, 1915, which was \$19,435, with interest, less \$2,500 paid by the appellant, declared to be a lien on the property sold, and described in the bill of complaint, and a trustee to be appointed to make sale of the property to satisfy this lien.

The prayer of the bill, as set out in the record, is as follows:

First. That this court pass a decree declaring the balance of \$19,435, with interest thereon, less \$2,500 paid by Leon Rasst to the Safe Deposit & Trust Company, owing to your orator by the said Rasst, a lien on said property, and appoint a trustee to make sale of same to satisfy said lien.

Second. That this court pass a decree to the effect that Leon Rasst hold the property for the benefit of and in trust for your orator for the payment of the balance of purchase money due of \$19,435 and interest thereon due under the contract of purchase with the defendant of date September 10, 1915, less \$2,500 paid by Leon Rasst to the Safe Deposit & Trust Company, trustee.

Third. That this court decree unto your orator such other and further relief as it is competent to give, and which he may be entitled to or which the nature of his cause may require.

The contract of sale which the appellee by the proceedings in the court of law and equity seeks to have enforced is dated September 10, 1915. The property consists of certain land and improvements known as the Mt. Vernon Brewery property, located on Ridgely, Scott, and Carey streets, Baltimore. The purchase price of the property was \$32,985, and payable as follows: Twelve thousand five hundred dollars, to be represented by a mortgage for two years at 5 per cent. interest semiannually, with the privilege of prepayment after one year; \$19,435 to be represented by the acceptance of \$299,000 in Carranzistas Constitucionalista De Mexico currency without any obligation on the part of the purchaser to guarantee the value in United States currency of the said Mexican money, and the balance, to wit, \$1,000 to be paid in cash, making in all \$32,985.

The only question, at this stage of the proceedings, we are called upon to decide is whether the plaintiff may prosecute both an action at law and a suit in equity, against the defendant, at the same time, for the relief sought by him, or whether he should be forced to elect between the remedies sought and proceed with the one or the other, whichever he may select. The doctrine of the election of remedies is too well settled by former decisions of this and other courts to re-

quire any extended discussion here. In 9 R. C. L. 904, § 11, it is said:

"It is a general rule that where a plaintiff is prosecuting an action at law and a suit in equity against a defendant at the same time for the same cause, he may be compelled by the court, on application by the defendant, to elect whether he will proceed with the one or the other; but, to come within this principle, it is required that the two suits must have substantially the same aim and scope, and the relief sought must be in each case substantially the same. In other words, the plaintiff should not be compelled to elect, unless the remedy in the suit at law is equally complete and adequate with the remedy in equity."

In *Way v. Bragaw*, 16 N. J. Eq. 218, 84 Am. Dec. 147, it was held, that the plaintiff will not be put to his election, unless the suit at law is not only for the same cause, but the effect must be the same. The remedy must be coextensive and equally beneficial to the plaintiff with the remedy in equity. 2 Daniel Ch. Pl. and Pr. 721, 961; 7 Ency. of Pl. and Pr. 360; 15 Cyc. 266.

Judge Phelps, in his work upon Juridical Equity, § 120, says that the maxim that "equity prevents multiplicity of suits" entitles a defendant in equity, who is also sued at law by the same plaintiff for the same matter, after filing his answer, to an order requiring the plaintiff to elect the court in which he will proceed, but the two suits must be *ad idem*; that is, their object and purpose must be identical. Alex. Ch. Pr. 100; *Union Bank v. Kerr*, 2 Md. Ch. 460; *Swan et al. v. Dent et al.*, 2 Md. Ch. 115, note; *Bradford et al. v. Williams et al.*, 2 Md. Ch. 6.

In *Foley v. Bitter*, 34 Md. 653, under a somewhat similar state of facts as are presented in the case at bar, this court held that the lower court was right in dismissing a petition and refusing to require the plaintiff to elect. In that case, the court said:

"There is no rule requiring an election in the case here presented. The proceedings upon the attachment [at law] and the bill [in equity] in this case are not instituted for the same purpose, nor can they attain the same object."

The two suits are not *ad idem*.

In *Wilhelm v. Lee et al.*, 2 Md. Ch. 823, the chancellor held that the general rule as to the election of remedies applies only to cases where the demand at law and in equity are equally personal, and not where the cumulative remedy is in personam, while the other remedy is upon the pledge or in rem. The remedy in a court of equity upon the mortgage was in rem, and that at law was in personam. *Dunkley v. Van Buren*, 3 Johns. Ch. (N. Y.) 330; *Jones v. Conde*, 6 Johns. Ch. (N. Y.) 77; 4 Kent, 183.

It is clear, we think, from an examination of the suit at law and the bill in equity in the instant case, that the remedy in the two suits are not coextensive, they were not instituted for the same purpose, and the relief sought is not substantially the same. The suit at law was instituted to recover the value of the counterfeit Mexican currency,

which was given as part payment on account of the purchase money for the property sold the appellant by the appellee, and the action is one in personam, and the judgment, if recovered, would be a lien upon the appellant's property. The object and purpose of the suit in equity is to have the purchase money declared a lien on the property sold, and is an action in rem, against that specific property itself.

Upon a careful consideration of the case, we find no sufficient reason to justify us in disturbing the order appealed from, and for the reasons stated it will be affirmed.

Order affirmed, with costs to the appellee.

(133 Md. 119)

KRUG v. MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE et al.
(No. 22.)

(Court of Appeals of Maryland. June 19, 1918.)

1. TRUSTS §272(3)—DIVISION OF PROFITS—LIFE TENANT AND REMAINDERMEN.

Where the trustee held shares of its own stock in trust, and, having realized a profit from the purchase of stock of another corporation whose reduction of capital stock doubled value of that held by the trustee, declared a dividend to its own stockholders, consisting of shares in the other corporation, such dividends from the profits belonged to the life tenant as income.

2. TRUSTS §272(3)—DIVISION OF PROFITS—LIFE TENANT AND REMAINDERMEN—"INCOME."

Dividends of earnings made after the death of the testator are "income," and are payable by the trustees to the life tenant, whether in cash, scrip, or stock.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

Appeal from Circuit Court No. 2 of Baltimore City; James M. Ambler, Judge.

"To be officially reported."

Special case stated under Code Pub. Civ. Laws, art. 16, § 206, between Caroline Selmar Krug and the Mercantile Trust & Deposit Company of Baltimore as trustee and others. From the decree rendered, Caroline Selmar Krug appeals. Reversed and remanded.

Argued before BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Frank Gosnell, of Baltimore (Karl A. M. Scholtz and Marbury, Gosnell & Williams, all of Baltimore, on the brief), for appellant. Charles McH. Howard, of Baltimore, for appellees.

BRISCOE, J. This is a special case stated under the forty-seventh equity rule (Code, art. 16, § 206), and is an amicable controversy between a beneficiary for life and remaindermen, for the purpose of determining whether or not a distribution of shares of stock of the Merchants' & Miners' Transportation Company (to be hereafter called the Transportation Company) constitute income or corpus of a trust estate. The facts are

undisputed, and are set out in an agreed statement in the record, and all of the parties in interest are sui juris.

The testator under whose will the trust was created, died on the 4th of January, 1908, and his will was duly probated in the orphans' court of Baltimore city. The fourth clause of this will is as follows:

"I give, devise and bequeath unto the Mercantile Trust & Deposit Company of Baltimore, two thousand dollars Baltimore City stock, Harford Run, issue 1920, fifty shares of stock of the Maryland Casualty Company and ninety-two shares of stock of the Mercantile Trust & Deposit Company of Baltimore, in trust, to hold said investments for and during the natural life of my daughter, Caroline Selmar Krug, paying to her monthly the net income therefrom, and from and after her death then in trust for my said son, Theodore F. Krug, paying to him during his natural life, the net income therefrom, and immediately from and after my said son's death, said trust shall cease, and the said fund shall then go to and be divided by my said trustee in equal shares, between the descendants of my said son, per stirpes, and not per capita."

By the seventh item of the will one-half of the residuary estate was devised and bequeathed to the trustee upon the same trusts, and the trustee was given power to change the investments.

The appellant is a daughter of the testator, is now living, and is unmarried. The appellee Theodore F. Krug is a son of the testator, is also living, and has five children, who are also appellees, and all of whom are above the age of 21 years.

The Mercantile Trust & Deposit Company of Baltimore, the trustee (to be hereafter called the Trust Company), is a corporation, incorporated under the laws of this state, for the purpose of conducting the business of a safe deposit and trust company. It is admitted that the business transacted by the company includes the purchase of stocks, bonds, and other securities and the selling thereof. In the settlement of the estate of the testator, it appears that 221 shares of the stock of the Trust Company were distributed to the trustee, to be held in trust as provided by the testator's will. Subsequently, on the 23d of December, 1908, the capital stock of the Trust Company was reduced by retiring 25 per cent. of each stockholder's holdings at \$130 per share, leaving 165 shares belonging to the Krug trust.

The material facts, bearing upon the investment from which the profit to the Trust Company resulted and which is the subject-matter of this controversy, are set out in the agreed statement of facts and are in part as follows: On April 15, 1914, the Trust Company purchased from the New York, New Haven & Hartford Railroad Company the following debentures and stock of the Transportation Company, a corporation organized and existing under the laws of Maryland and engaged in the business of owning and operating a fleet of vessels between the port of

Baltimore and the ports of Savannah, Boston, and elsewhere, viz.: \$1,950,000 par value of 4 per cent. debentures, due May 1, 1932, 15,190.20 shares of stock of said company of the par value of \$100 each. In January 1916, the capital stock of Transportation Company was reduced from \$5,000,000 to \$3,000,000, by the cancellation of 40 per cent. of its outstanding capital stock, so as to reduce the number of shares held by each holder to three-fifths of his former holdings, whereby the number so held by the Trust Company was reduced to 9,114.12 shares. At the same time the debentures so held by the Trust Company were surrendered and exchanged for new first mortgage 6 per cent. 25-year bonds of the Transportation Company of the aggregate value of \$1,305,000, and 4,500 shares of additional capital stock of the Company, whereby the number of shares of stock held by the Trust Company was increased to 13,614.12. The additional shares so acquired, however, were like the former ones carried on the books of the Trust Company under the nominal valuation of \$1. Subsequently, the first mortgage bonds acquired by the Trust Company were sold by it, and the amount realized from such sale exceeded the amount which was originally paid when the debentures and stock were first acquired, leaving the Trust Company the owner of 13,614.12 shares of the stock carried on its books at a nominal value. On January 4, 1918, at a meeting of the board of the directors of the Trust Company, the following resolution was passed:

"Resolved, that there be distributed from the assets of the Mercantile Trust and Deposit Company to its stockholders for each three (3) shares of the capital stock of this company held by them and standing in their names on January 4, 1918, one (1) share of the capital stock of the Merchants' & Miners' Transportation Company and at the same rate for any smaller or greater number of shares. Such distribution to be made to the stockholders of record at 12 o'clock noon on January 4, 1918, and payable at this office on and after January 11, 1918."

At the time of this distribution, the Trust Company held 13,614.12 shares of the stock of the Transportation Company, and 10,000 shares of this stock were allotted and distributed to the various holders of stock in the Trust Company, in pursuance of its resolution of the 4th of January, 1918. As the Trust Company held, as trustee under the will of Gustav Krug, deceased, 165 shares of its own capital stock, it received by virtue thereof, in the distribution under the resolution, 55 shares of stock of the Transportation Company, and the single question upon the facts here presented is whether these shares of stock, so distributed to the trust estate shall be treated, between the beneficiary for life and remaindermen, as corpus or income. The court below, by its decree of the 27th of February, 1918, held that these shares of stock were corpus or principal, and not income of the trust estate, and that the stock,

or any investments thereof, shall be held by the trustee as part of the corpus or principal of the trust estate. From this decree, this appeal has been taken.

It will not be necessary for us to review at length the numerous cases in this court upon the rights of life tenants and remaindermen to dividends or distributions by a corporation, among its stockholders, or to discuss the so-called "Pennsylvania" or "American" rule, which has been adopted and followed in this state. The rule has been stated and the authorities in support thereof have been discussed, in a number of recent cases in this court. *Thomas v. Gregg*, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 810; *Quinn v. Safe Deposit Co.*, 93 Md. 285, 48 Atl. 835, 58 L. R. A. 169; *Smith v. Hooper*, 95 Md. 16, 51 Atl. 844, 54 Atl. 95; *A. C. L. Dividend Cases*, 102 Md. 73, 61 Atl. 295; *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209; *Coudon v. Updegraff*, 117 Md. 71, 83 Atl. 145; *Foard v. Safe Deposit Co.*, 122 Md. 476, 89 Atl. 724; *Washington County Hospital v. Hagerstown Co.*, 127 Md. 1, 91 Atl. 787, L. R. A. 1915A, 738; *Northern Central Ry Div. Cases*, 126 Md. 16, 94 Atl. 338; *Miller v. Safe Deposit Co.*, 127 Md. 610, 96 Atl. 766.

[1] While the facts of the present case are somewhat unusual, and the question here presented is not free from difficulty, we think the case falls within the principle recognized by this court in *Ex parte Humbird*, 114 Md. 638, 80 Atl. 209, and followed in the more recent case of *Washington County Hospital v. Hagerstown Trust Co.*, 124 Md. 10, 91 Atl. 787, L. R. A. 1915A, 738, wherein it is said, as stated in *Taylor on Private Corporations* (4th Ed.) 799, that moneys arising from the sale of corporate property and distributed as a cash dividend are income if they rise from a sale of property made by the corporation in the ordinary course of its business, when it sells only such property as its regular business is to sell. In *Thomas v. Gregg*, 78 Md. 555, 28 Atl. 568, 44 Am. St. Rep. 810, it is said:

"When a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity which disregards form and grasps the substance would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."

In the case at bar, "the assets" distributed among the stockholders represent the profit which had been realized by the Trust Company in the usual course of its business, and was in substance a distribution in kind of a portion of the identical specific profits accruing to the Trust Company from a transaction entered into and completed after the death of the testator. In *Miller v. Safe Deposit & Trust Co.*, 127 Md. 611, 96 Atl. 766, it is said that:

"The principle is definitely settled * * * that a dividend from earnings accrued and declared after the trust has become operative is payable to the life tenant as income," and "that

an income dividend is payable to the person entitled at the time it is declared."

[2] It is also well established that dividends of earnings made after the death of the testator are income and payable to the life tenant no matter whether the dividend be in cash, or scrip or stock. *Atlantic Coast Line Cases*, 102 Md. 73, 61 Atl. 295; *Foard v. Safe Deposit & Trust Co.*, 122 Md. 480, 89 Atl. 724; *Northern Central Railroad Cases*, 126 Md. 16, 25, 94 Atl. 338.

It is clear, we think, under the authorities, that if the 10,000 shares of the Transportation Company had been converted into cash, and distributed in that form, instead of making distribution of the identical shares, which represented the profits, as was done in this case, that the dividend would be treated as income, and not corpus. The mere fact, then, that "the assets" which represented the gains and profits of the investment from this particular transaction were distributed in kind, that is, consisting of shares of stock of another corporation rather than in cash, should not alter or affect the principle involved. In *Coudon v. Updegraff*, 117 Md. 80, 83 Atl. 145, this court said:

"If this stock dividend was based upon the earnings of the company, and the company had the power to so distribute it, and this power was validly exercised, then this extra 250 shares, declared as a stock dividend, must be treated as income from the trust estate." *Coast Line Dividend Cases*, 102 Md. 73, 61 Atl. 295.

The English cases hold that dividends of profit consisting of shares of stock of another corporation are income and belong to the life tenant, and between a dividend paid in cash and one paid in property, that is, in stock of another corporation, owned by the distributing corporation, there is no substantial difference. And to the same effect are the cases of *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789, and 223 Mass. 293, 111 N. E. 713; *Smith v. Dana*, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; *Union Tr. Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697; *Equitable Life Society v. Union Pac. Ry. Co.*, 212 N. Y. 860, 106 N. E. 92, L. R. A. 1915D, 1052.

The facts of this case, we think, under the well-settled rules applicable to this class of cases, require us to hold that the dividend here in controversy is income and not corpus, and is payable to the life tenant. There are a class of cases which deal with the apportionment of dividends between life tenant and remaindermen, but they involve conditions and present a state of facts dissimilar and different from those in this case.

For the reasons stated, the decree appealed from will be reversed, and the cause remanded, to the end that a decree may be passed in accordance with the views expressed herein.

Decree reversed, cause remanded, the costs above and below to be paid equally by the life tenant and the remaindermen.

(133 Md. 118)

LANAHAN v. MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE et al.
(No. 23.)

(Court of Appeals of Maryland. June 20, 1918.)

Appeal from Circuit Court No. 2 of Baltimore City; James M. Ambler, Judge.

"To be officially reported."

Controversy between Charles M. Lanahan, Jr., and the Mercantile Trust & Deposit Company of Baltimore, trustee, and others. From the decree rendered Lanahan appeals. Reversed and remanded.

Argued before BRISCOE, THOMAS, PATTON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Charles Markell, of Baltimore (Karl A. M. Scholtz, of Baltimore, on the brief), for appellant. Charles McH. Howard, of Baltimore, for appellees.

BRISCOE, J. The controlling questions, to be determined in this case, are the same as those disposed of and decided by us in No. 22, *Krug v. Mercantile Trust & Deposit Co. et al.*, 104 Atl. 414, at this term, and for the reasons stated in that case the decree in this case will be reversed, and the cause will be remanded so as a decree may be passed, declaring that the shares of stock in the Merchants' & Miners' Transportation Company, distributed by the Trust Company to the trust estate herein, constitute income and not corpus or principal, and is payable to the life tenant.

Decree reversed and cause remanded, the costs above and below to be paid equally by the life tenant and remaindermen.

(133 Md. 176)

STOCKSDALE v. JONES et ux. (No. 31.)

(Court of Appeals of Maryland. June 20, 1918.)

1. PLEADING §324—BILL OF PARTICULARS—EXCEPTION.

In suit on the common counts, where defendants demanded bill of particulars, and plaintiff filed bill stating demand was for money "received by defendants from plaintiff's intestate, to wit," etc., exception to such bill was properly sustained, for, in view of Code Pub. Civ. Laws, art. 75, § 24, subsec. 107, as amended by Acts 1914, c. 878, a bill of particulars should be specific.

2. TRIAL §45(1)—OFFER OF EVIDENCE.

In suit by administratrix on common counts, announcement by plaintiff's attorney in opening statement that he proposed to show that during life of plaintiff's decedent defendants obtained money from him while he was incapable of making a valid deed or contract, was not a proffer to accompany a certain record from the orphans' court, where decedent's will had been offered for probate, with evidence of his mental condition when the checks involved were given.

3. TRIAL §45(1)—PROFFER OF OTHER EVIDENCE.

It is incumbent on a party to accompany an offer of evidence with a proffer to follow it up with other evidence only where the evidence is not of itself admissible, and to make it so the other evidence must be introduced.

4. WILLS §53(2)—TESTAMENTARY CAPACITY—EVIDENCE.

Though the question is whether an alleged testator was capable of making a valid deed or contract at the time the will was executed, evidence of his mental condition prior and subsequent to execution is admissible to reflect on such question.

5. EVIDENCE \S 132—CAPACITY—PRIOR TESTAMENTARY INCAPACITY.

Because decedent was not capable of making a will in September, it does not follow that he could not give valid checks in November.

6. EVIDENCE \S 87(2)—PRESUMPTION OF CONTINUANCE OF CONDITION—INSANITY.

There is no presumption that insanity which is shown to have existed at one time continued, unless it is shown to have been of a permanent character, or the person was suffering from some disease which was progressive, or had been regularly found insane by an inquisition still in force.

7. WILLS \S 431—DENIAL OF PROBATE AS EVIDENCE OF CONTRACTUAL INCAPACITY.

In administratrix's action on common counts to recover money paid defendants by decedent by checks, record of probate proceedings in orphans' court, wherein decedent's alleged will presented by defendants was refused probate for lack of testamentary capacity, was admissible on issue of defendant's capacity to draw checks, but was not conclusive, and by itself was not even evidence on the point.

8. APPEAL AND ERROR \S 1056(1)—HARMLESS ERROR—EVIDENCE.

In administratrix's suit on common counts to recover money paid defendants by decedent by check on ground of decedent's lack of capacity, exclusion from evidence of record of orphans' court, in proceedings wherein defendant's alleged will was refused probate for lack of testamentary capacity, was harmless, where no further evidence was offered reflecting on defendant's mental condition.

9. TROVER AND CONVERSION \S 4—WHAT CONSTITUTES CONVERSION—DEPOSIT IN BANK.

In suit by administratrix to recover money paid by decedent by checks on ground decedent was without capacity, court properly excluded testimony of officer of bank, where check was deposited by defendant to his own credit, as to whether money was afterwards paid out; a conversion being shown by mere deposit.

10. APPEAL AND ERROR \S 1052(2)—HARMLESS ERROR—EVIDENCE.

The exclusion of testimony on a point of fact which was later developed in evidence was harmless.

Appeal from Circuit Court, Carroll County; Robert Moss, Judge.

Suit by Ida F. Stocksdale, administratrix, against Thomas S. Jones and Frances S. Jones, his wife. From judgment for defendants, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Guy W. Steele, of Westminster, for appellant. Theo. F. Brown and F. Neal Parke, both of Westminster (Jno. Milton Reifsnider and Bond & Parke, all of Westminster, on the brief), for appellees.

BOYD, C. J. The appellant sued Thomas S. Jones and Frances S. Jones on the common counts. There was a demand for a bill of particulars, and one was filed as follows:

"To money loaned to defendants by plaintiff's intestate, to wit: On or about November 13, 1914, \$500; on or about November 30, 1914, \$1,800; and to interest thereon."

At a later term leave was granted the plaintiff to amend the bill of particulars,

and an amended one was filed. In place of the language used above it read:

"To money received by the defendants from the plaintiff's intestate, to wit"

—and then follows the amounts as stated in the original bill of particulars. An exception was filed to that, which was sustained. The plaintiff then filed a second amended bill of particulars as follows:

"The defendants are indebted to the plaintiff for money had and received from the plaintiff's intestate for the use of the plaintiff's intestate, as follows."

The amounts and dates are the same as those set out above. Issue was joined on the general issue pleas and a plea of the statute of limitations, and the case proceeded to trial, but the plaintiff entered a non pros. as to Frances S. Jones. There are six bills of exception. The first five embrace rulings on evidence, and the sixth was to granting a prayer "that under the pleadings and evidence in this case there is no legally sufficient evidence to enable the plaintiff to recover, and the verdict of the jury must be for the defendant." That prayer was granted, and verdict rendered accordingly. From the judgment entered thereon this appeal was taken.

[1] The first point relied on by the appellant is the ruling of the court on the exception to the amended bill of particulars. There can be no doubt about the correctness of that ruling. "To money received by the defendants from the plaintiff's intestate, to wit," etc., gave the defendants no information as to what the suit was about, or how it was claimed to have been received. It might have been a gift, a loan, or, as stated in *Mueller v. Michaels*, 101 Md. 188, 60 Atl. 485, in reference to the particulars there filed in a suit under the Practice Act ("for cash money received from the plaintiff in the month of June, 1904, by the defendants in the sum of \$285.00"), "it may have been received in the payment of a debt due the defendants; it may have been paid to them under some mistake; it may have been received to be delivered to some third party; or it may have been received by the defendants as a stake to be held to abide the determination of some event. In what way the alleged indebtedness of the defendants arose out of the receipt of the money is left wholly a matter of speculation." In *Cairnes v. Pelton*, 103 Md. 40, 44, 63 Atl. 105, it is said:

"The office and legal effect of a bill of particulars is to inform the opposite party of the precise nature and extent of the claim which the plaintiff intends to rely upon under each and every count of the narr., and to confine his evidence to the claim thus stated."

That a bill of particulars ought to be specific, like an account filed under a Practice or Speedy Judgment Act, may at least be implied from section 24, subsection 107 of

article 75 of the Code, as amended by the act of 1914, chapter 378.

The most important question in this case is presented by the first bill of exceptions, whether the record from the orphans' court of Carroll county was admissible in evidence. Jacob Webster Caple executed a last will and testament on September 14, 1914, and died November 10, 1915. On November 19, 1915, Ida F. Stocksdales, his only daughter, filed in the orphans' court a petition in which she said she had heard there was in existence a paper writing purporting to be his last will and testament, and asked the court not to probate it until she had a reasonable time for an examination of it and the preparation and filing of a formal caveat thereto. On November 22d Thomas S. Jones, the appellee, presented the will to the orphans' court, and declared that the instrument of writing was the true and whole last will and testament of said Caple; that he had found it among the private papers of the deceased, and did not know of any other will or codicil. On November 26th Mrs. Stocksdales filed a caveat, alleging testamentary incapacity, undue influence, fraud, and other grounds, and on November 30th a summons was issued for the devisees and legatees named in the will, including Frances S. and Thomas S. Jones, which was returnable December 14, 1915. All were returned summoned, and on December 14th the trustees of the Sandy Mount Methodist Protestant Church in Carroll County (to whom he had left \$500 to be invested and the income to be used for the care of a lot in the church burying ground) and Lewis W. Caple, the executor named, appeared in open court and verbally declined to take any action in the matter. The others did not appear or answer.

The will left Mrs. Jones \$500 "for her care and trouble in nursing me and my wife during her illness" and Thomas S. Jones \$500 "in consideration of his care and trouble in helping to nurse me and my wife during her illness, and also in caring for and feeding my stock." Item 3 is:

"And, whereas, the said Thomas S. Jones and Frances S. Jones, his wife, have promised to board, wash and iron and care for me during the balance of my life, I do hereby bequeath to them the sum of two hundred and fifty dollars (\$250.00) for each and every year or proportionate part thereof, that they may so board, wash and iron and care for me, in the event that I have not already paid them in my lifetime, the sum to be paid in full payment for said board, washing and care."

By item (4) he left \$500 to the trustees of Sandy Mount Methodist Protestant Church, as stated above, and he gave his daughter \$5 "and no more" in item (5). By item (6) he left all the rest and residue of his estate to his two grandsons, Vernon W. Stocksdales and Howell Kelley Stocksdales, and he then appointed Lewis W. Caple his executor.

Nothing was done until May 9, 1916, when

a summons for witnesses was issued returnable on May 12th, when the court heard testimony of witnesses produced on the part of the caveator. On May 26, 1916, the court met for the further consideration of the case, and passed a decree in which, after reciting the proceedings, amongst others that no party defendant had filed an answer, and, "the court being satisfied that at the time said paper writing was executed by the said Jacob Webster Caple he was not of sound and disposing mind and capable of executing a valid deed and contract, and that said paper writing is not the last will and testament of the said Jacob Webster Caple, deceased," the court "adjudged ordered, and decreed that the said Jacob Webster Caple died intestate, leaving as his next of kin and heir at law his only child, the petitioner, Ida F. Stocksdales, and that the probate of the said paper writing * * * be and the same is hereby refused." This exception shows that at the trial of the case in the circuit court the plaintiff's attorney, in his opening statement to the jury, announced that "he proposed to show that during the lifetime of Jacob W. Caple the defendants, Thomas S. Jones and Frances S. Jones, obtained money from him while he was not capable of making a valid deed or contract, and that he would prove he was not capable of making a valid deed or contract by the records of the orphans' court for Carroll county." The plaintiff called the register of wills, who produced "the original papers in the matter of a caveat to the supposed will of Jacob Webster Caple, and a transcript of the docket entries in that case before the orphans' court of Carroll county," which included the petition of Ida F. Stocksdales, of November 19, 1915, the will and depositions of the subscribing witnesses, the caveat, the decree, and the docket entries. The first exception is thus worded:

"Whereupon objection was made to them being offered in evidence, whereupon counsel for the plaintiff made the following offer: These papers offered in evidence, with a transcript of the docket entries in the matter of the caveat of Ida F. Stocksdales to the last will and testament of Jacob Webster Caple, deceased, are

"And the defendants renewed their objection to the introduction in evidence of said papers (but not on the ground that the original papers were offered and not a certified copy thereof), although coupled with the foregoing offer of proof, and the court sustained their objections, and refused to allow said original papers and the transcript of the docket entries to be offered in evidence, to which ruling of the court the plaintiff excepted," etc.

[2] Apparently it was intended to set out the papers and docket entries after the word "are" above, but, however that may be, no proffer to accompany or follow up the record from the orphans' court, with evidence as to the mental condition of the deceased at the time the checks were given, is disclosed in the record in this case. What was said in the opening statement of counsel cannot be said to be such proffer, although

It does show the ground the appellant was relying on for recovery. What is said in an opening statement of counsel cannot be treated as a proffer of additional evidence. *Davis v. Calvert*, 5 Gill & J. 310, 25 Am. Dec. 282; 38 Cyc. 1327. Nor do we find anything to justify the statement in the appellant's brief that the court refused to receive the record of the orphans' court, "as well as any evidence showing the mental condition of the plaintiff's intestate."

[3] The question, however, is whether any proffer of other evidence was necessary in order to introduce the orphans' court record. Sometimes it is incumbent on a party to accompany an offer of evidence with a proffer to follow it up with other evidence, but that is only where it is not of itself admissible, and in order to make it so other evidence has to be introduced. As has been said in several cases in this court, a party cannot afford all of his evidence at the same time, and when he tenders that which is legal and material to the issue, it is the duty of the court to receive it, and it cannot require him to state in advance what other proof he intends to offer. *Patterson v. Crowther & Boone*, 70 Md. 124, 132, 16 Atl. 581; *Met. Life, Ins. Co. v. Dempsey*, 72 Md. 288, 19 Atl. 642; *Scaggs v. Reilley*, 89 Md. 162, 43 Atl. 58, or, as was said in *Taylor v. State*, 79 Md. 130, 28 Atl. 815:

"It was his unconditional right to pursue his own order in offering his proof; and it was the duty of the court to admit any legal evidence material to the issue, *although it would not be sufficient to maintain the issue on his part, unless followed up by other proof.*" (Italics ours.)

If it alone is not sufficient to sustain the case, the court can on application so instruct the jury. *Plank Road Co. v. Bruce*, 6 Md. 457.

[4-7] This record, if standing alone, would undoubtedly not be sufficient to prove that at the dates of the checks in November, 1914, the deceased was not mentally capable of making or giving them, but, as has often been held in will cases, while the question is whether the alleged testator was capable of making a valid deed or contract *at the time the will was executed*, evidence of his mental condition prior and subsequent to the execution is admitted for the purpose of reflecting on that question. *Davis v. Calvert*, 5 Gill & J. 300, 25 Am. Dec. 282; *Brashears v. Orme*, 93 Md. 442, 49 Atl. 620; *Harris v. Hip-sley*, 122 Md. 418, 89 Atl. 852. We entirely agree with the appellee that because a man is not capable of making a will in September it does not follow that he cannot give valid checks in November. That depends upon circumstances, and in this case there is not even anything to show for what the checks were given. It is also true that there is no presumption that insanity, which is shown to have existed at one time, continued, unless it was proven to be of a permanent character, or the party was suffering from

some disease which was progressive, or he had been regularly found insane by an inquisition which was still in force. But that does not seem to us to meet the whole question, and the record was in our judgment admissible. It was, however, not conclusive, and by itself was not even evidence of the mental condition of the deceased when the checks were given, or sufficient to show that he was incapable of giving valid checks at those times. Nor can we agree with the appellee that the case of *Packham v. Glendmeyer*, 103 Md. 416, 63 Atl. 1048, is conclusive of the question now being considered. There a will executed in 1903 had been set aside on the findings of a jury that there was fraud, undue influence, and incapacity to make the will. A will executed in 1902 was then offered for probate, to which a caveat was filed, and the findings on the issues upon the will of 1903 and the judgment of the orphans' court were offered in evidence at the trial of the issues as to the one of 1902. Some of the caveatees in the contest over the will of 1902 were not parties to the caveat of the will of 1903. The court held that the finding of the jury upon the issue as to fraud under the will of 1903 was not admissible, and then said:

"In regard to the testamentary capacity of the testatrix which was passed upon by the jury, in the proceedings referred to in the offer of evidence in question, what was determined as to that was her capacity *vel non* at the very time of the execution of the will which was there in controversy. The finding had no relation to any time anterior, and was but the opinion of the jury upon evidence relating to the case in which it was adduced. Judgments and decrees as *against those not parties* to them are only 'admissible to prove *rem ipsam*, and the legal incidents and consequences' thereof; but 'not to prove the facts' upon which they are founded. *Parr v. State*, 71 Md. 220 [17 Atl. 1020]; [*Dorsey v. Gassaway*] 2 Har. & Johns. 402-409 [3 Am. Dec. 557]. The contention of the appellants here would give to the findings of a jury a greater or larger effect in respect to their admissibility as evidence than the law gives to judgments and decrees."

It will thus be seen that the court had in mind in that case that some of the parties to it were not parties to the first proceeding. In this case both Mr. and Mrs. Jones were parties to the caveat, and there would seem to be no doubt that they were bound by the decision made by the orphans' court; that is to say, that the deceased was not capable of making a valid deed or contract on September 14, 1914. Of course, it was not conclusive against them as to the capacity to draw the checks, but it was admissible evidence as reflecting upon that, if there was other evidence tending to show the lack of capacity to give the checks. The record offered in *Packham v. Glendmeyer* was not admissible against those who were not parties to it, and hence was necessarily rejected as to all, as the verdict of the jury would be as to the validity of the will of 1902, and it could not be said the record of the proceedings as to

the will of 1903 was admissible as to some and not for other caveators.

In the discussion of the admissibility of judicial records in Reynolds on Trial Evidence, pages 52-61, the learned author points out that every record of a court consists of two distinct parts, denominated in Best on Evidence, § 590, as "the *substantive* and judicial portions," and he explains them. He says on page 55 that the judicial portions of records (the part in which the court expresses its judgment of opinion on the matter) are "admissible and conclusive as between the parties and their privies," and in further explanation of that it is stated that every judgment rendered by a court having competent jurisdiction over the parties and the subject-matter is, *as between the parties*, conclusive proof of all facts actually decided by the court, and appearing from the record itself to be the ground on which the judgment was based, unless evidence was admitted in the action in which judgment was delivered which is excluded in the action in which that judgment is intended to be proved, or vice versa." The case of Gridley v. Boggs, 62 Cal. 190, cited by the appellee, does not seem to us to meet the question spoken of above. The parties sought to be affected by the determination in the former proceeding do not appear to have been parties to that case. Moreover, the decision in Gridley v. Boggs, seems to have been largely influenced by a statute in force in that state.

[8] But, notwithstanding what we have said, the difficulty in this case is that there was no evidence offered which could be said in any way to reflect upon the mental condition of the deceased, excepting that record. We cannot understand why evidence was not introduced, if the appellant had it, but we find no evidence whatever in the record which throws any light on that question, excepting so far as the record may do so. The record itself was not legally sufficient to show incapacity of Mr. Caple at the time the checks were given, and hence we are forced to the conclusion that there was no error in the court granting the prayer taking the case away from the jury, even if the record of the orphans' court be considered and treated as in evidence, and as a result of that conclusion there is no reversible error in rejecting the record.

[9, 10] There can be no doubt about the correctness of the ruling in the second exception. The question was, "Now, Mr. Stem, that money was afterwards paid out?" Mr. Stem was the officer of the bank where the check was deposited by Jones, who had deposited it to his own credit. In the appellant's brief it is said that question was asked "to show the conversion by the appellee to his use of the \$1,800," but it was certainly not necessary for the plaintiff to introduce it to show a con-

version, as that was already shown by the appellee's depositing the check to his own credit in the bank. Moreover, it was later proven by the witness Benson that about December 1, 1914, Jones paid him \$1,800, and told him he got it from Mr. Caple, and therefore the appellant could not have been injured by the refusal of the court to allow the question to be answered.

In regard to the questions in the third, fourth, and fifth bills of exception, it is only necessary to say that they did not in any way reflect upon the competency of the deceased to give checks, or tend to show any right of the plaintiff to recover, and, under our view of the instruction given, it would be useless to discuss them.

We have not thought it necessary to discuss the pleadings nor the form of the bill of particulars, but whatever the theory of the latter was, there is no legally sufficient evidence to sustain it. The only difference between it and the ordinary count for money had and received is that the bill of particulars states that it was received from the plaintiff's intestate. There is no evidence whatever to show that it was received for the use of the plaintiff's intestate, which is a very material part of the count and in this case of the bill of particulars.

From what we have already said, it will be seen that in our judgment there was no error in granting the defendants' first prayer. It follows that the judgment must be affirmed.

Judgment affirmed, the appellant to pay the costs.

(133 Md. 432)

BOWERS v. COOK et al. (No. 21.)

(Court of Appeals of Maryland. April 2, 1918.)

1. EXECUTORS AND ADMINISTRATORS §=85(4)
—CONCEALMENT OF ASSETS—JURISDICTION OF ORPHANS' COURT.

Though jurisdiction of orphans' court, under Code Pub. Civ. Laws, art. 93, § 243, prescribing action of administrator where person conceals part of estate, is limited to cases where title is not involved, under section 244, court has jurisdiction to determine title to property alleged to be concealed by or in possession of administrator, and not included in inventory or list of debts returned by him.

2. EXECUTORS AND ADMINISTRATORS §=85(9)
—CONCEALMENT OF ASSETS—ISSUE PRESENTING LAW AND FACT—STATUTE.

On petition against administratrix in orphans' court, under Code Pub. Civ. Laws, art. 93, § 244, for concealment of assets, fact that issue, sent for trial to circuit court, whether there was such concealment, presented a mixed question of law or fact, did not render it fatally defective.

3. EXECUTORS AND ADMINISTRATORS §=85(9)
—CONCEALMENT OF ASSETS—TRIAL OF ISSUE IN CIRCUIT COURT—JUDGMENT OF ORPHANS' COURT.

After trial in circuit court of issue as to administratrix's concealment of assets, which issue covered entire case made by petition in orphans' court and answer of administratrix, she was not entitled to new issues as to facts admissible in evidence under old issue, and it be-

came duty of orphans' court to render judgment in accordance with verdict certified to it.

4. EXECUTORS AND ADMINISTRATORS ¶85(9)
—CONCEALMENT OF ASSETS—ISSUE FOR TRIAL IN CIRCUIT COURT—NOTICE.

Where administratrix was charged in orphans' court with concealment of assets, she should have been notified of issue proposed by petitioners to be submitted to circuit court, and given opportunity to object or propose another, and to exercise right of appeal from order of orphans' court.

5. EXECUTORS AND ADMINISTRATORS ¶85(9)
—CONCEALMENT OF ASSETS—LACHES.

Administratrix charged in orphans' court with concealment of assets held guilty of laches, depriving her of any relief she might have been entitled to on prompt application to court after she became aware of granting of issue of concealment for trial in circuit court, or discovered alleged fraud in procuring it.

6. EXECUTORS AND ADMINISTRATORS ¶85(9)
—CONCEALMENT OF ASSETS—APPEAL FROM ORDER OF ORPHANS' COURT—STATUTE.

Under Code Pub. Civ. Laws, art. 93, § 245, appeal to Court of Appeals of administratrix from order of orphans' court dismissing her petition to set aside a judgment, entered on trial of an issue in the circuit court, finding her guilty of concealment of assets, must be dismissed; order being reviewable in circuit court.

Appeal from Orphans' Court, Baltimore County.

"To be officially reported."

Petition by Georgeanna Bowers, administratrix of William Thomas Bowers, deceased, against John H. Cook and Samuel M. Lucas. From an order dismissing the petition, petitioner appeals. Appeal dismissed.

See, also, 124 Md. 567, 93 Atl. 162.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Linwood L. Clark, of Baltimore, for appellant. T. Scott Offutt, of Towson (Thomas H. Robinson, of Bel Air, on the brief), for appellees.

THOMAS, J. William Thomas Bowers, of Baltimore county, Md., died leaving a last will and testament, which was duly admitted to probate by the orphans' court of Baltimore county on the 18th day of September, 1913, and letters of administration with the will annexed were granted to his widow, Georgeanna Bowers. The testator devised and bequeathed his estate to John H. Cook and Samuel M. Lucas, in trust to pay the income therefrom to his said widow, as therein provided, during her life, and after her death to divide his estate between his "children or their heirs," and on the 9th of February, 1916, the trustees, who were administering the trust under the jurisdiction of the circuit court for Baltimore county, filed a petition in the orphans' court of Baltimore county, alleging that Georgeanna Bowers, administratrix, had filed what purported to be her final account, and—

"that the said Georgeanna Bowers * * * collected and reduced to her possession the sum of two thousand dollars (\$2,000) of the proper

estate and property of William T. Bowers, * * * deceased, * * * and although said money belonged to and should have been accounted for and returned by her as a part of the estate and property of William T. Bowers, her said decedent, in the inventory and other accounts filed by her in the above-entitled matter, yet she failed and neglected to account for the same, or any part thereof, and still fails and neglects and refuses to account for the same, or any part thereof, but conceals and retains the same in her possession, in violation of her duties in the premises, and to the loss and injury of said estate, and that the inventory and accounts filed by her in the matter of the estate of William Thomas Bowers are false, in that they did not fully and completely show the amount of the personal property of the testator which came into the hands of Georgeanna Bowers, administratrix as aforesaid, in that it does not show she received the said sum of \$2,000 which in truth and fact she did receive as of the goods, chattels, and property of William Thomas Bowers, deceased, and that the neglect of said administratrix to make and file an inventory of the same, and to account for the same to the court, is a fraud upon your petitioners."

The petition prayed the court to pass an order requiring said administratrix to appear before the court on a day to be therein named "to show cause, if any she has, why the money mentioned and referred to in this petition should not be returned and accounted for to this court as a part of the estate of her decedent, William Thomas Bowers, and her letters of administration revoked, and an administrator or administrators appointed to properly administer said estate," and on the same day the orphans' court passed an order as prayed. The administratrix answered the petition, alleging that she had accounted for the whole of the personal estate of the deceased, and alleging, in substance, that the \$2,000 mentioned in the petition belonged to her, and was not a part of the decedent's estate. The answer also relied upon the decision of this court in 124 Md. 567, 93 Atl. 162, as having determined her right to the money mentioned in the petition. On the 25th of April, 1916, the petitioners filed a replication to the answer, and also a petition praying the orphans' court to send to the circuit court for Baltimore county for trial the following issue:

"Whether the said Georgeanna Bowers, administratrix of William Thomas Bowers, collected and reduced to her possession the sum of two thousand dollars (\$2,000) of the proper estate and property of William Thomas Bowers, late of Baltimore county, deceased, as aforesaid, which she conceals and refuses to account for as a part of the estate of said William Thomas Bowers."

On the same day the orphans' court passed an order directing that the issue as framed by the petitioners be sent to the circuit court for trial, and that in the trial thereof the petitioners should be the plaintiffs and the administratrix the defendant. The record shows that the case was removed from the circuit court for Baltimore county to the circuit court for Harford county, and that

the transcript of the record was filed in the latter court on the 25th of October, 1916; that the trial commenced on January 8, 1917, and resulted in a verdict, on January 10, 1917, in favor of the plaintiffs.

On the 3d of April, 1917, the administratrix filed her petition in the orphans' court of Baltimore county, praying that court to "rescind the issue" previously granted by it, that the verdict of the jury thereon be not received, and that said verdict be rejected as the basis of a final judgment or order in the case, and that certain issues contained in her petition be sent to a court of law for trial in lieu of the issue tried in the circuit court for Harford county. The petition alleged, as reasons for granting the relief prayed:

That the issue sent to the circuit court for trial was defective in form, and presented a question of law and not an issue of fact; that "the ambiguous, complex, and misleading form of this issue, considered together with the clandestine way it was put through by the petitioners, without any knowledge to the respondent or her attorney, until called for trial in the circuit court, which fact compelled the removal of said issue, represented a fraudulent and collusive attempt to confuse the issue by ambiguous and technical language, and to deliberately keep your respondent in ignorance of the request for and transmission of said issue until too late for this court to revoke or remodel, so as to present the issue in a plain and clear way," and that, "no notice having been received by her or her attorney from any source, that she was to be or was defendant in said trial of issues, until same was peremptorily called for trial in the circuit court months later, your respondent could do no more, and no less, than defend her rights the best she could under said so-called issue, and thereafter rely upon your honorable court for the relief hereby prayed; the established rule of law being that 'the orphans' court has no power to revoke or remodel issues after they have been transmitted for trial.'"

The petition prayed the court to pass an order requiring the trustees to show cause under oath why the prayer of the petition should not be granted, and that she be given an opportunity to offer testimony in support of the facts therein alleged. The orphans' court accordingly passed an order requiring the trustees to show cause why the prayer of the petition should not be granted. The trustees answered, denying the averments of the petition, and alleging that the issue tried in the circuit court was in proper form and the orphans' court passed an order setting the petition for hearing on the 13th of September, 1917. At the hearing the administratrix offered to prove that neither she nor her attorney knew of the application for the issue sent to the circuit court at the request of the trustees, or of the transmission of said issue to the circuit court, until it was called for trial in the circuit court for Baltimore county; that she was taken by surprise, and in order to gain time in which to determine what to do she had to resort to her right of removal, and that before the jury was sworn in the circuit court for Harford county her attorney announced that his

appearance at the trial was not to be construed as a waiver of her right to move the orphans' court for a rescission of the issue as illegal. This evidence was objected to by counsel for the trustees, and the objection was sustained by the orphans' court, and on the 18th day of September, 1917, the orphans' court passed the order, from which this appeal was taken, dismissing the petition of the administratrix and requiring her to pay the costs of the proceedings, and adjudging, on the verdict of the jury in the circuit court for Harford county, which had been certified to the orphans' court, that she had "collected and reduced to her possession the sum of \$2,000 of the proper estate and property of William Thomas Bowers, late of Baltimore county, for which she has not accounted as part of the estate of William Thomas Bowers."

The theory of the appellant is (1) that the only question raised by the petition of the trustees and her answer thereto involved the title to the \$2,000 mentioned in the petition, and that the orphans' court had no jurisdiction to determine that question; and (2) that the issue sent to the circuit court for trial at the instance of the trustees presented only an issue of law, and that the verdict of the jury in the circuit court for Harford county could not therefore be made the basis of an order or judgment of the orphans' court.

[1] Section 243 of article 93 of the Code prescribes the course to be pursued by an administrator where any person conceals a part of his decedent's estate, and section 244 extends the provisions of section 243 "to all cases where any person interested in any decedent's estate shall by bill or petition allege that the administrator has concealed, or has in his hands and has omitted to return in the inventory or list of debts, any part of his decedent's assets." While the jurisdiction of the orphans' court under section 243 is limited to cases of concealment of assets belonging to the estate of a decedent, where no question of title to the property is involved (*Gibson v. Cook*, 62 Md. 260; *Linthicum v. Polk*, 93 Md. 84, 48 Atl. 842; *Dronenberg v. Harris*, 108 Md. 597, 71 Atl. 81), this court has repeatedly decided that under section 244 the orphans' court has jurisdiction to determine questions of title to the property alleged to be concealed by or in the possession of the administrator, and not included in the inventory or list of debts returned by him (*Linthicum v. Polk*, supra; *Dronenberg v. Harris*, supra; *Pratt v. Hill*, 124 Md. 252, 92 Atl. 543). The reasons for so holding are fully stated in *Linthicum v. Polk*, supra, where the court, referring to section 244, said:

"The plain language of that section not only applies to concealment by the administrator, but to cases in which he has omitted to return in the inventory, or list of debts, any part of his decedent's estate," and that the orphans' court could not "be shorn of all power to compel ad-

ministrators to file true and correct inventories and lists of debts on the mere allegation of the administrator that the property belonged to him."

[2] In *Pratt v. Hill*, supra, Chief Judge Boyd, speaking for this court, quotes the statement in *Cummings v. Robinson*, 95 Md. 83, 51 Atl. 1105, that, in order to give the orphans' court jurisdiction under section 244:

"It must be alleged and shown, either that the administrator 'has concealed or has in his hands and has omitted to return in the inventory or list of debts' some part of his decedent's assets."

Both of these averments were made in the petition of the trustees, and were denied by the answer of the administratrix, who also alleged in her answer that the \$2,000 mentioned in the petition was her property. The allegations of the petition, and the issue sent by the orphans' court to the circuit court for trial followed very closely the language of section 244. The fact that the issue presented a mixed question of law and fact did not render it fatally defective. In the case of *Connelly v. Beall*, 77 Md. 116, 28 Atl. 408, Chief Judge Alvey said:

"The sixth issue is objected to as being but the mere statement of facts fully covered by, and made admissible under, the second issue, and that, if the second issue be found for the caveator, it would embrace all the facts that could be given in evidence under the sixth issue proposed. In this contention of the appellants we entirely agree. The statute has fixed the standard of mental capacity to enable a party to make a valid last will and testament. * * * This standard prescribed by the statute requires a further definition by the court as to what condition of mind is required to enable a party to execute a valid deed or contract. But an issue formed in the terms of the statute presents a mixed question of law and fact, and that question can always be submitted to the jury under proper instructions by the court. This test, as prescribed by the statute, is fully presented by the second issue; and every fact that could be offered under the sixth issue can be availed of under the second."

And in the later case of *McSherry v. Wimsatt*, 116 Md. 652, 82 Atl. 451, the court said:

"The phraseology adopted by the orphans' court of Frederick county is a paraphrase of the language of the Code (article 93, section 317), and undoubtedly the better form in which to present an issue upon the execution of a will is to adopt as nearly as possible the language of the statute."

[3] The issue tried in the circuit court covered the entire case made by the petition of the trustees and the answer of the administratrix. After the trial of that issue, the administratrix was not entitled to new or other issues as to facts admissible in evidence under the issue already tried, and it became the duty of the orphans' court to render its judgment in accordance with the verdict of the jury certified to it. *Pegg v. Warford*, 4 Md. 385; *Levy v. Levy*, 28 Md. 25; *Diffenderfer v. Griffith*, 57 Md. 81; *Decker v. Fahrenholtz*, 107 Md. 522, 68 Atl. 1048, 72 Atl. 339; *Pleasants v. McKenney*, 109 Md. 277, 71 Atl. 955; *Sumwalt v.*

Sumwalt, 52 Md. 338; *Tabler v. Tabler*, 62 Md. 601; *Connelly v. Beall*, supra.

[4, 5] The petition of the administratrix alleges in general terms that the issue sent to the circuit court was procured by fraud, and that she was kept in ignorance of the request for and transmission of said issue until it was called for trial. The petition does not allege of what the fraud consisted, nor is there any proof to sustain the charge. She did offer to prove that she did not know that the issue had been granted until it was called for trial in the circuit court for Baltimore county. The record, however, shows that the case was removed by her from the circuit court for Baltimore county to the circuit court for Harford county, and that the record was filed in the latter court on the 25th of October, 1916. There was no request for issues in the petition filed by the trustees on February 9, 1916, which was answered by the administratrix on the 23d of February, 1916. The petition for the issue sent to the circuit court was not filed until April 25, 1916, and the issue was granted by the orphans' court on the same day without, so far as the record discloses, any notice to the administratrix. This is not in accordance with the proper practice in such cases. The administratrix should have been notified of the issue proposed by the petitioners, and given an opportunity to object to it, or to propose another issue in lieu thereof, and to exercise her right of appeal from the order of the orphans' court in reference thereto. But in this case the administratrix knew that the issue had been granted when the case was called for trial in the circuit court for Baltimore county. She thereafter participated in the trial of the issue in the circuit court for Harford county, and did not file her petition in this case until the 3d of April, 1917. Under these circumstances, she must be held to have been guilty of such laches as deprived her of any relief she might have been entitled to upon prompt application to the orphans' court, after she became aware of the granting of the issue, or discovered the alleged fraud in procuring the same. *Redman v. Chance*, 32 Md. 42; *Munnikhuysen v. Magraw*, 57 Md. 172; *Pleasants v. McKenney*, supra. Her title to the \$2,000 was not determined in 124 Md. 567, 93 Atl. 162.

[6] A motion has been made to dismiss the appeal. Section 245 of article 93 of the Code provides that either party to a bill or petition filed under sections 243 or 244 "may appeal to the circuit court for the county, or to the superior court of Baltimore city," and this court has held in numerous cases that the appeal provided for in this section applies to every proceeding instituted under sections 243 and 244, and is exclusive of all other appeals. *Hignutt v. Oranor*, 62 Md. 219; *Linthicum v. Polk*, supra; *Stonesifer v. Shriver*, 100 Md. 27, 59 Atl. 139; *McAvoy v. Renehan*, 116 Md. 333, 81 Atl. 673. In

McAvoy v. Renehan, *supra*, the proceeding was under what is now section 244 of article 93 of the Code, and the appeal was from an order of the orphans' court refusing to receive the answer of the administrator and to grant his application for issues to be sent to a court of law for trial. This court held that the order appealed from was only reviewable in the circuit court, and dismissed the appeal. The appeal in this case must be dismissed upon the same ground.

Appeal dismissed, with costs.

(133 Md. 157)

McMULLEN, State Comptroller, v. SHEPHERD. (No. 26.)

(Court of Appeals of Maryland. June 20, 1918.)

1. CONSTITUTIONAL LAW §26 — POWER OF LEGISLATURE—LIMITATION.

The Legislature of the state has all power, except such as is expressly denied to it by the state or federal Constitution.

2. CONSTITUTIONAL LAW §16 — CONSTRUCTION OF CONSTITUTION.

In construing the Constitution, the Court of Appeals is to consider the circumstances attending its adoption, and what appears to have been the understanding of the people when they adopted it; one of the useful and most helpful sources being the debates of the convention.

3. PUBLIC LANDS §154—COMPENSATION OF LAND COMMISSIONER—STATUTE—CONSTITUTIONALITY.

Acts 1900, c. 318 (Code Pub. Civ. Laws, art. 54, § 13), providing treasurer of state shall pay back to commissioner of land office 25 per cent. of moneys received from him, is violative of Const. art. 7, § 45, providing commissioner shall semiannually report all fees to comptroller of treasury, and void.

Appeal from Circuit Court, Anne Arundel County; Robert Moss, Judge.

"To be officially reported."

Petition for mandamus by James S. Shepherd, Land Commissioner of the State of Maryland, against Hugh A. McMullen, Comptroller of the State. From an order that the writ issue, respondent appeals. Reversed, and petition dismissed.

Argued before BOYD, O. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Albert C. Ritchie, Atty. Gen., for appellant. J. C. France and Edgar Allan Poe, both of Baltimore, for appellee.

CONSTABLE, J. James S. Shepherd, land commissioner of the state of Maryland, filed his petition praying that Hugh A. McMullen, comptroller of the state of Maryland, be directed to issue his warrant upon the treasury of the state of Maryland in favor of the said petitioner in the amount of 25 per cent. of the moneys paid by the petitioner into the treasury, as shown by accounts filed by him with the comptroller on the 31st day of March and on the 30th day of September, 1917. The comptroller filed an answer to the said petition denying that the petitioner was entitled to the 25 per cent. of moneys referred

to in his petition, and further averring that chapter 318 of the Acts of the General Assembly of Maryland of 1900, codified as section 13 of article 54 of the Annotated Code of Maryland, upon which alone the petitioner based his alleged right to the writ of mandamus, was unconstitutional, null, and void so far as the same provides that:

"25 per cent. of such moneys so received the treasurer shall pay over on warrant of the comptroller semiannually to the commissioner of the land office."

The petitioner demurred to the answer, and, upon the court overruling the demurrer, the writ was ordered issued, and this appeal taken. This appeal brings up for decision the right of the land commissioner to receive, by way of compensation, fees of his office in addition to the salary provided by the Constitution.

[1] The only question involved is whether chapter 318 of the Acts of 1900 is obnoxious to the Constitution of Maryland and therefore void. It is a well-settled rule that:

"The Legislature has all power, except such as is expressly denied to it by the state or federal Constitution." *Thrift v. Laird*, 125 Md. 70, 93 Atl. 449.

The constitutional provisions relating to the land commissioner are found in sections 4 and 5 of article 7, and are as follows:

"Sec. 4. There shall be a commissioner of the land office, who shall be appointed by the Governor, by and with the advice and consent of the Senate, who shall hold his office during the term of the Governor, by whom he shall have been appointed, and until his successor shall be appointed and qualified. He shall perform such duties as are now required of the commissioner of the land office, or such as may hereafter be prescribed by law, and shall also be the keeper of the chancery records. He shall receive a salary of one thousand five hundred dollars per annum, to be paid out of the treasury, and shall charge such fees as are now, or may be hereafter fixed by law. He shall make a semiannual report of all the fees of his office, both as commissioner of the land office, and as keeper of the chancery records, to the comptroller of the treasury and shall pay the same semiannually into the treasury.

"Sec. 5. The commissioner of the land office shall also, without additional compensation, collect, arrange, classify, have charge of, and safely keep all papers, records, relics and other memorials connected with the early history of Maryland not belonging to any other office."

The Constitution of 1851, section 6 of article 7, provided that the commissioner should sit as judge of the land office and should receive as a salary therefor the sum of \$200 per year and should retain for the performance of the other duties of his office, as compensation, the fees received. By chapter 415 of the Acts of 1853, and chapter 149 of the Acts of 1854, the commissioner was authorized to receive fees for recording papers and proceedings in land cases, and further to deduct as his compensation 25 per cent. from all moneys on account of public lands, the remaining 75 per cent. to be paid to the state. By chapter 208 of the Acts of 1861-62, the commissioner was made the custodian of the

records of the court of chancery and was paid a salary of \$500 per annum.

As we have seen from a perusal of the present constitutional provision relating to this office, it is apparent that somewhere between the time of the adoption of the Constitution of 1851 and the Constitution of 1867 it changed from a fee office to a salary office, and we will find that this change was made by the framers of the Constitution of 1864 and continued with slight modifications in the Constitution of 1867.

[2] In construing the Constitution we are to consider the circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it, and one of the useful and most helpful sources is the debates of the convention. *Bandel v. Isaac*, 13 Md. 202; *Mayor, etc., v. State*, 15 Md. 376; *Bonsal v. Yellott*, 100 Md. 481, 60 Atl. 593, 69 L. R. A. 914; *Jackson v. State*, 87 Md. 191, 39 Atl. 504.

According to the Debates of the Maryland Constitutional Convention of 1864, as found in volume 1, at page 163, the committee on civil offices made a report to the convention in which they recommended that the land commissioner should be elected by the people for the term of six years, and should receive a salary of \$1,800 and should turn all of the fees of his office into the treasury. On page 1089 of the second volume of the "Debates," the section referring to the land office was first taken up for debate. The section was read, and the president of the convention said:

"The President: 'I have been requested by the commissioner of the land office to state to the convention that the salary fixed in this section does not amount to what he actually receives at the present time. I think he said the amount he now receives was not less than two thousand dollars. I make this statement for the consideration of the convention at his request.'

"Mr. Briscoe: 'Does that include the compensation he receives for performing the duties of keeper of the chancery records?'

"The President: 'My understanding was that it applied to both offices.'

"Mr. Daniel: 'He referred a petition to us on that subject, asking that his salary be fixed, instead of giving him fees. I wish to say further that I think the report of the commissioner of the land office shows that some years his compensation has gone down as low as \$1,500 or \$1,600; on other years it has gone up as high as \$2,700 or \$2,800. It shows that his fees are now decreasing, and in a few years they will doubtless not amount to as much as \$1,800. That consideration influenced the committee to fix his salary at some reasonable sum, and they considered that \$1,800 was about a fair compensation under all circumstances.' * * *

"The President: 'I understand that the commissioner of the land office receives a stipulated salary, as keeper of the chancery records, under the existing law, of \$500; and that all the fees are to go into the treasury.'

"Mr. Daniel: 'It was the intention of the committee that all the fees should be paid into the treasury, and he should receive the \$1,800 as a substitute.'"

The petition that the then land commissioner referred to the committee, and which was mentioned to the convention, was read to the convention and is too lengthy to insert

in this opinion, but we will insert one paragraph of it from page 1183 of volume 2:

"I would respectfully suggest that the office may be continued in its present form, and the evil growing out of the influence of the commissioner's decisions upon his emoluments corrected, by fixing a salary to be paid out of the treasury of the state, the fees of register and examiner general to be charged and received by the commissioner, to be paid by him into the treasury, after deducting necessary office expenses. This would also relieve the office from the embarrassment necessarily arising from the uncertain and unsettled state of his compensation."

The section was afterwards passed by the convention fixing the salary at \$2,000, although there was considerable debate as to whether or not the smallness of the business done did not justify an abolishment of the office.

No one can have any doubt, after a reading of the debates, that it was the intention, not only of the members of the convention but of the land commissioner himself, that a salary of \$2,000 was to be in lieu of all fees, and the language of the section itself, "providing that the fees shall be turned in to the state treasury," gives assurance. When the convention of 1867 met, an effort to abolish the office was again renewed, and the convention at first voted to abolish the office (see proceedings Maryland Constitutional Convention 1867, p. 486), but later reconsidered their action and continued the office at a salary reduced from \$2,000 to \$1,500 and added section 5 as it now stands, which simply made him the historiographer of the state of Maryland. By chapter 66 of the Acts of 1874, the commissioner was made the custodian of certain deed books, and provision was made for him receiving and retaining fees for making copies and searches of the same. The provision of this act, together with the Acts of 1853 and 1854 about which we have heretofore spoken, were codified as sections 6, 9, 11, and 13 of article 54 of the Code of 1888. Section 11 of the Code of 1888, which was the Act of 1853, § 5, which authorized the commissioner to deduct as his other compensation 25 per cent. of all moneys received on account of the public lands the balance to be paid over to the state, was amended by the Acts of 1894, c. 191, so as to require the commissioner to pay over all such moneys to the state. The Acts of 1900, c. 318, now codified as section 13 of article 54 Bagby's Code and is the act involved in this controversy, sought to restore to the commissioner the right to this 25 per cent., and is as follows:

"All moneys payable to the state on account of the public lands and all fees shall be paid to the commissioner of the land office, whose receipts therefor shall be a good acquittance to the party paying the same; and the said commissioner shall keep an accurate account of all such payments in a book kept for the purpose, and shall account semiannually on the thirty-first day of March and the thirtieth day of September with the comptroller, on oath and pay over to the treasurer all such moneys so received; and twenty-five per cent. of such moneys so received &

treasurer shall pay over on warrant of the comptroller semiannually to the commissioner of the land office."

[3] What more is this legislative enactment than an attempted amendment of a constitutional provision? The Constitution says in plain, unequivocal, and express language that he shall make a semiannual report of all the fees of his office, both as commissioner of the land office, and as keeper of the chancery records, to the comptroller of the treasury, and shall pay the same semiannually into the treasury, the plain meaning of which can only be that fees collected are not to be retained as any part of his compensation, notwithstanding which the Legislature passes this statute, which, in effect, it seeks to set aside this constitutional provision. There is no question the Legislature can place additional duties upon the office, but it cannot allow the occupants, in the face of the express prohibition of the Constitution, to retain or recover any part of the fees, but they as a whole shall go to and be retained by the state. Being of the opinion that the Constitution expressly says the commissioner shall not have any of the fees of his office, but shall take a salary in lieu thereof, section 13 of article 54, attempting to do that, is null and void and of no effect.

Order reversed, and petition dismissed, with costs to the appellant.

(132 Md. 693)

HICKS v. KERR et al. (No. 9.)

(Court of Appeals of Maryland. April 28, 1918.)

WILLS §—578(1)—LEGACIES—INCOME.

A bequest of specific registered stock did not carry with it stock dividends subsequent to execution of the will, which became a part of the general estate.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Action by R. Randolph Hicks against Charles G. Kerr and Reverdy J. Kerr, executors of the will of Ella J. Kerr, deceased. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

R. E. Lee Marshall and John G. Schlipp, both of Baltimore, for appellant. Clapham Murray, Jr., and Walter L. Clark, both of Baltimore, for appellees.

URNER, J. The eighth paragraph of the will of Ella J. Kerr, late of Baltimore city, deceased, is as follows:

"To my daughter, Ella K. Hicks, wife of R. Randolph Hicks, of Norfolk, Virginia, I give and bequeath the forty-two (42) shares of stock in the Northern Central Railway Company,

now registered in my name. I further provide with reference to said legacy that, in the event my said daughter predeceases me without children or descendants of children surviving her, the same shall become the absolute property of her husband, R. Randolph Hicks."

The will was executed July 1, 1913, and the testatrix died on the 17th day of March, 1917. During the period between the execution of the will and the death of the testatrix, her daughter, Mrs. Hicks, died without leaving any children or descendants, but survived by her husband, to whom the 42 shares of stock specifically bequeathed by the clause of the will we have quoted have been transferred in due course of administration. At the time of her death the testatrix was also the owner of 16 additional shares of stock of the Northern Central Railway Company, which she had received, by virtue of her existing share holdings, as her proportion of a 40 per cent. stock dividend declared by the company in July, 1914, on account of surplus earnings appropriated to improvements or otherwise invested. The 16 shares which thus accrued to the testatrix are claimed by her son-in-law, Mr. Hicks, as the substituted legatee, under her will, of the 42 shares therein bequeathed, upon the theory that the dividend stock subsequently issued bore such a relation to the original shares as to follow the course of their testamentary disposition. This claim is contested by the two surviving sons of the testatrix, who assert that the 16 shares in question have passed to them as residuary legatees. The appeal is from a decree by which the latter view was sustained.

The descriptive terms of the bequest are clear. The property intended to be bequeathed was plainly designated by the testatrix as "the forty-two (42) shares of stock in the Northern Central Railway Company now registered in my name." It was the only stock of that company owned by her when she executed her will, and it was readily identified by the description quoted when the will took effect at her death. So far as the specific terms of the bequest are concerned, they are completely gratified by the delivery to the legatee of the 42 shares precisely described. It is only because the stock dividend represented assets which previously formed elements of value of the stock already issued that the dividend stock is claimed by the legatee of the original shares.

When the 16 shares of dividend stock were issued to the testatrix, she also received her due proportion of a cash dividend, likewise declared on account of accumulated earnings of the corporation. It is, of course, not suggested that this cash dividend would pass under the bequest of the stock, even if the money thus derived could be identified at the period when the will became operative. The

railway company might have distributed its surplus earnings wholly in the form of cash dividends, instead of using a part of such funds for improvements on account of which stock dividends were declared. If the former course had been pursued, it would not be contended that the bequest of the 42 shares should be treated as carrying with it such part of the proceeds of the cash dividends as the testatrix may not have expended in her lifetime. The fact that the dividends were declared partly in stock, instead of entirely in cash, does not affect the principle of the question now being determined. *Northern Central Dividend Cases*, 126 Md. 16, 94 Atl. 338; *Miller v. Safe D. & T. Co.*, 127 Md. 612, 96 Atl. 766.

The ordinary rule is that dividends and income accruing prior to the death of the testatrix, from stock or other property which is the subject of a specific bequest under the will, do not follow the legacy, but form part of the general estate. 40 Cyc. 1549; *Thompson on Corporations* (2d Ed.) vol. 4, § 4292; *Wethered v. Safe Deposit & Trust Co.*, 79 Md. 157, 28 Atl. 812. In the application of that rule no distinction can properly be made between stock and cash dividends of corporate earnings received by a testator under such circumstances as those shown by this record.

In the case of *In re Brann*, 219 N. Y. 263, 114 N. E. 404, L. R. A. 1918B, 663, a testatrix had bequeathed the 30 shares of stock of the Standard Oil Company owned by her at the time of the execution of her will, to be held in trust for her brother for life and for certain charities in remainder. The will was executed in 1908 and the testatrix died in 1912. About a year prior to her death she received from the Standard Oil Company a number of shares of the stock of its various subsidiary oil companies, which it distributed to its stockholders under a decree of the United States Supreme Court requiring it to dispose of its holdings in corporations under its control. The question in the case was whether the shares of the subsidiary companies, thus accruing to the testatrix in her lifetime, passed with her bequest of the primary shares, on account of which they were distributed, or were included in the portion of the estate to which the residuary legatee was entitled. The Court of Appeals of New York adopted the latter theory, and in the course of its opinion said:

"The new shares are, in effect, an extraordinary dividend declared during the life of the testatrix. * * * The case stands the same as if the Standard Oil Company had sold the shares, and distributed the proceeds. It is hardly denied that a voluntary dividend, whether paid in money or in stock, would be separate from the primary shares."

A different rule could not be invoked, the court said, merely because the dividend in that case was compulsory. Due consideration

was given to the fact that the subsidiary shares, while held by the parent company, contributed to the value of its stock, but it was held that the reduction which their distribution caused in the value of the bequeathed shares was analogous to a partial ademption of the legacy.

If, in the present case, the dividend shares had been received by the testatrix before her will was executed, it is obvious that they could not be held to be embraced in the specific bequest of the original 42 shares of which she was the owner. In such a situation the omission of the testatrix to mention the additional shares in connection with the legacy would be accepted as a plain indication of her intention that they were not to be included in the bequest. They would certainly not be attached to the legacy by judicial action, simply because they represented assets from which the bequeathed stock had formerly derived a part of its value. While the dividend stock with which we are now dealing had not been received by the testatrix at the time of the execution of her will, it was in her possession for more than two years prior to her death; but no change was made in her will to include the new stock within the terms and effect of the bequest under consideration. If it had been the desire of the testatrix to have the legacy include the 16 shares of Northern Central stock issued to her in 1914, as well as the 42 shares specified in the bequest, it may well be supposed that, in the ample time available, she would have made the simple alteration in her will necessary to accomplish that result.

Decree affirmed, with costs.

(133 Md. 196)

KAMPS et al. v. ALEXANDER et al.
(No. 34.)

(Court of Appeals of Maryland. June 20, 1918.
Motion for Reargument Denied July 30, 1918.)

1. APPEAL AND ERROR ¶345(1)—TIME FOR APPEAL.

An appeal must be filed within two months of rendition of a verdict in a court of law in trial of issues from orphans' courts, and filing motion for new trial does not extend the time.

2. APPEAL AND ERROR ¶355—TIME FOR FILING APPEAL—ESTOPPEL.

That appellees participated after the filing of an appeal in an argument regarding what the bill of exceptions should contain did not estop them from objecting in the Court of Appeals that the appeal was not taken in time.

Appeal from Baltimore City Court;
Charles W. Heusler, Judge.

"To be officially reported."

Proceeding by William Kamps and others against Alfred Alexander and others, to try issues from the orphan's court of Baltimore City, involving the validity of the will of Elizabeth Everett. Verdict for defendants,

and plaintiffs appealed. Motion to dismiss appeal granted.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, and STOOKBRIDGE, JJ.

Charles F. Harley, of Baltimore, for appellants. Clarence A. Tucker, of Baltimore (Lee I. Hecht and Knapp, Ulman & Tucker, all of Baltimore, on the brief), for appellees.

THOMAS, J. This appeal is by the plaintiffs from a ruling of the Baltimore city court in the trial of issues from the orphans' court of Baltimore city, involving the validity of the will of Elizabeth Everett, and the appellees have filed a motion in this court to dismiss the appeal on the ground that it was not taken within the time prescribed by the statute, and on the further ground that the bill of exceptions was not signed and filed within the time required by law.

[1] Section 6 of article 5 of the Code provides:

"All appeals, or writs of error, allowed from any judgment or determination of a court of law, to the court of appeals of this State, other than from decisions on questions arising under the insolvent law, shall be taken within two months from the date of such judgment or determination, and not afterwards."

The record in this case shows that the verdict of the jury on the issues involved in this appeal was rendered on the 27th of October, 1917, and that the order for the appeal was not filed until the 6th of February, 1918, more than three months after the date of the verdict.

It appears, however, from the docket entries, that on the day the verdict was rendered the plaintiffs filed a motion for a new trial, and that the motion was not finally disposed of by the court until the 1st day of February, 1918, and the appellants contend that where a motion for a new trial is filed in due time there can be no appeal until that motion is disposed of. That is the settled rule in ordinary suits at law, where the court enters a judgment, from which alone the appeal may be taken, and where the judgment cannot be entered until the motion for a new trial is overruled. But in the trial of issues from orphans' courts, courts of law do not enter a judgment, and the appeal is allowed by the statute from the "determination" by the court of law of questions of law arising during the trial of the issues. *Hoppe v. Byers*, 60 Md. 381. Such determinations or rulings of the court of law become effective and final upon the rendition of the verdict, and the time within which the appeal must be taken runs from the date the verdict is rendered. A petition for a rehearing after the entry of a decree does not operate to suspend the decree so as to arrest the running of the time in which an appeal must be taken. *Jacobs v. Bealmear*, 41 Md. 484. Upon the same principle, a motion to strike out a judgment does not suspend the judgment, nor can a motion for a

new trial, after a verdict upon issues from the orphans' court, operate to suspend the rulings of the court of law, or the verdict.

Whatever may be the rule in other jurisdictions, the precise question was decided by this court in the case of *Bradley v. Bradley*, 123 Md. 506, 91 Atl. 685. In that case the verdict of the jury in favor of the defendant on the issues sent from the orphans' court was rendered on the 23d of August, 1913. A motion for a new trial was filed by the plaintiffs on the 25th of August, 1913, and was overruled by the court on the 12th of November, 1913, and the order for the appeal was filed on December 2, 1913. In dismissing the appeal, this court, after referring to the section of the Code quoted above, said:

"It is well settled that the circuit court has no authority to enter a judgment on a verdict rendered on issues sent from the orphans' court; and the appeal in such cases is taken from the determinations and rulings of the court, in the course of the trial of the issues. * * * In this case, the verdict of the jury was in favor of the appellee on all the issues and was rendered on August 23, 1913; there was no appeal taken until the 2d day of December, 1913; and as this date was not within the time limited by the statute for an appeal, but afterwards, the appeal from the rulings or determinations of the court during the trial below is clearly too late."

[2] It is suggested by the appellants that, as counsel for the appellees participated in the argument before the court below, on the 11th of March, 1918, in regard to what the bill of exceptions should contain, and the court, at the instance of the appellees' counsel, directed certain evidence to be inserted in the bill of exceptions, the "appellees are too late with their objections." They cite in this connection the case of *Williams v. U. S. Fidelity Co.*, 105 Md. 490, 66 Atl. 495; and, if the suggestion had reference to the motion to dismiss the appeal on the ground that the bill of exceptions was not signed and filed within the time allowed by statute, there would be some force in the contention. But this court has held that the order for an appeal must be filed, or "the entry of the appeal must be made within the time limited by the statute," and that the filing of a bill of exceptions is not equivalent to the entry of an appeal. *The State, etc., v. Mackall*, 11 Gill & J. 456; *Gaines v. Lamkin*, 82 Md. 129, 33 Atl. 459. The connection of the appellees' counsel with the preparation of the bill of exceptions, relied on by the appellants, and set out in the certificate of the judge who presided at the trial in the court below, cannot therefore operate to estop the appellees from objecting in this court that the appeal was not taken in time.

As the appeal must be dismissed on the ground that it was not entered within the time fixed by the statute, it is not necessary to consider the other ground of the appellees' motion.

While we cannot dispose of the appeal on its merits, we may add that we have examined the record, and do not find any error

that would justify a reversal of the ruling of the court below. The only exception in the case is to the rejection of the plaintiffs' second prayer, and the granting of the defendants' tenth, eleventh, and thirteenth prayers. Plaintiffs' second prayer is like the third prayer of the plaintiffs in *Lyon v. Townsend*, 124 Md. 163, 91 Atl. 704, which this court said, in that case, should have been granted. But in that case the court also rejected the plaintiffs' first prayer, and the effect of the court's ruling on all the prayers, as noted by Judge Burke in the opinion, was to leave the jury without any satisfactory rule by which "to measure the testatrix's testamentary capacity," or to guide them in determining from all the facts and circumstances of the case whether she had sufficient capacity to make a will. In the case at bar the court below granted the plaintiffs' first prayer, which is like the plaintiffs' first prayer in *Lyon v. Townsend*, supra, and which gave the jury a rule by which to measure, and to guide them in passing upon, the testamentary capacity of the testatrix.

The only objection urged by the appellants to the defendants' tenth, eleventh, and thirteenth prayers is that, in describing the mental capacity necessary to make a will, instead of following the exact language of the Code, "valid deed or contract," the defendants used the words "valid deed or ordinary contract." The same words were employed in the defendants' third prayer in *Lyon v. Townsend*, supra, which the court held should not have been granted. But the prayer was condemned by this court upon another and entirely distinct ground, and there is nothing in the opinion of the court to suggest that the prayer was defective because of the language referred to.

We see no objection to the plaintiffs' second prayer, but the record does not indicate that the instruction was of such vital importance to the plaintiffs as to make the refusal of the court to grant it serious error; and, while the defendants' tenth, eleventh, and thirteenth prayers would, perhaps, have been more accurate if they had followed the exact language of the Code, in view of the instructions granted we see no such error in the rejection of the second prayer, or in the granting of the defendants' tenth, eleventh, and thirteenth prayers, as would warrant a reversal of the ruling appealed from.

Appeal dismissed, with costs.

(123 Md. 290)

MAYOR, ETC., OF BALTIMORE et al. v.
GAMSE & BRO. (No. 98.)

(Court of Appeals of Maryland. April 12,
1918. Motion for Modification of Opinion Denied Aug. 3, 1918.)

1. EMINENT DOMAIN §147—LEASEHOLDS—
MEASURE OF DAMAGES.

Where a leasehold is sought to be condemned under the power of eminent domain,

the tenant is to be allowed the market value of his estate.

2. EMINENT DOMAIN §147—MEASURE OF
DAMAGES—LEASEHOLD.

In proceedings to condemn a leasehold, in arriving at the value of the lessee's right to continue in possession, the labor and expense of dismantling, removing, and reassembling the machinery and appliances in another place at the time they were required to quit the premises could not be considered, since such expenses would, regardless of condemnation, have to be incurred by them at the end of their tenancy.

3. EMINENT DOMAIN §147—EVIDENCE—IM-
PROVEMENTS.

In condemning a leasehold, improvements made by the tenant are only to be considered in ascertaining the extent to which the value of the use and occupation of the premises is enhanced thereby.

4. EMINENT DOMAIN §147—LEASEHOLDS—
AMOUNT OF COMPENSATION.

In proceedings to condemn a leasehold under the power of eminent domain, the compensation to which the tenants were entitled is to be the difference between the fair value of the use and occupation of the premises for the unexpired term, if such use and occupation exceeded the amount of rent contracted to be paid and the rent which the tenants had contracted to pay for the remainder of the term.

5. EMINENT DOMAIN §202(1)—EVIDENCE—
ADMISSIBILITY.

In proceedings to condemn a leasehold, evidence as to the cost of constructing the leased buildings was inadmissible, where the inquiry was limited to the value of the lessee's right to use and occupation.

6. EMINENT DOMAIN §201—EVIDENCE—AD-
MISSIBILITY.

In proceedings to condemn a leasehold to which the city had acquired the reversion, the deed of such reversionary interest was admissible; the jury being entitled to know that the original landlord's interest had passed to the city.

Appeal from Baltimore City Court; Carroll T. Bond, Judge.

Proceeding by the Mayor and City Council of Baltimore and others against Gamse & Bro., to condemn a leasehold under the right of eminent domain. An award was affirmed by the city court after a jury trial, and the City appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

S. S. Field, City Sol., and Benjamin H. McKindless, Asst. City Sol., both of Baltimore, for appellants. Edgar Allan Poe, of Baltimore (James Fluegel, of Baltimore, on the brief), for appellees.

PATTISON, J. This is a proceeding by the mayor and city council of Baltimore to condemn, under the right of eminent domain, the leasehold interest of the appellees in a lot of land and the improvements thereon, situated on the northwest corner of Saratoga and Courtland streets, and occupied by them in the conduct of their business of lithographing and printing. The said lot of land, which fronts 50 feet on Saratoga street, with a depth of 100 feet on Courtland street, is im-

proved by a brick building of three stories and a basement. The premises were first leased unto the appellees, Herman Gamse and Benno E. Gamse, trading as H. Gamse & Bro., by the Owners' Realty Company, by deed of lease dated the 9th day of December, 1910, for the term of five years, commencing on the 1st day of April, 1911, and ending on the 31st day of March, 1916, at and for the annual rental of \$3,000. The said lease contained the following provision:

"That at the expiration of the lease, and upon a previous notice of six months by H. Gamse & Bro., this lease shall continue in force for another period of five years, subject to the same conditions as herein set forth, but subject to an increased rental of \$3,300 per annum."

Before the expiration of the lease it was agreed by the parties thereto that upon a renewal of it the lessors should make certain improvements upon the leased property, for which the lessees were to pay to the lessors, as rent, the sum of \$210 per year, in addition to the said rental of \$3,300 provided for by the original lease, making a total rental therefor of \$3,510; and on the 27th day of March, 1916, a renewal lease was executed by the parties, in conformity with the agreement so made, for the term of five years, commencing on the 1st day of April, 1916, and ending on the 31st day of March, 1921. This lease contained no provision for its renewal.

It was to condemn the leasehold interest of the appellees in said property that these proceedings were instituted. The commissioners for opening streets awarded to the appellees \$1,000 compensation therefor, and the appellees, being dissatisfied with said award, appealed therefrom to the Baltimore city court, where a trial by jury was had, which resulted in an award of \$9,250 to the appellees, as compensation for the taking of their leasehold estate. From that award the city has appealed to this court.

At the conclusion of the evidence, both the city and the appellees asked for instructions to the jury as to the measure of damages applicable to the facts before them. The appellees' first and third prayers were refused, and its second was granted as modified. The appellant's first, fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth prayers were refused. Its second was granted, and its fourth A and sixth prayers granted as modified. In addition to the prayers granted, the court granted an instruction of its own.

The city, prior to the institution of these proceedings, had acquired the reversionary interest of the Owners' Realty Company in said property by a conveyance from it, and, as we have said, the controversy here relates only to the amount the appellees are entitled to be paid for their leasehold interest, taken from them under these proceedings. The appellees, as owners of the leasehold, and the city, as owner of the reversion, acquired from the Owners' Realty Company, together held

the fee-simple estate, and the sum of the values of these interests is the value of the property taken. *Gluck v. M. & C. C. of Baltimore*, 81 Md. 321, 32 Atl. 515, 48 Am. St. Rep. 515. The value of the property is not enhanced by the fact that the entire title or estate in the property is not held by one and the same party. *Lewis on Eminent Domain* (3d Ed.) § 716.

In proceedings instituted to condemn the reversionary interest, as well as the leasehold interest, the rule is to ascertain the entire compensation to be allowed as though the entire title or estate in the property belong to one person, and then apportion the sum between the holders of the different interests, according to their respective rights. *Baltimore City v. Latrobe*, 101 Md. 629, 61 Atl. 203. As was said by this court, speaking through Chief Judge Boyd, in the case last cited:

"The condemning party, as a rule, ought not to be required to pay for the two interests more than the portion taken would be worth if owned by one person. * * * The jury, or other tribunal authorized to make the award, should always keep the value of the entire property in mind, and should limit the whole amount to be paid to that value, unless it is clearly shown that the lessee is entitled to more than the difference between what they allowed the reversioner and what the whole property would be worth in the market, if there had been no ground rent."

When 'the entire property included in a lease is taken, the question is one of comparatively easy solution, although there may be, as in this case, two separate estates therein, held by different parties. In such case the rule stated above may ordinarily be applied without difficulty.

[1] By the weight of authority, the rule as to the measurement of compensation in cases like the one before us is, generally speaking, precisely the same, whether the assessment of damages be to the tenant in fee, for life, or for years. The tenant should be allowed the market value of his estate. See note to *Baltimore v. Latrobe*, 4 Ann. Cas. 1005. In *Baltimore City v. Latrobe*, supra, Judge Boyd said:

"The reversioner is undoubtedly entitled to what his interest is worth in the market and prima facie the leasehold is charged with that value." *Gluck v. Baltimore City*, supra.

In *Baltimore City v. Rice*, 73 Md. 307, 21 Atl. 181, the city was granted a prayer, by which the jury were instructed that they could award the owner of the leasehold estate "only the fair market value of his interest in the brickyard, less the fair market value of his interest in so much thereof as would remain after the opening of Clare street." This court held that prayer good, and said of it that it covered the whole question. It would thus seem that, in this state, at least, the measurement of compensation for the appropriation of an estate, in cases of this character, is ordinarily the market value of the estate.

[2] The court's prayer instructed the jury:

"That they are to estimate and allow to the lessees the value of the right to continue in undisturbed possession of the premises for the remainder of the term fixed in the lease now existing, and that this value so to be estimated is represented by the price at which a lessee in the situation of the present lessees willing but not compelled to sell would sell the right, and a buyer, if there should be any such, willing, but not compelled, to buy, would pay for the right; that in arriving at their estimate the jury should consider the extent to which the building has been specially equipped and adopted for the lessees and the labor and expense of dismantling, removing, and reassembling the machinery and appliances in another place at this time; not that the jury shall award to the lessees the items of expense of equipment and adaptation of the building and of moving the plant, but they shall bear such items in mind as possible factors, which might play some part in the value and selling price mentioned above in this instruction."

It is contended by the appellant that this prayer incorrectly states the law applicable to the facts and circumstances of this case as disclosed by the record, and should not have been granted. The building and improvements upon the leased premises were constructed for the appellees by the Owners' Realty Company, with special regard for the adaptability of the same to the purposes for which the premises were to be used by the appellees; and the lessees, at their own expense, made other improvements for the better adaptation and equipment of the premises for the use for which they were intended.

The terms and conditions, if any, upon which the improvements were made by the appellees, do not appear in the record. It is not shown that there was any agreement between the lessor and the lessee by which the latter were to be paid therefor, or that such improvements were to be property of the lessees, to be removed by them at the expiration of the lease. The substantial or permanent character of some of the improvements made by the appellees indicates that they were not to be removed by them at the end of their tenancy, for they could not be removed without injury to the building. It may be that some of the improvements are of such a character as to entitle the lessees to remove the same at the end of their tenancy, without any agreement to that effect; if so, they are still entitled to remove them when they are required to quit the premises because of these proceedings. The city does not under such proceedings take the personal property of the tenants, but only their rights in the leasehold.

The appellees, as we have said, have not shown that they were to be paid for the permanent improvements made by them, or that such improvements were to be their property at the expiration of their tenancy, and therefore to allow them for said improvements, which they have not shown they are entitled to; might result in paying them for something to which they have no claim or right.

[3] Upon the facts of this case, as found in

the record, the improvements made by the tenant upon the leased premises are only to be considered in ascertaining the extent to which the value of the use and occupation of the premises was enhanced or increased by reason of such improvements. In cases where it is shown that the value of the use and occupation of the leased premises has been increased by the improvements placed thereon by the lessee, proportionate to the amount expended therefor, the cost of such improvements may be submitted to the jury as an element of proof in arriving at the value of the use and occupation of the property after such improvements are made.

As the appellees placed improvements upon the leased premises, in addition to those placed thereon by the Owners' Realty Company, they are entitled to show, by proper evidence, of what the improvements consist, and the extent to which the value of the use and occupation of the premises is increased thereby, in ascertaining the value of their leasehold interest in the property. This prayer is faulty, in our opinion, in that it instructs the jury that in arriving at their estimate of the value of the lessees' right to continue in possession of the leased premises they should consider the labor and expense of dismantling, removing, and reassembling the machinery and appliances in another place at the time they are required under these proceedings to quit the leased premises.

If the tenants were to remain upon the premises for the full length of their term, the cost, labor, and expense of dismantling, removing, and reassembling the machinery and appliances in another place would fall upon them, or at least this is true so far as the record discloses; and the fact that they must, as a result of these proceedings, remove therefrom at an earlier time, and pay the costs of the same, does not, as shown by the record, impose upon them additional burdens. The effect of condemnation under these proceedings would be to hasten the removal of the appellees and to shorten the term of their tenancy, but not to place upon them any additional burden, in dismantling, removing, and reassembling the machinery and appliances in another place in consequence thereof, which they would be required to do at their own expense at the end of their tenancy, if not disturbed by these proceedings. It is said in *Lewis on Eminent Domain*, § 27:

"The business conducted upon the property is not taken [under condemnation proceedings], and the owner can remove it to a new location. Any incidental loss or inconvenience in business which may result from removal must be borne for the sake of the general good in which he participates."

And in the case of *New York, W. S. & B. R. Co., 35 Hun (N. Y.) 635*, the court in discussing this question said:

"The circumstances of this case do not present the question of compensation for the expense of removing personal effects from the premises in any different light than it would be if the appellant were the owner of the fee,

instead of being tenant for a term of years. The company seeks to acquire a complete title to an entire parcel of land. It should not in fairness be compelled to pay more for the land than its market value, because the owner of the fee has carved out of it a leasehold estate."

See *Hunter v. O. & O. R. R.*, 107 Va. 158, 59 S. El. 417, 17 L. R. A. (N. S.) 124, and other cases cited in note to *Blincoe v. Choctaw, Okla. & Western R. R. Co.*, 18 Okl. 286, 83 Pac. 903, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689.

[4] In this case the amount of compensation to which the appellees are entitled, upon the facts before us, is the difference between the fair value of the use and occupation of the leased premises for the unexpired term, (if such use and occupation exceeds the amount of rent contracted to be paid by the appellees for said premises for such time) and the rent which the appellees had contracted to pay for said premises for the remainder of the term.

The first and fourth prayers of the city are consistent with the views we have expressed as to the measurement of the compensation to which the appellees are entitled, and so was the city's four A prayer as offered. These prayers should have been granted.

The city's fifth prayer should have been granted, and the reason therefor is given in what we have said in holding the court's prayer defective.

The modifications of the city's sixth prayer was, we think, wrongfully made, in that it was thereby made subject to the finding of the jury under the court's prayer, which, as we have said, was defective.

The city's seventh, eighth, ninth, and tenth prayers were all refused, because, as the court stated, they were likely to confuse the jury in view of the instructions above referred to, which we have held to be defective. Upon the evidence offered these prayers should have been granted.

The eleventh, thirteenth, and fourteenth, prayers of the city were properly refused, because not qualified in conformity with the view we have expressed as to the measurement of compensation. The twelfth prayer should have been granted for the reasons we have stated in disposing of the court's instruction.

The first, second, eleventh, and fourteenth exceptions are to the admission of evidence as to the intentions of the landlord and tenant to renew the lease of the property mentioned in these proceedings. This testimony was first admitted, but afterwards stricken out, and the petitioner's prayer based upon this testimony was refused.

The third, fourth, seventh, and eighth exceptions are to the admission of evidence as to the cost of the improvements to the property placed upon the property by the appellees. This evidence was inadmissible, as it did not as offered conform to the qualifications heretofore indicated as necessary to render such testimony competent.

[5] The fifth and sixth exceptions refer to the admission of evidence as to the present cost of constructing the leased buildings. For the purpose of this inquiry as to the value of the lessee's right to the use and occupation of the premises we think such evidence was inadmissible.

The ninth, tenth, twelfth, thirteenth, fifteenth, sixteenth, and seventeenth except to the admission of evidence in relation to the cost of dismantling and removing the machinery of the appellees to another location and the rent they would be required to pay at such new location. This evidence should have been excluded for the reason given in disposing of the court's prayer.

[6] The eighteenth exception was to the refusal of the court to admit in evidence the deed of the Owners' Realty Company conveying to the city of Baltimore its reversionary interest in the leased property. The deed should have been admitted in evidence, as the jury were entitled to know that the interest of the Owners' Realty Company in said property had passed from it to the city. The fact that the city had become the owner of such interest in the property by virtue and in pursuance of Ordinance No. 513 approved October 3, 1914, and Ordinance No. 77, approved January 21, 1916, sets at rest the question of a renewal of the lease by the appellees at the expiration of its term. It was because of the court's errors in its rulings above stated that this court reached the conclusion announced in the per curiam opinion heretofore filed.

Rulings reversed, and new trial awarded, with costs to the appellants.

McMICHAEL v. CULLITON et al.

(Supreme Court of New Jersey. July 23, 1918.)

1. ARREST §63(1)—AUTHORITY TO ARREST WITHOUT WARRANT—MISDEMEANOR—VIOLATION OF FEDERAL STATUTES.

A state officer was not justified in law in making an arrest without complaint and warrant for acts which under the federal statute constitute only a misdemeanor and were not committed in the presence of such officer.

2. CRIMINAL LAW §27—MISDEMEANORS AND FELONIES.

Though crimes in this state are divided into high misdemeanors and misdemeanors, and both classes comprise crimes which were felonious at common law, the legal rules as they existed at common law, growing out of the distinction between felonies and misdemeanors, are still in force, except in so far as modified by statute.

3. ARREST §63(1)—ARREST BY STATE OFFICER FOR VIOLATION OF FEDERAL STATUTE—NECESSITY OF WARRANT.

U. S. Comp. St. 1916, § 1674, authorizing designated state officers to make arrest for violation of federal statutes, process to be issued against offender "agreeably to the usual mode of process against offenders in such state," requires such arrest to be made with complaint and warrant.

4. FALSE IMPRISONMENT §7(1)—JUSTIFICATION—ARREST WITHOUT WARRANT—MISDEMEANOR—VIOLATION OF FEDERAL STATUTES.

In action for false imprisonment, the fact that the arrest was made upon information received from agents of the Red Cross that plaintiff had committed acts constituting a misdemeanor under federal statutes is not legal justification, where arrest was without complaint and warrant; U. S. Comp. St. 1916, § 1674, authorizing designated state officers to make arrest for violation of federal statutes, requiring that such arrest be made with complaint and warrant.

5. FALSE IMPRISONMENT §20(2)—PLEADING—ANSWER.

Where complaint in false imprisonment action alleges that plaintiff was arrested without cause, an answer denying such allegation, and alleging that arrest was with cause, raises issue for jury, although answer admits arrest was without complaint or warrant; there being no inference from such admission that it was not a proper case for arrest without complaint and warrant.

Action by William P. McMichael against James P. Culliton and others. Plaintiff moves to strike out answer and special defense. Special defense stricken, and motion to strike out answer denied.

Argued before KALISCH, J., at chambers, under the Practice Act.

Josiah Stryker, of Newark, for the motion. Charles E. Bird, Henry M. Hartman, and W. Holt Appar, all of Trenton, opposed.

KALISCH, J. The plaintiff sues the defendants in an action for false imprisonment. The complaint alleges that on the 26th day of June, while plaintiff was at the Clinton Street station of the Pennsylvania Railroad Company, in the city of Trenton, the defendant James Stanton approached plaintiff and willfully, violently, and without cause laid his hands upon him and informed plaintiff that he was under arrest; that the defendant

Stanton called the police patrol wagon and forcibly compelled plaintiff to enter the same, and took him by force and against his will to the police station, and there delivered him to the defendant James O'Rourke, who was there doing desk duty as police sergeant, and who then and there caused plaintiff's name to be entered upon the police blotter, compelling plaintiff to give his name, age, occupation, and place of residence, and then and there willfully and without cause imprisoned and detained him for an hour and a half; that the defendant James T. Culliton, as police captain, willfully and without cause ordered the defendant to arrest the plaintiff as aforesaid, and ordered the defendant James O'Rourke to detain plaintiff, as above mentioned; that no complaint or charge of any kind was made or entered against the plaintiff, and no warrant was issued for his arrest.

The defendants in their amended answer admit that the defendant Stanton put the plaintiff under arrest, but deny that the former willfully, violently, and without cause laid his hands upon plaintiff. The defendants further admit that in consequence of such arrest the defendant Stanton forcibly compelled plaintiff to enter the patrol wagon, and took the latter by force and against his will to the police station, and delivered him to the defendant O'Rourke, who dealt with the plaintiff as stated in the complaint, with the exception that the defendants deny that the plaintiff was imprisoned and detained willfully and without cause. The defendants, in their answer, deny the fifth averment of the complaint, which is to the effect:

"That the defendant James T. Culliton, as police captain of the first precinct of the police department of the city of Trenton, willfully and without cause ordered the said James Stanton to arrest plaintiff as aforesaid, and ordered the said James O'Rourke to detain plaintiff as aforesaid."

The defendants, in their answer, further admit that no complaint or charge of any kind was made or entered against the plaintiff, and no warrant was issued for plaintiff's arrest. As a special defense to the action, in the nature of the common-law plea of justification, the defendants set up that upon information received from George O. Tablyn and other agents of the American National Red Cross, directing the collection of funds in the city of Trenton for said organization, to the effect that the plaintiff had committed certain acts described and set forth in the defendants' special defense, which acts were in direct violation of section 4 of an act of Congress, entitled "An act to amend an act to incorporate the American National Red Cross, approved January 5, 1905," and which acts of the plaintiff under said sections constitute a misdemeanor, indictable and punishable in the federal courts.

Counsel for plaintiff moves to strike out

this defense upon the ground that the matters set up therein do not constitute a legal justification for the arrest.

[1, 2] The contention of counsel of plaintiff is that, since the defendants admit that the arrest was made without complaint and warrant, for acts which under the federal statute constitute only a misdemeanor, and were not committed by the plaintiff in the presence of the officer, the officer was not justified in law to make the arrest. I think this contention is sound. While it is true that crimes in this state are divided into high misdemeanors and misdemeanors, and both classes comprise crimes which were felonies at common law, nevertheless the legal rules, as they existed at common law, growing out of the distinction between felonies and misdemeanors, are still in force and effect in this state, except in so far as modified by statute. Reported cases on the civil and criminal sides, expository of this view, are numerous in this state, and must be familiar to the general practitioner. It is highly important to observe that the offense charged against the plaintiff was the violation of a federal statute, of which the state courts have no jurisdiction. Prior to the enactment of section 1674 (3 U. S. Comp. Stat. p. 3447), the right to arrest for the violation of a federal statute by a state officer did not exist. The settled practice was for a complaint to be made before a United States commissioner, who issued a warrant to the United States marshal. I recall a case in my own practice, where the offense was committed in the District of Columbia, and the accused was arrested in Newark, by virtue of a bench warrant issued by the presiding judge of the court of common pleas of Essex county, and upon habeas corpus proceedings before Depue, J., the accused was refused a discharge and remanded to the Essex county jail, and upon a habeas corpus sued out of the United States District Court, it being made to appear that no complaint had been made before a United States Commissioner, and that the accused was held on a bench warrant and commitment issued out of the state court, Nixon, J., discharged the accused from custody.

[3, 4] By the section above referred to, Congress empowers certain state officials, enumerated in the act, to issue process against offenders, "agreeably to the usual mode of process against offenders in such state," which language I think clearly indicates that there must be a complaint and warrant. It is to be remarked that this statute does not confer any jurisdiction of the offense denounced by it upon any of the state officials designated, but only constitutes them, so to speak, special officers for certain purposes only, and the limitations placed upon them must be strictly observed in order to give validity to their acts. The right

to hear and determine which is the insignia of the investiture of judicial authority is not conferred. I am therefore clear that the facts set up in the special defense do not constitute a legal justification, and therefore must be stricken out.

[5] Counsel of plaintiff also moves to strike out the answer of the two defendants James Stanton and James O'Rourke. The contention is that their answer presents no issue to be passed upon by a jury, in that both of these defendants admit the arrest to have been made without complaint and warrant. The complainant alleges that his arrest was without cause. The defendants, in their answer, deny this, and assert that it was with cause. The fact that the complainant was arrested without complaint and warrant does not justify the inference that it was not a proper case in which such an arrest could be made without complaint and warrant. I cannot assume, without anything appearing in the complaint or answer to the contrary, that the offense for which the complainant was arrested was not a felony, or that the offense, if a misdemeanor, was not committed in the presence of the officer. What the facts were at the time the arrest was made can only be developed on the trial of the cause. Of course, if it should appear that the offense charged was a misdemeanor, and not committed in the presence of the officer making the arrest, the arrest was unlawful; or if it should appear that the arrest was made for an offense committed by the plaintiff against the United States, the arrest was unlawful, if made without complaint and warrant. In deciding, however, on the validity of the answer, the facts set up in the special defense must be disregarded.

The answer may be open to the criticism that it is unscientifically drawn, but I think that it can be fairly held to be equivalent to the plea of general issue under the old practice, and therefore the motion to strike out the answer is denied.

(89 N. J. Eq. 144)

In re BATTIN. (No. 44/581.)

(Court of Chancery of New Jersey. June 14, 1918.)

1. TRUSTS ⇐165—DISCHARGE OF TRUSTEE.

The Chancery Court has power to discharge a trustee and appoint a substitute in his place.

2. TRUSTS ⇐160(2)—APPOINTMENT OF TRUSTEE—POWER OF COURT.

The Chancery Court has power to appoint a trustee to administer a trust, where no trustee is in existence; the identity of trustees being a matter of pure judicial discretion.

3. TRUSTS ⇐160(1)—APPOINTMENT OF TRUSTEES—NUMBER NAMED IN INSTRUMENT.

The Chancery Court is not obliged to appoint the same number of trustees provided for by the trust instrument, when it appoints a trustee to administer the trust; the number of trustees being a matter of pure judicial discretion.

4. TRUSTS §169(1)—APPOINTMENT OF SUBSTITUTE TRUSTEE—REASONS.

On application of trustees for appointment in place of one deceased, survivors expressing desire to resign, Chancery Court will appoint trust company, where parties in interest assent, it has proved difficult to get responsible persons, satisfactory to all, to accept, expense of surety bonds will be avoided, the beneficiaries have increased in number, etc.

5. TRUSTS §169(2)—APPOINTMENT OF TRUSTEE—AWARD OF COMPENSATION.

The Chancery Court, where it appoints a trustee, if necessary to secure a proper trustee, may award fairly adequate compensation, notwithstanding the provisions of the trust instrument.

In the matter of the application of surviving trustees under deed of trust made by Joseph Battin, deceased, for appointment of trustee in place and stead of deceased trustee. Application by four-sixths in interest in the trust fund for appointment of a trust company as sole substitute trustee granted.

Frank Bergen, of Newark, for the application. C. McK. Whittemore, of Elizabeth, and Philip D. Elliott, of Newark, for certain beneficiaries.

LANE, V. C. [1-3] The deed of trust provides for three trustees and for succession by appointment by the court to any trustee who shall die, refuse or become unable to discharge his duties. Upon the filing of the petition, the two surviving trustees expressed a desire to resign, thus leaving, upon the acceptance of their resignations, no one to administer the trust, unless an appointment is made by the court. The application is now made by four-sixths in interest in the trust fund for the appointment of the Union County Trust Company as a single trustee. There was no objection from the other parties in interest, and on the hearing their counsel consented. That this court has power to discharge a trustee and substitute another, to appoint a trustee to administer a trust where no trustee is in existence, needs no citation of authority, nor is the court obliged to appoint the same number of trustees as provided for by the trust instrument. *Barker v. Barker*, 73 N. H. 353, 62 Atl. 166, 1 L. R. A. (N. S.) 802, 6 Ann. Cas. 596; 39 Cyc. 283, 285. The number of trustees and their identity is a matter of pure judicial discretion.

[4, 5] The reasons which induce me to grant the prayer of the petition are as follows: The parties in interest assent. It has been difficult to get responsible disinterested persons, satisfactory to all parties in interest, to accept the trust as individual trustees. Individual trustees would be required to give large surety bonds at considerable expense to the estate. Appointment of a qualified trust company will insure succession for the life of the trust. The expense and trouble of probable further applications for appointment of suc-

cessor trustees during the next 21 years will be obviated. The compensation allowed by the trustee agreement is inadequate when divided among three trustees, and is scarcely adequate for one. It is doubtful if three trustees of ability and responsibility could be found who would be willing to accept their meager share of the total compensation provided, for the increasing trouble and responsibilities of administering the trusts. The number of beneficiaries concerned has already increased over those provided for originally, and there will be many more to deal with in the future. A trust company is now qualified by law to accept appointment as trustee. At the time the trust was created trust companies in New Jersey were not legally qualified to accept appointment, and it is not unreasonable to assume that, if the law of New Jersey had permitted the appointment of a trust company as trustee, the donor would have made such appointment. I do not mean to indicate by anything that I have said that I am of the opinion that the court is bound by the provisions in the trust deed as to the amount of compensation. I think the court may, where it appoints a trustee, if necessary to secure a proper trustee, award compensation as may be fairly adequate notwithstanding the provisions of the trust instrument.

(39 N. J. Eq. 314)

MCBRIDE et al. v. GARLAND et al.
(No. 44/731.)

(Court of Chancery of New Jersey. June 18, 1918.)

1. INSURANCE §148(1) — REFORMATION — GROUNDS—IMMORAL CONTRACT.

That insured had his life insurance policy made payable to his mistress upon her promise to continue illicit relations with him does not entitle the executors of insured's estate, upon insured's death, to have the policy reformed to make it payable to them.

2. REFORMATION OF INSTRUMENTS §33—PARTIES.

Where there was no fund or policy within the jurisdiction of the court, in a suit to reform life insurance policy so as to change the beneficiary thereof, the named beneficiary was a necessary party; the action being one in personam and not in rem or quasi in rem.

3. EQUITY §263—MOTION TO STRIKE OUT.

That a necessary party defendant cannot be brought within the jurisdiction of the court by service of process or agreement to appear cannot be raised by motion to strike out the bill.

4. ACTION §68—MOTION TO STAY SUIT.

That a necessary party defendant cannot be brought within the jurisdiction of the court by service of process or agreement to appear may be raised by motion to stay the suit until such defendant be brought in.

Suit by Hesser G. McBride and another, as executors of the estate of Edward M. Richman, deceased, against Mabel Brooks Garland and another. On order to show cause; on motion to strike out bill. Motion to strike

out granted, order to show cause dismissed, and the restraint dissolved.

George Edward Quigley, of Union Hill, for complainants. Wolber & Blake, of Newark, for defendant Garland. Alfred Hurrell, of New York City, and James Guest, of Newark, for Prudential Ins. Co. of America.

LANE, V. C. The bill, considered as favorably to complainants as possible, may be said to allege that the Prudential Insurance Company of America, at the request of Edward M. Richman, deceased, and in consideration of premium paid by him, issued its policy of insurance upon his life, payable to Mabel Brooks Garland, his mistress; that Richman obtained the policy and had it made payable to Garland upon Garland's promise that she would continue illicit relations with him; that such illicit relations continued; that the contract between Garland and Richman was immoral and illegal; that the policy provided that in case of the death of Garland prior to Richman, the proceeds should be paid to the executors, administrators, or assigns of Richman. No other provision of the policy is set out. The bill alleges that the proceeds should be paid not to Garland, but to the contingent beneficiaries. The bill also prays that the policy be reformed by striking out the provisions making it payable to Garland and inserting a provision making it payable to the executors, administrators, or assigns of Richman.

[1] I have not been favored with a brief of complainants. The defendant Prudential Company, moving to strike out, has furnished me with exhaustive briefs. It seems to me that it would be superfluous to consider the numerous cases cited. Upon what theory complainants insist that the proceeds should be paid to them as contingent beneficiaries is not disclosed. It is only in case Garland predeceases Richman that his executors, administrators, or assigns are given any rights under the policy. The fact that Garland was the mistress of Richman, and that the policy was made payable to her for this reason, does not equal her death. The attempt of complainants in reality is, not to reform the policy, but to make a contract not thought of by either of the parties to it. It seems to be the idea of complainants that because Garland induced Richman to have the policy written in her favor by an immoral promise, this court may compel the Prudential Company, not a party to the immoral transaction, to make a contract which it never dreamed of making. Whether the Prudential Company can resist the claim made by Garland is, so far as the allegations of the bill disclose, no concern whatever of complainants. Their uttermost rights would be to recover, for the estate, the premiums paid by Richman if, in fact, the Prudential Company does not pay the amount due on the policy. No case has been

brought to my attention that would warrant the court in taking any such action as complainants ask.

[2] As there may be an application to amend the bill, there is another insurmountable difficulty to the granting of any relief that should be mentioned. Defendant Garland is a necessary party. She is a nonresident, and has appeared specially, objecting to the jurisdiction of the court. Her objection is well founded. The action is one in personam, and not in rem or quasi in rem. *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160; *Gary v. Northwestern Masonic Aid Association* (Iowa, 1891), 50 N. W. 27; *Coe v. Garvey*, 130 Ill. App. 221.

There is no fund within the jurisdiction of this court. The policy is not within the jurisdiction of this court, so that, even if *Ely v. Hartford Life Insurance Co.*, 128 Ky. 799, 110 S. W. 265, may be considered as expressing good law, complainants are not aided. The Prudential Company could not interplead unless it could acquire jurisdiction over defendant Garland by personal service or appearance. *Hills v. Aetna Life Insurance Co.*, 39 N. J. Law J. 132 (Speer, Circuit Court Judge, 1916); *Hinton v. Penn Mutual Life Ins. Co.*, 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636; *Gary v. Northwestern Masonic Aid Association* (Iowa) 50 N. W. 27. Any decree which might be rendered in this court would not bind defendant Garland, and she might sue the company in California or any other state. That a double recovery is not a remote possibility is illustrated by a consideration of some of the foregoing cases in which it has actually occurred. It seems to me that defendant Garland is a necessary party, and that this suit cannot proceed without her presence. *Reed v. Baker*, 42 Mich. 272, 8 N. W. 959; *Hyams v. Old Dominion Co.* (D. C.) 204 Fed. 681. This being so, it would be useless to permit the bill to be amended unless defendant Garland agrees to appear. *Hyams v. Old Dominion Co.*, *supra*.

[3, 4] The fact that defendant Garland cannot be brought within the jurisdiction of the court cannot, of course, be raised by motion to strike out. It may be raised by motion to stay the suit until the defendant be brought in. Whether it should not be raised by answer in lieu of plea under the sixty-eighth rule (100 Atl. xii), with permission to defendant to answer over if the plea be found insufficient or untrue and what, if such a plea be filed and found true and sufficient, the decree should be are questions not now before me. In any event, it appearing on the return of the order to show cause that defendant Garland has not been served with process within the state and will not appear, the order to show cause would have to be dismissed and the restraint dissolved even if the bill were sufficient.

The motion to strike out will be granted.

the order to show cause dismissed, and the restraint dissolved. Settle order on two days' notice.

(89 N. J. Eq. 293)

SEACOAST REAL ESTATE CO. v. AMERICAN TIMBER CO. et al.

(No. 41/238.)

(Court of Chancery of New Jersey. July 24, 1918.)

1. MORTGAGES ¶460 — FORECLOSURE — ACCOUNTING FOR COLLATERAL — BURDEN OF PROOF.

Complainant in mortgage foreclosure has the burden of showing how it credited or disposed of the proceeds of the sale of any collateral.

2. MORTGAGES ¶492 — FORECLOSURE — ACCOUNTING FOR COLLATERAL.

Defendant, owner of lots subject to the B. mortgage, having conveyed eight of them as collateral security to complainant mortgagee, who then bought the B. mortgage, is entitled to credit for the entire proceeds of complainant's sale of the eight lots without deducting the amount due on the B. mortgage, unless complainant surrenders such mortgage.

3. USURY ¶2(2) — LAW GOVERNING.

The law of the state where notes are made and payable governs as to usury.

4. USURY ¶127 — DEFENSE BY SURETY.

A surety may plead defense of usury.

5. ESTOPPEL ¶68(4) — PLEADING IN OTHER SUIT.

Defendant is not estopped to plead usury in notes because in a prior proceeding against it still untried, to collect them, it was not pleaded; pleadings therein being still amendable on proper application.

6. USURY ¶83 — DEFENSE BY CORPORATION.

Act April 3, 1902 (P. L. p. 459), forbidding a corporation setting up defense of usury against an obligation executed by it, does not relate to its ordinary debts.

7. MORTGAGES ¶203 — MORTGAGEE IN POSSESSION — REPAIRS AND PERMANENT IMPROVEMENTS — REIMBURSEMENT.

While a mortgagee in possession may make necessary repairs for protection or preservation of the property, and be reimbursed therefor, he may not, as complainant, have allowance for permanent improvements made by him without any mistaken belief of absolute ownership and without consent of owner.

8. MORTGAGES ¶203 — MORTGAGEE IN POSSESSION — IMPROVEMENTS AND REPAIRS — REIMBURSEMENT.

Mortgagee in possession making expenditures without notice to or knowledge of owners, not merely for repairs, but as part of scheme to improve and develop, when mortgage was due and security ample, which work, because badly designed or improperly executed, was destroyed by elements, is not entitled to reimbursement for any part of expenditures.

9. MORTGAGES ¶202 — MORTGAGEE IN POSSESSION — REPAIRS — REIMBURSEMENT.

Mortgagee in possession, honestly making repairs under expert advice in the belief that they were necessary for protection of the property, is entitled to reimbursement, though perhaps the necessary repairs under some other method might have been made for a smaller expenditure.

Suit by the Seacoast Real Estate Company against the American Timber Company and others. Decree for complainant.

Durand, Ivins & Carton, of Asbury Park, and John D. McMullin, of Philadelphia, Pa.,

for complainant. Martin V. Bergen, of Camden, and De Witt Robinson, of Philadelphia, Pa., for defendants.

FOSTER, V. C. Complainant's bill is filed to foreclose, as a mortgage, a conveyance made by the defendant American Timber Company to Lydia S. Hinchman, under date of May 31, 1912. On June 22, 1914, Lydia S. Hinchman and Charles S. Hinchman, her husband, assigned this conveyance, or mortgage, and the indebtedness secured thereby, to complainant. These deeds were given to secure the payment of the indebtedness owing by one Henry H. Yard to both Mr. and Mrs. Hinchman.

The premises in question consist of two tracts of land at Manasquan Beach in Monmouth county, with an ocean frontage of about 3,000 feet, and the lands extend southerly along the beach from a point about 500 feet north of the Brielle Road to the Manasquan river. At the time the deed from the American Timber Company to Mrs. Hinchman was made and delivered, Henry H. Yard and wife gave to Mrs. Hinchman a quitclaim deed dated June 1, 1912, for their interest in the premises. The defendants are the American Timber Company, of which Henry H. Yard, now deceased, was president, and his widow and minor son. The complainant, of which Mr. Hinchman, now deceased, was president, is practically another name for Charles S. Hinchman and the members of his family, and the defendant corporation is only another name for Mr. Yard and members of his family.

The indebtedness which these deeds were intended to secure complainant claims now amounts to \$37,818.90, and arises out of the following transactions: In 1901 Mr. Yard borrowed from Joseph M. Gazzam and A. O. Granger certain sums of money, and gave to each of them his notes for \$3,000. On October 1, 1904, the indebtedness being unpaid, Yard gave to Gazzam and Granger his notes for \$3,500, each payable in one year with interest. After maturity these two notes were purchased by Mrs. Hinchman, and later were assigned by her to complainant. The security which Gazzam and Granger held for their notes was the first tract of land in question, which the American Timber Company had conveyed to Gazzam and Granger, and which they in turn conveyed to Mrs. Hinchman when they sold her the notes, and which she transferred with other security, to complainant when she assigned the notes.

The indebtedness of Mr. Yard to Mr. Hinchman is entirely distinct from the indebtedness due on the notes bought by his wife, and is based upon a note dated October 31, 1904, payable to Hinchman's order for \$22,452.12. This note was given as a result of a settlement between Yard and Hinchman at this date, and attached to this note is a

statement, dated October 19, 1904, showing the collateral held by Hinchman for its payment. Since the delivery of the deeds in 1912 Mr. and Mrs. Hinchman and complainant have been in actual possession of the premises, and have rented portions thereof, and Mr. Hinchman has had the entire control and management of the property, and has collected a gross annual income therefrom of about \$5,000, and complainant now values the property as being worth about \$75,000. The parties recognize that the Hinchmans and the complainant have since 1912 been occupying the position of mortgagees in possession, but defendants dispute the amount claimed to be due complainant, on the following grounds:

(1) That complainant has not given proper credit for the amount realized from the sale of some of the collateral shown on the above-mentioned statement; (2) that the amount claimed to be due on the notes to Gazzam and Granger is usurious; (3) that the amount charged for repairs to the mortgaged premises is improper and illegal.

Considering these objections in the order stated, it appears that the first objection is based upon the following circumstances: In the statement of collateral prepared by Mr. Yard and Mr. Hinchman under date of October 19, 1904, appears, among other property, the following:

Belmar lots, 2952-59.....\$3,000 00

In the account attached to the replication, complainant makes this statement:

12/31/08 Proceeds 2952/7 Belmar.. \$2,297 51
Less Brown Mtg. & Int. for 9/15/04 1,402 30

\$ 895 21

The Brown mortgage referred to was a mortgage given by Harry Tatu and wife to Peter and Anthony Brown on October 15, 1900, covering about ten acres of land at Belmar, and not part of the lands involved in this action. Subsequently Tatu and wife conveyed this property to the American Timber Company subject to this mortgage, and on January 27, 1902, the American Timber Company, as part of the collateral for Yard's indebtedness, conveyed to Charles S. Hinchman out of this tract eight lots, Nos. 2952-2959, both inclusive, subject to the Brown mortgage.

On September 14, 1904, the Browns assigned this mortgage to C. Russell Hinchman, the son of Charles S. Hinchman, for the consideration of \$1,115. On September 9, 1904, Charles S. Hinchman sold lots Nos. 2958 and 2959 for \$1,200, and on December 5, 1908, he sold the remaining lots, Nos. 2952-2957, for \$2,500. Releases of the Brown mortgage were given by C. Russell Hinchman for all these lots for the nominal consideration of \$1 in each case. The total amount received from the sale of the eight lots by Mr. Hinchman was \$3,700, from which he paid taxes, commission, and a recording fee amounting to \$232.49, leaving a net balance in Hinchman's hands of \$3,467.51, and of

this sum complainant gives defendants a credit of only \$895.21.

[1] Complainant seeks to justify its position by claiming that lots Nos. 2958 and 2959 had evidently been included in the statement of collateral through mistake; that the sale had been made and credit therefor given to Mr. Yard's account six months before the settlement was reached between Yard and Hinchman. Complainant contends there is no proof to show that the proceeds of this sale were not properly credited as it claims, but the answer is that there is no proof to show that it was, and the burden is upon complainant to show how it credited or disposed of the proceeds of the sale of any of the collateral held by Mr. Hinchman or itself as security for Yard's debt. The deed for these two lots was executed and acknowledged by Mr. Hinchman on September 19, 1904, just one month before the date of the collateral statement; and I am unable to find anything in the record to support the claim that the proceeds of the sale had been previously credited on Yard's indebtedness, or that the collateral statement erroneously included these two lots; and my conclusion is that defendants should be credited with \$1,170, the net amount realized by Mr. Hinchman from the sale of these lots, with interest.

[2] Complainant further insists it is entitled to charge against the proceeds of the sale of the remaining six lots, Nos. 2952-2957, the amount due on the Brown mortgage. It appears that C. Russell Hinchman actually bought and held the Brown mortgage for his father. It further appears that for reasons satisfactory to Mr. Hinchman, the son released the lien of this mortgage from the collateral lots, as they were sold for a merely nominal consideration of \$1. Complainant claims Mr. Hinchman was obliged to purchase the Brown mortgage to protect his collateral and prevent its foreclosure, and it is clear that he did not buy it for the Yard account, but apparently held it as an investment, and did not charge it against nor connect it with the Yard account until 1912, eight years after he bought it and four years after the last of the eight lots were sold. At the time of the sale of the lots, Hinchman credited the entire proceeds thereof in his books, and did not charge the principal and interest of the mortgage to defendants until December, 1912. It would seem that Mr. Hinchman in releasing the lots for a nominal consideration thought he had ample security in the balance of the Tatu property, for the amount due on the Brown mortgage; and in this he was probably correct. Whether he was or not, defendants are entitled to have either the entire net proceeds of the sale of these eight lots credited on the amount now claimed to be due, or they are entitled to have the Brown mortgage surrendered to them for cancellation. If complainant desires to hold the Brown mortgage as an investment, which it is entitled to

do, because the transaction is entirely independent of the matters involved in this controversy, then defendants are entitled to be credited, on the amount now claimed to be due, with the net proceeds of the sale of the Belmar lots amounting to \$3,467.51, instead of the credit of \$895.21.

[3] The defendants' next objection, that the Gazzam and Granger notes are usurious, is based on the claim that between October 9, 1901, and December 11, 1901, Mr. Yard had borrowed sums of money from both Gazzam and Granger, that the amounts he actually borrowed from each of them was \$2,400, and that as evidence of his indebtedness he gave each of them four notes for sums aggregating \$3,000. Apparently Yard did not pay either the principal or interest of the notes when due, and on October 1, 1904, he gave Gazzam and Granger the notes in question for \$3,500 each, payable in one year; the balance of the interest due on the old notes of \$21.26 was paid by Yard to Gazzam and Granger.

It appears from the testimony of Wm. S. Wallace, a member of the Philadelphia Bar, and who for years acted as the attorney of Mr. Gazzam, that he is personally familiar with these transactions, and he states that Gazzam and Granger agreed to loan Yard \$4,800, that each of them loaned him \$2,400, and that Yard gave each of them his notes for \$3,000, the difference between the amounts of the loans and the amount of the notes representing the bonus Yard had agreed to pay them for the accommodation; that in 1904, when Yard was pressed for payment, he agreed to give Gazzam and Granger each his note for \$3,521.26, representing the principal of, and the interest due on, the old notes. Later he gave his note dated October 1, 1904, to each of them for \$3,500, and paid \$21.26 to each of them in cash. Wallace is corroborated by a copy of his letter to Gazzam's nephew, in which he explains the transactions between Yard and Gazzam and Granger in connection with negotiations, then pending, for the sale of these notes to Mrs. Hinchman. He is further corroborated by the entries on the stubs in Mr. Gazzam's check book, and the proof is convincing that the amount actually owing by Yard to both Gazzam and Granger, including interest, on October 1, 1904, the date of the notes in suit, and which were purchased in the name of Mrs. Hinchman after maturity, was \$5,592.28, and not \$7,000, as complainant claims.

The pleadings and proofs show that notes were made and were payable in Pennsylvania. Under the Pennsylvania Act on Usury and Negotiable Instruments (P. L. 1901, p. 202, §§ 52, 58), only the amount actually loaned on them, with legal interest, can be recovered, and the law of Pennsylvania governs such a situation. *Trust Co. v. Electric Co.*, 57 N. J. Eq. 42, 41 Atl. 488.

[4-6] Complainant contends, however, that if the notes are usurious, this defense has been waived, and that defendants are estop-

ped from setting up such defense in this action. This contention is based on the fact that in other proceedings instituted by Mrs. Hinchman in 1911 (and not yet tried), to collect the amount due on these notes, Yard and the American Timber Company appeared and filed pleadings therein, but they did not, in any of these actions, set up the defense of usury against the amount claimed to be due; and in consequence, by their failure so to do, it is claimed that the defendants herein are estopped from doing so. And it is further claimed that it is doubtful if the American Timber Company, as a surety, can, under P. L. 1902, p. 459 (C. S. 5706), which forbids a corporation to set up usury as a defense to an obligation, set up the defense of usury now. All the defendants have pleaded usury in this case—the American Timber Company pleading it especially as surety, which it may do (39 Cyc. 1074)—and, if necessary, the pleadings filed in the other actions could, on proper application, be amended to permit the defendants therein to set up such defense. *Hill v. Collie*, 25 N. J. Eq. 469; *Corning v. Ludlum*, 28 N. J. Eq. 398. The right of the timber company to raise the defense is not affected by the act of 1902, as this statute has been held to be limited in its application, not to the ordinary debts of a corporation, but to obligations of a corporation which have been bought in the open market and have gone before the public for investment. *Lembeck v. Storage Co.*, 70 N. J. Eq. 757, p. 761, 64 Atl. 126; *Mazarin v. Building Co.*, 80 N. J. Law, 35, 76 Atl. 322. As the proofs show that neither Mrs. Hinchman nor complainant paid the face value of the notes and as they also show that the transactions with respect to them, between Yard and Gazzam and Granger, were usurious, all that complainant can be permitted to recover thereon is the amount actually loaned on the notes, with lawful interest.

The last objection to complainant's claim questions the necessity for and the legality of the charges made by complainant for repairs to the mortgaged premises. Defendants claim the repairs were unnecessary; were extravagantly made, and were actually improvements, and not repairs; and that they were made for the present and future permanent improvement and development of the property, with the intent on the part of Mr. Hinchman to improve defendants out of their property by making the amount they would be required to pay, in order to redeem, so large that defendants would be unable to pay it. About one-half of complainant's total claim, or \$18,986.16, represents the cost of the repairs which complainant claims it was necessary to have made, in order to protect and preserve the mortgaged premises, and that these repairs were absolutely necessary because of the following circumstances: About 1882 the federal government completed the construction of a stone crib at the southeasterly end of the mortgaged premises;

this crib extended from the line of the beach into the ocean for a distance of about 100 feet and extended inland for about 200 feet. In connection therewith the government also constructed a dike extending inland from the westerly end of the crib for a distance of about 1,800 feet to Stump Point, the highest and nearest point of firm land on what is called the Island of Sedges. The government's purpose in building the crib and dike was to establish a permanent channel for the Manasquan river. Prior to the construction of the crib and dike the river had no fixed outlet to the ocean. The action of the elements caused the outlet to shift from time to time towards the north; the sand would be washed and blown away; at times the erosion on the beach would be very pronounced. Sometimes the greater part of the beach was washed away by the shifting of the inlet as much as half a mile north of its present location. Before the government improvement was made there was no building of any kind on the beach. As a result of the construction of the crib and dike, the inlet was retained in its present location; the beach became wider and 10 or more feet higher; the creeks or bodies of water back of the beach became smaller and the marsh land firmer; all erosion ceased; a street was built nearly the entire length of the beach; water mains were laid therein by the municipality; about 200 bungalows have now been built on the beach, producing an annual rental of about \$5,000. And complainant claims that under Mr. Hinchman's management the rental value of the lands has increased from \$10 per lot in 1911 to \$50 a lot now, and that the value of the property has increased from \$25,000 in 1912 to \$75,000 now.

Under the deed from defendant timber company to Mrs. Hinchman she entered into possession of the property in 1912, and from that time to the present the property has been under the sole charge of Mr. Hinchman and complainant. For some time prior to 1912 the dike, which was then about 30 years old, had been getting out of repair; about half of the plank sheathing had broken or rotted away, and some of the piling were gone and some of the stringers were rotten. Some of the stone riprap that lay in front of the filling had been allowed to drop down by the water scouring the sand from under it. The government had not, and apparently would not, make any repairs. The crib at the mouth of the inlet adjoining the beach was, and is, in fairly good condition. As a result of the changed condition of the dike the waters of the river got behind it and formed large sized pools or lagoons at times—some of them more than 75 feet in width—and washed or scoured some sand away from part of the beach adjoining the crib. Mr. Hinchman did nothing to remedy this condition until the summer of 1914, and then he called on one Howland, a practical bulkhead builder, and after they had inspected the sit-

uation and talked the matter over, and without consulting defendants, he gave Howland an order to repair the dike at a cost of about \$11,970, without any plans, specifications, or written contract. Mr. Hinchman told Howland's son, who actually did the work that the purpose in repairing the dike was to fill in behind the dike with sand level with the plank on the dike. In 1913 Hinchman told the witness Haberle that he intended to fill in on the northwest side of the dike and put a boulevard there parallel with the dike, and while Howland was at work on the dike Mr. Hinchman told the witness Mount that he was going to improve the river front and put a boulevard in there and lay out some lots, and gave Mount an option to purchase one of the lots. Within a few months after Howland had finished his work, the severe storms of the winter practically demolished all of it, and left the dike in almost the same condition it was in during the early part of 1914.

In 1915 Hinchman had the dike repaired again, and employed Mr. Rogers, an engineer, to advise about the work. Rogers examined the dike in the fall of 1915, and found that in the central portion of it, for a distance of probably 150 feet in length, the filling and sheathing had been taken out by the action of the tides, and a contract was given on his specifications to the Logan Construction Company for \$6,682, to rebuild, repair, and reinforce about 1,000 feet of the dike; and an additional contract was also made for \$490 for repairs to the crib. In connection with their talk about repairing the dike Hinchman gave Rogers the idea that he contemplated filling in the swamp or meadow land out to the dike, and Rogers, at Hinchman's request, prepared maps in January, 1915, showing the meadow lands north of the dike and west of the beach strip laid out in streets and lots, and from what Hinchman told him, Rogers understood that there was a general scheme to deepen the creek and fill in north of the dike by pumping sand from the bars in the river on the northerly tide of the dike. The repairs made to the dike in 1915 are still very largely intact, although some part of the piling has been drawn out of place and is leaning out towards the river, and the scouring of sand and the formation of the pools back of the dike have almost entirely ceased.

Practically all the parties agree that the crib and dike have kept the inlet in a permanent location. Most of them agree that it is probably necessary that the crib and the dike, or some substitute for the dike, should be maintained in order to prevent the tide of the river from reaching the beach and from washing away the sand that has formed back of the crib or dike, but they greatly differ as to the methods to be adopted and the expenditures that would be required for such purposes.

Complainant and its witnesses, with the exception of Mr. Oram, who was the engi-

neer of, and superintended the repairs made by, the Logan Construction Company in 1915, all claim that the repairs were necessary, and that their cost was reasonable. Mr. Oram states that the work necessary to preserve the property could have been done for about \$3,000 by building a spur dam, but he did not inform Mr. Hinchman or Mr. Rogers of this, because there was more profit in it for his company to do the work as Hinchman and Rogers outlined it, and because the spur dam would not answer the purpose Mr. Hinchman told him he had in mind in doing the work, which was to pump in sand from behind the present bulkhead and fill it up; and the work his company did was not to preserve the property, but to fill in with sand and carry out a further development scheme. The engineers of defendants claim that scarcely any repairs were required to be made to the dike for the purpose of protecting the property. They agree with Oram that if protection and not development had been the object in doing the work, then the total cost of the same would not exceed \$2,000 or \$3,000.

It further appears that whatever scheme of improvement or development was contemplated, nothing further had been done to carry it out.

It is admitted that at the time these expenditures were made in 1914 and 1915, Mr. Hinchman knew that he was simply a mortgagee in possession, and that he did not make the repairs, or improvements, under the mistaken belief that he was the absolute owner in fee.

[7] The law applicable to the present situation is well settled, and the principle adopted by our courts is that a mortgagee in possession has the authority and is under the duty to keep the premises in necessary repair, and is entitled to be repaid any disbursements made for the protection or preservation of the property. In *Clark & Smith v. Smith et al.*, 1 N. J. Eq. 121, at page 139, Chancellor Vroom remarked that:

"The language of the books is, 'necessary repairs'; and this language has been construed strictly."

In *Venderhaise v. Hugues*, 18 N. J. Eq. 410, Chancellor Green held that credit should be given the grantee for both necessary repairs and lasting improvements, but this extension of the principle was made, as Mr. Justice Dixon points out in delivering the opinion of the Court of Errors and Appeals in *Freichnecht v. Meyer*, 39 N. J. Eq. 551, at page 562, on the inference that all parties considered the grantee to be the absolute owner, and that as such he had made the lasting improvement. And in this latter case, where complainant sought the redemption of the mortgaged premises, it was held that when the grantee, under the mistaken belief that he was the absolute owner of the property, made permanent improvements

thereto, complainant, in order to redeem, must pay the mortgagee the value of the improvements, applying the maxim that one who seeks equity must do equity. All the authorities that have come to my notice in cases where the mortgagee is the complainant limit his right to reimbursement to the money expended for necessary repairs made for the protection or preservation of the property. Where allowance has been granted to a mortgagee as complainant for permanent improvements, it has been based on the fact that such improvements had been made under a mistaken belief of absolute ownership on the part of the mortgagee; or it has been allowed in cases where the mortgagor as complainant sought to redeem and attempt to appropriate the benefit of the mortgagee's expenditures without compensation.

The principle that must control the present situation is stated in the opinion of the Court of Errors and Appeals in *Laible v. Ferry*, 32 N. J. Eq. 791, at page 801, where it is held that:

"It is perfectly well settled that where one knowingly makes permanent improvements upon the lands of another, without the consent or fault of the latter, he cannot, as a complainant in equity, obtain reimbursement for such expenses, even to the value of the benefit conferred upon the landowner."

[8, 9] The facts in this case bring it within the range of this principle. Complainant when he made his expenditures in 1914 knew that he was not the owner of the premises, but only the mortgagee in possession. Assuming some repairs to the dike were necessary, the danger, at the time, of injury to the property and mortgage security, was neither imminent nor impending. The expenditures were made without notice to the owners and without their knowledge, and these expenditures were made not merely for repairs, but as a part of a scheme to improve and develop the property.

At the time the expenditures were made in 1914, there was not much more than \$15,000 due on the mortgage, which was past due, and which could have been foreclosed with little delay at any time. The Hinchmans had possession of the property from 1912, but made no repairs thereon until 1914. If the dike was out of repair in 1912, as they claim, then they neglected it for nearly 2 years. At the time these expenditures were made the property is estimated to have been worth at least \$50,000, over three times the amount due on the mortgage. The net annual income from the property was then about \$4,000, and Mrs. Hinchman and complainant were in position to apply it at any time to the reduction of the amount due on the mortgage, and such reduction would have resulted in paying off the greater part of the mortgage debt by the time the expenditures now claimed were made.

The expenditure of over \$11,000 in 1914 was wasted because the work it paid for

was either badly designed or improperly executed, or both, as most of it did not last a year; and neither the property nor any of the defendants were in any way benefited thereby. The expenditure of nearly \$7,000 on the dike in 1915 may be said to have been of some value to protecting a part of the property, and the work done then, or the greater part of it, is still in a fair condition and is a benefit to the property.

This work of 1915 was done under expert advice and was fairly thought to be necessary, and I believe these or some other repairs were necessary, at that time. It is true that the proofs show that some other method of repair could have been adopted, the probable cost of which would not have exceeded \$2,000 or \$3,000. This proof, however, is largely a matter of speculation and estimate on the part of defendants' engineers. The other methods of repair suggested by them might or might not have proven as effective as the one Mr. Hinchman's engineer advised him to adopt, and these other methods of repair might have been built for the estimated amounts, and they might have cost much more. The whole subject is largely based on speculation and estimate of the most general character, and is too uncertain to justify me in holding that the cost of the necessary repairs made in 1915 was excessive.

On all the facts I find that Mr. Hinchman was not justified in making the expenditures for repairs and improvements to the dike which he did in 1914; that he was justified in making the expenditures he did in 1915 in making repairs that were necessary to both the dike and the crib, and, while these expenditures for 1915 are considerably in excess of defendants' estimate of the cost of such repairs, still I am satisfied they were honestly made, in the belief that they were necessary to protect the property, and were made under expert advice and for the repair work only which Mr. Hinchman's engineer had designed as necessary for the proper repair of the crib and dike in order to protect the property.

A decree will be advised in accordance with the views herein expressed.

(81 N. J. Law, 548)

**FIRE PROTECTION DEVELOPMENT CO.
v. AMERICAN DIST. TELEGRAPH CO.**

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

**PATENTS 218(5)—FIRE ALARM TELEGRAPHS
—CONTRACTS—CONSTRUCTION—ROYALTIES.**

Contract between assignee of owner of patents for telegraphic fire alarm, who had leased system of fire alarm, and defendant, giving defendant control of the system and reserving royalty to the assignee and binding defendant to pay expenses of operating the system held to absolve the assignee from payment of such expenses from its royalties notwithstanding its

prior contract with its lessor to pay the expenses.

Black and Williams, JJ., dissenting.

Appeal from Supreme Court.

Action by Fire Protection Development Company against the American District Telegraph Company. Judgment for defendant and plaintiff appeals. Reversed.

Magoffin & Signor, John W. Griggs, of Paterson, and Martin Conboy, of New York City, for appellant. Kinsley Twining, of Newark, and Rush Taggart, of New York City, for appellee.

GUMMERE, C. J. This is a controversy over the division of receipts coming from the operation of a manual fire alarm system in the city of New York. The trial was had before Adams, J., sitting without a jury, and resulted in a judgment for the defendant. From this judgment the plaintiff appeals.

In order to understand the respective claims of the parties in the present suit a rather detailed account of the history of their contractual relations is necessary:

On February 18, 1904, one Robert L. McElroy, who owned patents for a manual fire alarm system, entered into an agreement with the defendant company, a corporation of this state, whereby his system was to be operated by it over its lines in all places where those lines existed or might thereafter be constructed. Under this agreement many reciprocal duties and obligations were imposed, of which the following throw light upon the question to be determined:

McElroy was to manufacture all of the devices and apparatus which were to be used under the contract, and to deliver them to the defendant company free. He was also to put canvassers to work to solicit subscribers in the various cities of the United States where this system was to be put in operation. This, also, he was to do at his own expense. The defendant company was to equip central offices, to run wires therefrom to the buildings of the customers who should be obtained by McElroy, to install at its own cost the McElroy devices in these buildings, and to operate and maintain the system, making such ordinary repairs thereto as might be necessary to preserve the same in first-class working order. The company was also to collect from the subscribers of McElroy all of the rentals which the said subscribers under their contracts were to pay for the use and operation of the electrical devices covered by the contract, and to keep a just and accurate account of all the moneys so collected, and to remit and pay to McElroy each month 45 per cent. of the gross rentals which it should collect.

In April, 1905, McElroy assigned all of his rights under this contract to a corporation of the state of Maine known as the Automatic Fire Protection Company, and that

corporation assumed all of his obligations thereunder. At the time of the assignment the contract referred to was not operative in the city of New York, because of the fact that the defendant company had no property or franchises there. A purely manual fire alarm service, however, was being carried on in that city by a New York corporation, known as the Special Fire Alarm Electrical Signal Company, and on the 27th of July, 1905, the Automatic Company took a lease from this New York corporation of all its business, assets, and franchises of every name and nature for a period of 49 years, the business to be transferred as a going concern. The annual rental to be paid was the sum of \$5,000, and the Automatic Company also covenanted to keep the property in good condition, make all necessary repairs, and pay all taxes and assessments. The defendant company guaranteed the lease, and the payment of the consideration called for by it. The lessor company, however, continued to operate the plant until the 21st of August, 1905, and on that day, apparently, turned it over to the possession of the defendant company. The expense of operation between the dates mentioned was paid by the defendant as appears from a letter of its superintendent written on the latter day. Thereafter the defendant company continued in the full control of the leased property, and in the sole operation of it, including the collection of rentals from subscribers.

No formal instrument declaring the respective rights and obligations of the Automatic Company and of the defendant in the leased property was executed until October 12, 1905. On that day a contract was entered into between them which, after reciting that one of the purposes and considerations for the lease with the Special Fire Alarm Electrical Signal Company was to secure fire department connections for the National District Company, a subsidiary of the defendant (no other purpose being disclosed in the agreement), and that the rentals from subscribers were being received by the defendant, then provided that out of the gross income received by it from the business and contracts aforesaid there should be first paid, during the term of the lease, the annual rental of \$5,000, and that the remainder of the gross income which should be received by the defendant during the term of the lease for manual signal service in the city of New York, up to the aggregate of \$29,000, remaining after deducting the said \$5,000 rental, should be divided between the Automatic Company and the defendant in the following proportions, 45 per cent. to the Automatic Company, 55 per cent. to the defendant, and that all income in excess of \$29,000 should be retained and enjoyed by the defendant for its own use.

On April 29, 1909, by an agreement made between the Automatic Company and the

present plaintiff (the Fire Protection Development Company), the latter corporation succeeded to the rights and obligations of the Automatic Company under the agreements and lease above recited. The documents thus referred to, and the provisions thereof which have been recited, constitute all of the documentary evidence necessary to be considered.

Turning to the other facts in the case we have the following:

From the date of the lease of 1905 until May 25, 1912, the defendant paid over to the Automatic Company, and afterward to its successor, the present plaintiff, the full 45 per cent. of the gross income, after the deduction of the \$5,000 rental. On the latter date, conceiving that under the McElroy contract of February 18, 1904, they were entitled to deduct the expense of service contract solicitation, and moneys expended in the construction of devices and manual fire alarm apparatus, out of the share of the gross income payable to the plaintiff, they proceeded to make such deduction. On the 1st of April, 1913, the defendant claimed the right to deduct also from the plaintiff's share of the gross proceeds all necessary repairs made to the leased property and all taxes and assessments paid thereon. The right to make this latter deduction is challenged by the present litigation, and is the sole question presented to us for determination.

The fact that the contract of October 12, 1905, between the Automatic Company and the defendant (which shows on its face that it was prepared by a skilled draftsman), provided that, after deducting the rental to be paid to the Special Fire Alarm Electrical Signal Company, 45 per cent. of the gross income received by the defendant company from the operation of the leased property should be paid to the Automatic Company, and that it contains no suggestion that this 45 per cent. should be subject to any deduction to be made by the defendant, is significant of the intention of the parties to it with relation to the matter now under consideration; and this significance is emphasized by the further fact that the acquisition of the leased property was concededly for the purpose of enabling the defendant company to secure fire alarm connections in the city of New York. The fact that up to the time of the execution of that contract, and ever since, the cost of maintenance and repair of all the various manual fire alarm systems in the operation of which the parties are jointly interested is, by mutual agreement, to be borne solely by the defendant company, is a further indication of the purpose of the parties. So, too, the fact that from the time when the defendant company took over the leased property in 1905, up to April 1, 1913, the defendant company paid out of its own treasury the whole cost of the maintenance and upkeep of the manual fire alarm system leased

from the Special Fire Alarm Electrical Signal Company, including the taxes and assessments laid against the property, without any claim that it was doing so solely for the benefit of the Automatic Company and its successor, the plaintiff, or that either of them was liable to repay these expenditures, is a very potent aid in determining the scope of the contract, for it amounts to a practical construction put by the parties upon this portion of their agreement, and is difficult to explain, except upon the theory that both parties understood that these payments were in discharge of an obligation resting solely upon the defendant company under the contract.

We find nothing in the case to diminish the force of this congeries of facts, unless it be the provision of the lease made by the Special Fire Alarm Electrical Signal Company to the Automatic Company, by which the latter binds itself to pay the cost of maintaining and repairing the leased property, and paying the taxes and assessments thereon, during the term of the lease. We are of opinion, however, that this covenant, although it binds the lessee company and its successors so far as the lessor company is concerned, has no bearing upon the obligation of the plaintiff or the defendant, as between themselves, to meet these expenses. If we should hold otherwise, that is, if we should conclude that it was the intention of the Automatic Company and the defendant that the plaintiff and its predecessor should bear all the burden imposed on the lessee by the terms of the lease, except to the extent they were exonerated by the agreement of October 12, 1906, then we would be driven to say that, in the absence of any such agreement, the parties must be presumed to have intended that all of this burden should be borne by the Automatic Company and its successor, notwithstanding the fact that the defendant company was at once to receive the whole of the leased property, operate it, and collect all of the rentals from the subscribers; in other words, that the defendant company should enjoy all of the benefits flowing from the possession of the leased property and its operation, without any obligation to pay any part of the rentals, or contribute a penny toward its upkeep.

The conclusion we reach, therefore, is that the plaintiff was entitled to receive from the defendant its 45 per cent. of the gross income derived from the operation of the manual fire alarm system held under the lease from the Special Fire Alarm Electrical Signal Company, without any deductions for maintenance, repairs, taxes or assessments, and that, consequently, the judgment under review must be reversed.

BLACK and WILLIAMS, JJ., dissent.

(92 N. J. Law, 309)

LENNON v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §—289(32)—ASSUMPTION OF RISK—QUESTION FOR JURY.

The plaintiff's testator, while in the line of his duty as defendant's servant, was killed when riding on the running board of a moving car, on which defendant had negligently allowed a plank to be placed and carried for the use of one of defendant's trainmen, and while the train was in motion a fellow servant of the deceased, passing along the running board in order to dismount, negligently struck his foot against the plank causing one end to fall to the ground, and the other to strike and kill the deceased. *Held*, it was not error to leave to the jury the question whether the deceased had assumed the risk of working in a dangerous place, the evidence not being conclusive that the risk was obvious.

2. DEATH §—52, 57 — FEDERAL EMPLOYERS' LIABILITY ACT—CAUSES OF ACTION—PLEADING.

The cause of action rested on the federal Employers' Liability Act (Act Cong. April 22, 1906, c. 149, 35 Stat. 65 [U. S. Comp. St. 1910, §§ 8657-8665]), under which the representative of a deceased person may recover in a single action, damages for pain suffered by an injured person between his injury and death, and also for pecuniary damages resulting to the next of kin from the death, although the causes of action are separate and distinct. *Held*, that under this statute both causes of action must be set up in the pleadings if recovery be sought in each, and if plaintiff proceeds to trial on a complaint for pecuniary damages resulting from death alone, and refuses, when given opportunity to do so, to amend his complaint to embrace the other cause of action, it was error to permit evidence, over objection, in support of the injury not covered by the complaint. The statute gives a single action for a double wrong, but each wrong must be declared on.

Appeal from Circuit Court, Hudson County.

Action by Martha Lennon, executrix of Adolph Schneider, deceased, against the Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Modified and remanded.

Collins & Corbin, of Jersey City, for appellant. Alexander Simpson, of Jersey City, for appellee.

BERGEN, J. This action was instituted by the plaintiff as executrix of Adolph Schneider, deceased, under the Employers' Liability Act of the United States, for the benefit of the wife and children of the deceased, who was so injured that he died from the result of an accident happening to him while in defendant's service. Under the charge of the court the jury rendered verdicts for separate sums, one for \$1,000 for the pain and suffering endured by the deceased between the accident and his death, and another for \$6,000 for the pecuniary loss sustained by the widow and children of deceased. The wife survived her husband but a short time, and the court instructed the

jury as to her pecuniary loss to which no exception was taken. There were facts proven from which the jury might infer, if they accepted the testimony as true, that a train of defendant's consisting of about 22 cars, was being moved a short distance in charge of defendant's servants, and that deceased had some duties to perform in relation thereto which required his presence on the train; that the train consisted of cars of different character, some being tank cars for carrying oil; that on each side of these cars was a running board for the use of trainmen; that some one had placed on the running board of one of them a plank, which was not a part of the equipment, but carried for the benefit of one of the trainmen for firewood; that deceased was sitting on the running board near one end of the car with his legs hanging over the edge, and when it approached the point where one of the servants desired to get off the car, while in motion, he struck the plank causing it to move so that one end fell to the ground and the other, supported by the edge of the car, struck the side of the deceased and threw him to the ground, causing injuries from which death resulted in four days thereafter.

[1] The defendant has appealed and urges the following reasons for reversal of the judgment:

First. That it was error to submit to the jury any question of defendant's negligence because of an alleged custom to permit its employes to carry planks and boards on its trains; the contention of the plaintiff being that the servants of defendant had been accustomed to transport on this and similar trains wood, planks, and boards for their own purposes for so long a time that it had become a known custom; that in this case the plank was being carried according to that custom by permission of the agents of the company who had the power to prevent it, and that this custom had so long existed that the company or its authorized agents were chargeable with notice of it. Against this the appellant argues: (a) That the complaint did not allege the custom. We see no force in this. The complaint avers that because of the plank the deceased was not furnished with a safe place to work, and knowledge of that condition may be charged to defendant if a course of conduct has been pursued by its servants for so long a time as to charge it with notice of such a custom. Proof of knowledge of a dangerous situation sustains the averment that the place furnished is unsafe. (b) That there was no sufficient proof of the custom, we think there was enough to take that question to the jury, for there was proof that on many occasions defendant's servants carried bundles of wood, and in other cases boards and planks were put on cars for the benefit of servants, and that this had been going on for a long time. That one of the witnesses said it had become a habit of the

servants to take home firewood in this way, and we cannot say that there was no evidence of such custom which a jury ought not to be allowed to consider. (c) That even if such a custom was established the defendant was not liable because these planks and boards were carried by defendant's servants outside the scope of their duties, and therefore not fellow servants, and that the defendant could not, legally, expressly, or impliedly, consent to the free transportation of the plank. But this overlooks the rule that the master is bound to provide a safe place in which his servants are to work, and he cannot avoid that duty by permitting some of his servants to make the place unsafe for others, nor is his neglect cured because another servant creates the condition when not in service. His duty is to correct the unsafe condition if he has knowledge of it, and he will not be relieved, if consenting, upon the ground that he has no authority to consent, for he cannot escape liability by saying, "My consent to the act which made the place unsafe was unlawful." It makes no difference by whom the unsafe condition is created the master must, if he has knowledge, correct it, or if likely to result from a course of conduct to his knowledge, take reasonable precautions to prevent it. The ground of this action is not the negligence of a fellow servant in the line of his duty, but the negligence of the defendant in permitting a condition which made or was likely, to its knowledge, to make the place unsafe for his servants to work in.

Second. That there was no evidence of negligence on the part of defendant in not using reasonable care to provide a safe place. The argument in support of this is that there was a thorough inspection before the train started and no plank was on the car. There was testimony from which a jury might infer that the plank was on the car, and if the inspectors did not see it a jury question arose, whether the inspection was properly made. This is argued as a question of fact which the jury found against the defendant. We do not review questions of fact if there be any evidence to support the verdict. There was evidence that the plank was in plain view and could have been seen by proper inspection, and the jury might determine that testimony that the plank was not on the car indicated careless inspection, and the submission of that question to the jury was not error.

Third. That there was no evidence of negligence by a fellow servant of the deceased. The facts proven were that a servant of the defendant named Scott was, in the line of his duty, on the running board of the car with the deceased upon which the plank was; that Scott intending to get off the car while in motion at a point near his home, started to walk along the running board to the end of the car where a step was located, and in doing this stepped on

the plank which caused one end of it to drop from the car and strike the ground, producing the accident. We think that a jury might find that under the circumstances Scott ought reasonably have expected that stepping on, or striking it with his foot, the plank would produce the result which occurred, and that in doing this he was negligent. If he had avoided the plank, and there is nothing to show he could not, the accident would not have happened, and whether his conduct was negligent was for the jury and properly submitted to it.

Fourth. That deceased so conclusively assumed the risk of injury by sitting on the running board that no jury question remained; that is, with the plank on the car, deceased assumed the risk that some one would step on the plank so as to overbalance it sufficiently to throw it to the ground in such manner as to come in contact with him. Whether a servant assumes the risk of injury in his master's service depends upon the facts and circumstances in each particular case. "It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or, at least, to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation." *Burns v. Del. & Atl. Telegraph Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956. In the present case there was no direct proof that deceased ever saw the plank before it struck him. It is urged that, situated as he was, he must have seen it; but Scott, who was on the same running board, testified he did not see it until he stepped on it. We are of opinion that it was not so conclusively shown deceased knew of the presence of the plank as to withhold the question from the jury. But if he did not know it cannot be said that the concurring cause, viz. the conduct of Scott in making the primary negligence effective, was so obvious that its risk was assumed. The consequence of the negligence of the master, through a concurring cause for which he is responsible, does not charge the injured servant with the assumption of the risk, unless it be obvious, and where, as in this case, the knowledge by the servant of a dangerous condition, the risk of which it is claimed he assumed because obvious, or otherwise acquired, is to be inferred from testimony which is not conclusive, a jury question is present and its submission to the jury was not error.

[2] Fifth. That it was error to submit to the jury, as a basis for recovery, the pain and suffering the deceased endured between the accident and his death; there being no supporting allegation in plaintiff's complaint. The complaint does not aver any such ground for recovery, and when the evidence on that

point was offered defendant objected to it for that reason. The trial court then, expressing doubt, offered to permit the plaintiff to amend his complaint in order to meet this objection, but the plaintiff refused to amend upon the ground that "the statement comes in the damage clause," which was, "The plaintiff demands \$50,000 damages." That such a clause does not state a cause of action requires no discussion, and without amendment the cause of action alleged in the complaint was for pecuniary damages recoverable by the next of kin, because of the death of the deceased. Notwithstanding plaintiff's refusal to amend the complaint to cover the pain and suffering of deceased between the accident and death, the trial court admitted the evidence objected to, and instructed the jury, if they found for plaintiff, to render separate verdicts, which they did as above stated, and judgment was entered for \$7,000. This action is based on the federal Employers' Liability Act, and is governed by that statute, and under it the Supreme Court of the United States held in *St. Louis & Iron Mtn. Ry. v. Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160, that a recovery could be had for damages growing out of loss and suffering endured by an injured decedent while he lived, and also for the pecuniary loss suffered by the beneficiaries named in the statute because of his death, in the same action, recognizing, however, that the two claims are different. "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other." But the right to recover in a single action for a double wrong does not include a right to recover for a wrong not counted on in the pleadings, and not within the issue framed by them. The defendant was not required by the complaint to prepare to meet the question relating to pain and suffering, and if the complaint was amended might have been allowed time to meet the new issue with a different defense, but to prevent this the plaintiff refused to amend his pleadings to embrace the issue to which the objectionable testimony was directed, and the defendant had no opportunity to plead to the issue the plaintiff was allowed to prove without an averment which defendant might traverse. Nor ought this court to now permit an amendment which the plaintiff refused at the trial, probably because at that time the statute of limitations had run as to the new matter, but, whatever the reason, he had the opportunity and he refused it, and an amendment now would perhaps deprive defendant of a legal defense which he could not raise at the trial for want of a pleading to answer. That the pleading should include both causes of action for the double wrong is indicated in

Washington Ry. & Elec. Co. v. Scala, 244 U. S. 630, 37 Sup. Ct. 654, 61 L. Ed. 1360.

The admission of the testimony objected to was error, and without it there is no support for so much of the judgment as includes the verdict of \$1,000 awarded for pain and suffering of deceased, and to that extent the judgment is erroneous and should not exceed \$6,000.

The judgment will be modified and the record remitted to the Supreme Court in order that the judgment be modified according to the views herein expressed.

Remanded for modification.

BOURGEOIS v. EDWARDS et al.
(No. 38/666.)

(Court of Chancery of New Jersey. June 10, 1918.)

1. SPECIFIC PERFORMANCE ¶101—DELAY IN PAYMENT AS DEFENSE.

Where buyer of judgments delayed short time in tendering balance of price on account of failure of seller's attorney to provide assignment, seller cannot defend buyer's suit for specific performance on ground of delay.

2. ACCORD AND SATISFACTION ¶8(1) — CONSIDERATION.

Parole purchase by debtor of his debt for lesser sum than amount due does not liquidate it, on account of lack of consideration.

3. MORTGAGES ¶534—FORECLOSURE—TITLE OF PURCHASER.

Purchaser under foreclosure sale acquires title of mortgagee and interests of all defendants as of time of institution of suit.

4. FRAUDULENT CONVEYANCES ¶104(7) — MORTGAGE FORECLOSURE.

Fraud on creditors perpetrated by judicial procedure, as a mortgage foreclosure, wife of debtor purchasing property, is as impotent as any other imposition, whatever the scheme, as equity looks to substance.

5. JUDGMENT ¶704—RES JUDICATA—MORTGAGE FORECLOSURE.

Decree in mortgage foreclosure is not res judicata as between defendants whose rights have not been litigated.

6. FRAUDULENT CONVEYANCES ¶299(12) — MORTGAGE FORECLOSURE — SUFFICIENCY OF EVIDENCE.

In daughter's suit for specific performance of contract to sell judgments against her father, defended on ground father procured sale by falsely representing he had no property, evidence held insufficient to establish that hotel property, to which plaintiff's mother held title through mortgage foreclosures, belonged in fact to plaintiff's father, and that foreclosures were fraud on his creditors.

7. FRAUDULENT CONVEYANCES ¶278(2)—DEFENSE—BURDEN OF PROOF.

In daughter's suit for specific performance of contract to sell judgments against her father, defended on ground father procured sale by falsely representing he had no property, burden to prove untrue and fraudulent plaintiff's mother's claims on her husband's property through a mortgage foreclosure was on defendant.

8. FRAUDULENT CONVEYANCES ¶57(2) — IMPLICATION OF INTENT.

Where, when preferences were given by a debtor to his wife, he was only contingently liable, as surety for another, fraudulent intent as

to creditors as a matter of law is not to be implied.

9. HUSBAND AND WIFE ¶125 — PROFITS OF WIFE'S BUSINESS.

Profits of wife's business, though derived through activities of husband, belong to her.

Suit for specific performance by Rebecca Estell Bourgeois against Martha Edwards and others. Decree for complainant.

George A. Bourgeois, of Atlantic City, for complainant. Wilson & Carr, of Camden, for defendants.

BACKES, V. C. [1] In 1908 Martha Edwards, trading as Charles B. Edwards Company, recovered four judgments in the Supreme Court against Anderson Bourgeois and others, aggregating \$6,149.58. They were assigned to her son Earl S. Edwards, who, in July, 1914, sold and agreed to assign them to Rebecca Estell Bourgeois for \$2,250. \$1,853 of the purchase price has been paid, and the balance was tendered and refused, and this bill is filed to compel an assignment. The verbal agreement of sale is set out in the bill and admitted by the answer, and is evidenced by a receipt which reads as follows: "\$200.00. Ocean City, July 16, 1914.

"Received of Rebecca Estell Bourgeois check for \$200, which when paid shall be a receipt on account of \$2,250, which is to be paid inside of 60 days from the date hereof, said \$2,250 when paid shall be in full for all claims Earl Edwards has or had against Anderson Bourgeois et al., and which said Edwards agrees to assign to said Rebecca Estell Bourgeois.

"[Signed] O. L. Smyth,
"Attorney for Earl S. Edwards."

The \$1,853 was paid in four installments within the 60 days agreed upon, as mentioned in the receipt, and when the balance was offered a few days after the expiration of that time Edwards refused to receive it and live up to his bargain, on the shallow pretext that time was of the essence of the contract, and he sets it up as one of his defenses. It lacks merit, if for no other reason than that the delay was brought about by Smyth, the attorney of Edwards. At the time fixed for the transfer, and payment of the balance, a few days before the expiration of the period, Smyth had not provided himself with an assignment, and time was given him to obtain it. The real ground for refusing to perform the contract, and the main defense offered, is that Anderson Bourgeois, the judgment debtor, procured it by falsely representing that he was possessed of no property out of which the judgments could be made, and that he was execution proof, whereas in truth he was the owner of the Hotel Normandie at Ocean City, held for him by his wife, Annie Estell Bourgeois, in trust, in fraud of creditors; that he carried on the hotel business in her name; that the money used to buy the judgment was his money, the proceeds of said business; that he was the actual purchaser; and that the

complainant, Rebecca Estell Bourgeois, his daughter, was a mere figurehead. By cross-bill the defendant Edwards seeks to impress his judgments as liens upon the hotel property.

[2] It is established that Anderson Bourgeois negotiated the purchase of the judgments in the name of the complainant; that he represented his financial condition as alleged; that the purchase money came from the hotel business; and that the hotel was managed by him and the funds of the business banked in the name of his daughter. The explanation is that the property and business were those of the wife; that he managed both for her without fixed compensation; that the trade funds were handled by the daughter as the agent of the wife; and that the judgments were purchased with the wife's funds, for her, in the name of the daughter. That a contract to purchase a debt may be enforced in equity (*Pomeroy* on Cont. § 20); that specific performance of a contract obtained by deceitful practices will be denied (36 Cyc. 600; 6 *Pomeroy*, Eq. Jur., § 785); that a parol contract of purchase by a debtor of his own debt for a sum less than the amount due is unenforceable for want of consideration (*Eckert v. Wallace*, 75 N. J. Law, 171, 67 Atl. 76); and that a husband may give his time and labor to the management of his wife's business, without remuneration, and immune from creditors' attack (*Taylor v. Wanda*, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818)—are all well-settled and pertinent principles asserted, but not debated, by counsel. The proposition of law advanced by the complainant that Edwards, at the time the contract was made, knowing that the representations were false and that the business was that of his debtor, is without redress, citing *Baker v. Spencer*, 47 N. Y. 562, *Adams v. Sage*, 28 N. Y. 103, *Parsons v. Hughes*, 9 Paige (N. Y.) 591, *Ackerman v. Ackerman*, 44 N. J. Law, 173, and *Lembeck v. Gerken*, 86 N. J. Law, 111, 90 Atl. 698, is inapplicable; for, if both falsity and knowledge of deceit be admitted, then the situation would be governed by the rule already stated that a purchase by a debtor of his debt for a lesser sum than the amount due does not liquidate it.

There was no testimony offered to impeach the representations that induced the making of the contract, other than that which related to the ownership of the hotel and the proprietorship of the enterprise, and the question to be decided is: Does the evidence establish that the hotel was the debtor's property, or that the business belonged to him? The conclusion reached as to the former will have a strong bearing in disposing of the latter, and that subject will be first examined.

[3-6] The history of the hotel ownership is somewhat involved, tedious to follow, and difficult to miniature. The Normandle Hotel

was owned originally by the Ocean City Real Estate & Investment Company, of which Anderson Bourgeois was the holder of 60 per cent., and his wife, Annie Estell Bourgeois, the owner of 40 per cent. of the capital stock. In September, 1907, the company sold the hotel to Phillip H. S. Cake for \$55,000; \$10,000 in cash, and mortgages for \$30,000 and \$15,000 respectively. Only \$7,000 of the cash consideration was paid. The company at that time went into liquidation, and the \$30,000 mortgage was taken in the name of its directors, statutory trustees, and shortly after assigned to Mrs. Bourgeois. The property was sold to Cake, subject to a \$16,000 mortgage held by one Wiley, which was to have been paid off by the company, but, as only part payment was made, reducing the principal to \$11,600, the \$15,000 mortgage given by Cake was assigned to Wiley in escrow. Cake immediately began to remodel the hotel, and purchased an adjoining strip of land, upon which he started to build an addition or annex. Mrs. Bourgeois advanced the money necessary to buy this strip over and above a mortgage of \$3,500 held by one Corson. In the spring following, 1908, after Cake had dismantled the hotel and partly erected the annex, he was stalled in his operations for want of cash or credit. Mrs. Bourgeois had advanced to him considerable money, and in this fix she had to step in, in self-protection, and advance more to finish the jobs. At that time, May 20, 1908, Cake executed to her a mortgage on the hotel and annex for \$60,000, to secure past loans and future advances. While the building operations were still going on, foreclosure proceedings were begun on the Wiley mortgage, and at the sheriff's sale, June 7, 1909, the property was struck off to Mrs. Bourgeois for \$19,500. *Nixon v. Cake*, Docket 30, p. 544. The Corson mortgage was also foreclosed and struck off to Mrs. Bourgeois September 20, 1909, for \$6,900. *Corson v. Cake*, Docket 31, p. 72. In both cases Mrs. Bourgeois was a party defendant, by reason of her subsequent mortgages, and in the latter suit the assignor of Edwards was a defendant because of the judgments here involved. After the sale Mrs. Bourgeois found herself unable to negotiate a loan upon the property or to otherwise raise a sufficient sum to pay the sheriff and other obligations which were then pressing, approximately \$35,000, and in this dilemma Mr. George A. Bourgeois, her brother-in-law, and an esteemed member of our bar, came to her rescue, and by joining her in a bond to the Central Trust Company of Camden, secured by a mortgage on the hotel property, obtained a loan of \$30,000, and by indorsing her note secured \$4,500 from the Marine Trust Company of Atlantic City, which put her in funds to square her liabilities. To secure himself against loss

Mr. Bourgeois incorporated the *Ætna Company*, which he controlled and to which he had the property transferred, and by means of which he managed the hotel business during the following season. Immediately upon the conveyance the company executed to Mrs. Bourgeois three mortgages of \$17,500, \$80,000, and \$2,000 respectively, concurrent liens, the first two presumably representing her investment, and the latter to secure the balance due a materialman, *American Art Marble Company*, and thereafter conveyed the premises to Rebecca Estell Bourgeois, the conveyance being made to her instead of to her mother, to prevent a merger of the mortgages. In 1913 the Central Trust Company foreclosed its mortgage, and at the sale the property was bid in by Mrs. Bourgeois and conveyed to her by the sheriff on August 28, 1913. She financed the purchase by a loan of \$30,000 from the Economy Building & Loan Association, to which she also gave two mortgages of \$15,000 each. This ends the recital of the title, and at this point we may properly pause to consider the efficacy of the title conveyed to Mrs. Bourgeois by the sheriff under the two foreclosure proceedings of the Nixon and Corson mortgages; for it is thoroughly settled by abundance of authority that a purchaser under a foreclosure sale acquires the title of the mortgagee and the interest of all the defendants as of the time of the institution of the suit. *Mount v. Manhattan Co.*, 43 N. J. Eq. 25, 9 Atl. 114, affirmed 44 N. J. Eq. 297, 18 Atl. 80; *Boorum v. Tucker*, 51 N. J. Eq. 135, 26 Atl. 456; *Henninger v. Heald*, 52 N. J. Eq. 431, 29 Atl. 190; *Wimpfheimer v. Prudential Insurance Co.*, 56 N. J. Eq. 585, 39 Atl. 916. It is true, as the defendant asserts, that refuge cannot be taken behind them if it is satisfactorily made out that Anderson Bourgeois thereby concealed his interest in the hotel and caused this interest to be transferred to his wife in fraud of creditors. The form of the transaction is immaterial. Equity looks to the substance. A fraud perpetrated by means of judicial procedure is as vulnerable and impotent as any other imposition, whatever the scheme may be. *Metropolitan Bank v. Durant*, 22 N. J. Eq. 35, affirmed 24 N. J. Eq. 556; *Lee v. Cole*, 44 N. J. Eq. 318, 15 Atl. 531, reversed on facts, 45 N. J. Eq. 779, 18 Atl. 854. A decree in a mortgage foreclosure is not res judicata as between defendants whose rights have not been litigated. 23 Cyc. 1279; *Gardner v. Ralsbeck*, 28 N. J. Eq. 71. Now, unless it is shown that the foreclosure sales were effected in promotion of a fraudulent design to cheat the creditors of her husband, or that she acted as trustee for her husband, Mrs. Bourgeois' new title, born of the two mortgages, which admittedly were bona fide, is unimpeachable. The charge and the insistence that the mortgage foreclosures were

brought about by the connivance of Mr. and Mrs. Bourgeois are not in the slightest degree supported by evidence. There is not a shred of testimony that they, or either of them, contrived or were instrumental in the bringing of the suits, and for aught that appears they were unwilling parties to it; there is nothing in the circumstances to justify the inference that they in any manner invited them, nor is there anything in the case upon which to found a belief that in purchasing the property at the sheriff's sale Mrs. Bourgeois acted otherwise than for herself. The desperate financial straits in which she then was and which required the assistance of her brother-in-law to relieve her argues profoundly against inviting so distressing a situation. So far as the ownership is concerned, these conclusions could end here, but I surmise it will be more satisfying to the contending parties to discuss the circumstances from which it is argued that fraud is inferable, and I will state them as succinctly as possible.

[7] Mrs. Bourgeois was possessed of an extensive land estate inherited from her parents, and, having the business capacity and experience of the ordinary gentlewoman only, she throughout her married life left its management and disposition to her husband who used it according to his own good judgment and accounted for it when and as he willed, and undoubtedly fairly and honestly. He had used considerable of her money, collected from the sale of her land, and in repayment gave her the 40 per cent. of the stock in the Ocean City Real Estate & Investment Company when it was formed in 1899. From that time until 1908, when the corporation went into liquidation, he had appropriated considerable more of her estate. When Cake purchased the Normandie, he contracted with him to erect the annex for \$33,000, and to build bathrooms for \$6,600. He completed these contracts, but was never paid. It is claimed that he obtained the lumber from his wife's estate, and that she furnished him with money to carry on the operation, in the aggregate to the value and amount of \$20,000, and to secure her he caused to be assigned his three fifths interest in the \$30,000 purchase-money mortgage given by Cake; the remaining two fifths belonged to her by reason of her proportionate stockholdings in the real estate company. That Mrs. Bourgeois advanced to her husband \$8,000 towards this undertaking, that he procured lumber of the value of \$12,000 from her sawmill, and that she lent to Cake and paid for his use, in remodeling the hotel, approximately \$60,000, for which Cake gave his mortgage of that amount, is the testimony of Mr. and Mrs. Bourgeois. It is not clear whether this mortgage was intended to refund the Nixon and Corson mortgages. The explanations of the various transactions are not harmonious, and the proof of the advances equal to the securi-

ties is inconclusive, but withal it is satisfactorily shown that Mrs. Bourgeois invested a vast sum of her private estate; that she borrowed much money from banks and friends and pledged her resources to the point of exhaustion to save the hotel; that her husband's appropriations were large; and that the assignment and execution of the two mortgages to her were actuated by motives of good faith and for the single purpose of securing her against loss. That the testimony is in confusion and that Mr. and Mrs. Bourgeois were unable to account to the amount of her securities after the lapse of seven years, when accounts and vouchers were no longer available and memory had failed, is not surprising and her diligent, but unsuccessful, efforts to round out the grand total is in no sense compelling evidence against the integrity of her claims. The onus of establishing it is not upon her; the burden of proof that her claims were untrue and fraudulent was upon the defendant Edwards. *Taylor v. Wanda*, supra. This burden the defendant has not sustained.

[8] There is one additional aspect to which allusion should be made, which counsel urges as a badge of fraud, and as demonstrating that a valuable interest in the hotel is held by Mrs. Bourgeois in trust for her husband. His outlay in performing his contract with Cake of \$33,000 for the annex and \$25,000 for extras, gave additional value to his wife's mortgage liens, and it is the insistence that fraud is to be inferred from his failure to secure his debt by mechanic's lien or mortgage on the property; in other words, the argument is that he should have protected himself at the expense of his wife and sacrificed her interests for his own gain. An all-sufficient answer to this is that, in view of the confidence reposed in him, under the influence of which his wife surrendered to him the management and control of her fortune, which he jeopardized, such an advantage, in the crisis, would have been unconscionable and unpardonable. In the circumstances common honesty and justice dictated that he should forego his own rights rather than that she should suffer. It was his privilege to grant her the preference, and I know of no rule of law or equity that required him to subordinate her interests to his or to those of his creditors. Furthermore, it is to be noted that at the time the preferences were given Mr. Bourgeois was only contingently liable as surety of Cake to the defendant Edwards' assignor, and fraudulent intent as a matter of law, is therefore not to be implied. *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641.

Nor is there anything in the contention that Mrs. Bourgeois holds the hotel in trust for her husband to the extent of the value added to the property by reason of the performance of his contract with Cake. There is no proof of

a trust relation, and none is inferable from the circumstances. There is no evidence of the present value of the property, to show that it exceeds the amount of Mrs. Bourgeois' investment, nor is there any as to the state of the hotel at the time it was sold to her by the sheriff and that in its then incomplete condition it was worth more than the amount of her bids. And in support of the new title acquired by Mrs. Bourgeois from the mortgages under the foreclosure sale is the undisputed fact that the purchase price was her money exclusively, obtained by her without the participation of her husband in its procurement.

[9] Now, as to the business: The management of this, like the other affairs of Mrs. Bourgeois, is in the hands of her husband, who has general charge of the conduct of the hotel. The finances, however, are under the control of her daughter, the complainant. Annually, at the beginning of each season, she is put in funds by her mother which, together with the proceeds of the business, are deposited in her name and checked out by her as the requirements of the business demand and as her mother and father may direct. She accounts to her mother. During the prosperous season Mrs. Bourgeois received the profits and in lean years she has been compelled to resort to other funds to keep the concern going. I have little doubt that the enterprise is hers, and that the moneys used to buy the judgments belonged to her, and that they were bought for her in the name of her daughter. The profits of a wife's business, though derived through the activities of her husband, nevertheless belong to the wife. *Tresch v. Wirtz*, 34 N. J. Eq. 124; *Elliot v. Bodine*, 59 N. J. Law, 567, 36 Atl. 1038; *Taylor v. Wanda*, supra; *Kutcher v. Williams*, 40 N. J. Eq. 436, 3 Atl. 257; *Dickson v. Shay*, 45 N. J. Eq. 821, 18 Atl. 688; *Arnold v. Talcott*, 55 N. J. Eq. 519, 37 Atl. 891.

A decree will be advised in favor of the complainant, with costs.

(23 N. J. Law, 38)

**MOLINA v. COMISION REGULADORA
DEL MERCADO DE HENEQUEN.**

(Supreme Court of New Jersey. July 17, 1918.)

**1. INTERNATIONAL LAW §4—RECOGNITION
OF FOREIGN GOVERNMENT—RETROACTIVE
EFFECT.**

The recognition by the United States on August 31, 1917, of the Carranza government as the de jure government of Mexico is retroactive in effect, and validates all actions and conduct of the government so recognized from the commencement of its existence.

**2. INTERNATIONAL LAW §8—RIGHT OF
SEQUESTERATORS—CUSTODIANSHIP.**

A government which has sequestered property occupies to it the position of custodian only.

**3. INTERNATIONAL LAW §12—SEQUESTERED
PROPERTY—ACTION FOR CONVERSION—PROOF.**

In an action for conversion of property sequestered by an agency of a foreign government

on motion to strike the complaint, defendant must show, not only that the agency had authority to dispose of the property sequestered, but that it had authority to dispose of all of it.

4. INTERNATIONAL LAW ⇐10—JURISDICTION
—RESIDENCE OF PARTIES.

That both plaintiff and defendant in a conversion suit for property sequestered by an agency of a foreign government are citizens of a foreign country wherein the wrong complained of was committed does not deprive the courts of this state of jurisdiction.

5. INTERNATIONAL LAW ⇐10—JURISDICTION
—FOREIGN TERRITORY.

That the courts of one independent government will not sit in judgment on the validity of the acts of another done within its territory does not deprive the courts of the first government of jurisdiction once acquired over the case.

Action by Ricardo Molina against the Comision Reguladora del Mercado de Henequen. On motion to strike out the complaint. Motion denied.

Argued before Justice SWAYZE sitting alone pursuant to 1912 Practice Act (P. L. p. 377).

Nelson S. Spencer and Otto O. Wierum, Jr., both of New York City, and Robert H. McCarter, of Newark, for the motion. William Bradford Roulstone, of New York City, and Robert S. Hudspeth, of Jersey City, opposed.

SWAYZE, J. After the denial of the motion to dissolve the attachment in this case (103 Atl. 397), the defendants obtained leave to move to strike out the complaint, and to take testimony with that in view. This motion is now before me.

[1] It is unnecessary to go into the evidence in detail. I am satisfied that on April 15, 1915, the revolutionary authorities in Yucatan took proceedings against the property of the present plaintiff. These revolutionary authorities were acting under Gen. Carranza; and their action was subsequently recognized by his government as early as 1916. The Carranza government had then been recognized by the United States (on October 19, 1915) as the de facto government in Mexico; it has since been recognized (on August 31, 1917), as the de jure government; and the recognition by the United States is retroactive in effect, and validates all the actions and conduct of the government so recognized from the commencement of its existence. *Oetjen v. Central Leather Co.*, 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726.

It is settled by the decisions in that case and in *Ricaud v. American Metal Co.*, 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733, that our courts will not sit in judgment on the validity of the acts of another independent government done within its own territory. It is therefore unnecessary to inquire whether the action taken by the revolutionary authorities of Yucatan against Molina's property was legal or not. It was effective under the existing circumstances of revolution; and

the only question for this court is what the action was. The answer depends, in the first instance, upon the construction of two documents: (1) The decree (to call it by that name) of Gen. Alvarado, of April 15, 1915; and (2) his instructions to Andres Barera, dated April 16, 1915. Subsequent acts are important as showing that the Mexican government recognized, and, so to speak, took over the action of the Yucatan government, and that the decree of April 15th applied to Mr. Molina. The decree of April 15th does not mention Molina's name; but it is sufficiently proved that he was one of the class of persons therein referred to. The decree prevented him from selling, mortgaging, or alienating his property, and, in itself, went no further.

The instructions to Barera the next day are more specific. Their force and effect is to be determined by the quotation therein contained from the order issued by Gen. Alvarado to Alvarez, representative of Molina, which was embodied in the instructions to Barera evidently to define the scope of those instructions.

On these documents the defendant relies.

The case shows clearly that they amounted to what is called by the defendants a sequestration of Molina's property. The case does not turn upon the proper or the improper translation of words; nor does it depend at all upon the use of the word "sequestration" by the defendants. It depends upon the acts of the parties, and the authority given.

[2] The announcement, as it is called, to Alvarez, which is set forth in the order to Barera, states that the government has resolved to sequester the properties of Molina with the purpose of beginning the investigation of the civil and penal responsibilities which the state will exact. It was, then, a sequestration at the beginning of a proceeding, call it judicial or not. It was a sequestration by way of mesne process, and not by way of final process; for evidently, before Molina's title could be divested under the proceeding, there was meant to be some investigation. This investigation was had, and Molina was found to come within the class of persons whose property was to be sequestered. The rights that passed by the sequestration were such rights as would pass upon a sequestration by way of mesne process under our law; those rights are rights of custody only, and not of title. It has been held that on such a sequestration under our law a sale may be ordered by the court of certain kinds of property, including the produce of a farm. *Shaw v. Wright*, 8 Ves. 22; *Goldsmith v. Goldsmith*, 5 Hare, 123. Where a government has sequestered property, no doubt it also may order a sale. But speaking generally, the position of sequestrators is that of custodians only.

That this was the nature of the procedure in the present case is shown by the express

limitation upon the authority given to Alvarez, as the representative of Molina. He is ordered to abstain, as long as the sequestration lasts, from disposing in any way of Molina's property under his strictest responsibility to the government. This prevented any sale by him; and there is no suggestion of any sale by the government or its agents. That is excluded by the fact that investigation was to be made before Molina was condemned. Alvarez is also told by the order of Gen. Alvarado that this does not deprive him of the administration of such properties; that he must give an account of it to the provisional superintendent and controller, Andres Barera. The subsequent papers, especially the detailed report of July 12, 1916, from the director general of sequestered property, shows that it was the policy of the government to keep the administrator's staff which was officiating in control of the sequestered property, for the very obvious reason that in that way the property would be made very much more productive.

[3] It is clear that, under the order of April 16th to Barera, he was not to have the actual management of the property, but to receive the accounts of the administration by Alvarez, Molina's own representative. It is quite likely that the administration later involved the turning of the property, or the proceeds of the land, into cash, notwithstanding the express prohibition in Gen. Alvarado's order to Alvarez; and it may be, and I think it probable, that the accounting by Alvarez to Barera involved not merely a statement of account, but the actual turning over of proceeds of sales if any were subsequently permitted, and it is possible that Alvarez, as the recognized representative of Molina, confided with the administration of Molina's property by Gen. Alvarado himself, subsequently was permitted to sell the produce of the farm and to pass a good title thereto. This, however, is not the claim of the defendants. Such a claim would not avail on this motion, since, in the absence of an express order for sale, it involves inferences to be drawn by a jury from facts proved. The defendant's present claim is that in some way and at some time the revolutionary government had power to sell and pass a title to the crops of henequen. The evidence makes it probable that that was the situation at least as to a part of the crops; but, as counsel for the plaintiff well argued, in order that the defendants may prevail upon the present motion, they must show, not only that there was authority to sell part of the crops, but that there was authority to sell all; for if the title to any part of the henequen converted by the present defendant was imperfect, this action can be maintained, although the amount of damages might be less. Probably this is the true situation. Considerable time elapsed before the Mexican government took over from the revolutionary government of Yucatan, the administration

of the sequestered estate. Nieto testifies that the general manager in the republic was first appointed about the end of 1915. It may well be that the revolutionary government of Yucatan would not, or could not, take the responsibility of parting with the property without the action of the Mexican government. If so, there was in the meantime no one authorized to sell the henequen. It was impounded, but not yet forfeited or condemned, if in fact it ever was.

[4] The motion to dismiss the complaint must be denied unless I am required to grant it because both plaintiff and defendant are citizens of Yucatan, and the wrong complained of was committed there. I know of no such rule in New Jersey; and the cases cited by counsel from the New York courts, to which I have had access, do not sustain his position. On the contrary, the first case cited, *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636, quotes *McCormick v. Railroad Co.*, 49 N. Y. 303, to the contrary, and calls attention to the fact that the then pending case was governed by the Code of Civil Procedure enacted after the decision of the *McCormick* Case. We have no such statute as required the decision reached by the New York Court of Appeals in *Robinson v. Oceanic Steam Navigation Co.*

Latourette v. Clark, 80 How. Prac. (N. Y.) 242, is said in *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949, to be regarded as overruled; and in the latter case the court did take jurisdiction, although it said that the Supreme Court might, in its discretion, have refused to entertain the action. This is far from holding that there is a lack of jurisdiction in such a case.

Hoes v. N. Y., N. H. & H. R. Co., 173 N. Y. 435, 66 N. E. 119, comes nearer being in point, but the ground of decision there was, as the court said, that it presented a case of collusion and legal fraud.

I have not felt called upon to examine the other New York cases referred to, which were decided by inferior courts.

Even the case of *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31, cited in defendant's brief, implies that special reasons may justify an action by a nonresident plaintiff against a nonresident defendant for an injury happening abroad. Such a special reason exists in this case, where the proceeding is in rem to reach property attached in our jurisdiction.

[5] Even if counsel for the defendant are right in their contention that the henequen said to have been converted by the defendant had all of it been sold to the defendant by the authority of the government of Mexico or of Yucatan, it would not be my duty to dismiss the complaint. The rule was stated by the United States Supreme Court in *Ricaud v. American Metal Co.* Justice Clarke for the court says that the rule that the courts of one independent government will not sit in judgment on the validity of

the acts of another done within its own territory does not deprive the courts of jurisdiction once acquired over the case. It requires only that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction, but an exercise of it. The Supreme Court in that case in fact decided the question upon the merits, as it had also previously decided the case of *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456. In the case of the *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 828, 16 Ann. Cas. 1,047, it is true that the action of the court was a dismissal of the complaint; but it was after a trial upon the merits, not on a mere preliminary motion. The action taken was equivalent to the direction of a verdict under our practice after all the evidence is in; and the defendant would be swift if a verdict should be directed in its favor to call attention to the difference in the legal effect of a judgment thereon and the mere dismissal of the complaint. Moreover, if I understand the case, the claim of the defendants is a claim of right not shown by documents which the court must construe, but shown by facts, by acts of the revolutionary authorities, or the Mexican government, the effect of which and the inferences to be drawn therefrom are the proper subjects of inquiry by a jury, as well as the date upon which the alleged right to sell accrued.

The present motion is denied, with costs.

(79 N. H. 41)

ELDRIDGE BREWING CO. v. COCHECO BOTTLING CO.

(Supreme Court of New Hampshire. Strafford. June 29, 1918.)

FRAUDULENT CONVEYANCES §47—ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY—FRAUD.

An assignment of all assets including stock in trade, for benefit of creditors, is not void as to creditors as a sale of stock in trade, in violation of Laws 1909, c. 69, § 1.

Transferred from Superior Court, Strafford County; Allen, Judge.

Assumpsit by the Eldredge Brewing Company against the Cochecho Bottling Company. Transferred, without a ruling, from the superior court. Case discharged.

Assumpsit. The defendants assigned all their assets, including stock in trade, book accounts, tools, and machinery, to one O'Malley for the benefit of all their creditors. After he had accepted the trust and taken possession of the property, the plaintiffs attached it as the defendants' property. The

court permitted the assignee to intervene in this suit and ask for an order dissolving the attachment. Transferred, without a ruling, from the January term, 1918, of the superior court.

Ralph C. Gray and Ernest L. Guptill, both of Portsmouth, for plaintiffs. Fred H. Brown, of Somersworth, and Hughes & Doe, of Dover, for defendants.

YOUNG, J. The plaintiffs are creditors of the defendants, and they contend that the assignment is void as to them, because of Laws 1909, c. 69, § 1. While an assignment like the one in question may be a sale for some purposes (*Kenefick v. Perry*, 61 N. H. 362; *McGreenery v. Murphy*, 76 N. H. 338, 82 Atl. 720, 89 L. R. A. [N. S.] 874; *Clough v. Glines*, 77 N. H. 408, 92 Atl. 803; *Goodrich v. Woodsome*, 102 Atl. 533), it is not a sale within the ordinary meaning of that term. This tends to the conclusion that such transactions are not void under the provisions of section 1. The fact such a transaction tends rather to prevent than to promote the evil at which that section is aimed—that peculiar to merchants selling their stock in trade in order to defraud their creditors—also tends to the conclusion that such an assignment is not a sale, within the meaning of that term as it is used in this section. In fact, all the evidence points to this conclusion. It must be held, therefore, that the attachment of the trust property was illegal.

Case discharged. All concurred.

(79 N. H. 66)

CLOUGH et al. v. WILTON.

(Supreme Court of New Hampshire. Grafton. June 29, 1918.)

TIME §8(8)—EXCLUDING FIRST OR LAST DAY—APPEAL.

An appeal from the probate court was not claimed in time, where, excluding only the day on which the decree appealed from was made, it was not claimed within 60 days thereafter, as required by Pub. St. 1901, c. 200, § 2, as section 34 of chapter 2, providing that the day from which time is to be reckoned is to be excluded in computing the time within which an act must be done, tends to the conclusion that that is the only day to be excluded.

Transferred from Superior Court, Grafton County; Sawyer, Judge.

Proceeding by A. M. Clough and another, executors, to probate the will of Ella A. Higginson. From a decree allowing the will, George Wilton, administrator, appealed to the superior court. Motion to dismiss the appeal, and case transferred to the Supreme Court. Case discharged.

Probate appeal. The probate court allowed the will of Ella A. Higginson on March 3, 1917, and the defendant appealed from that decree on May 3d of that year. The plaintiffs moved to dismiss, because the ap-

peal was not claimed within 60 days after the decree appealed from was made.

Drew, Shurtleff, Morris & Oakes, of Lancaster, for plaintiffs. George W. Pike, of Lisbon, and L. F. Sherman, of Boston, Mass., for defendant.

YOUNG, J. The fact P. S. c. 2, § 84, provides that the day from which time is to be reckoned is to be excluded in computing the time within which an act must be done tends to the conclusion that that is the only day to be excluded in making the computation. As there is nothing to rebut this conclusion, it must be held that the appeal was not claimed within the time limited by P. S. c. 200, § 2. It does not necessarily follow that the appellant is remediless for sections 7-9 of this chapter provide that one who is prevented from claiming an appeal by accident, mistake, or misfortune may petition the court for relief, and it has been held that a mistake of counsel may be a misfortune within the meaning of section 7. *Grout v. Cole*, 57 N. H. 547; *St. Pierre v. Foster*, 75 N. H. 10, 11, 70 Atl. 289.

Case discharged. All concurred.

(79 N. H. 43)

CASEY v. FRANK JONES BREWING CO.

(Supreme Court of New Hampshire. Rockingham. June 29, 1918.)

1. MASTER AND SERVANT §361—INJURIES TO SERVANT—STATUTES.

To recover under Laws 1911, c. 163, an employee need not have been, at the time of the injury, working upon or in proximity to power-driven machinery.

2. MASTER AND SERVANT §278(16)—INJURY TO SERVANT—INSPECTION.

In an action by a servant for injuries occasioned by a sliver on a hoop on a barrel, evidence held to sustain a finding that the master should have discovered the defect before the barrel was delivered to plaintiff.

3. TRIAL §311—APPLICATION OF PERSONAL KNOWLEDGE OF JURORS.

In an action for damages by one who lost a hand through septic poisoning, recovery could be had for pain and suffering, although there was no evidence offered thereon; the jury in such case using the knowledge they possess in common with men in general.

4. EVIDENCE §14—JUDICIAL NOTICE.

It is a matter of common knowledge that old scars are often sensitive, and that amputation of a hand is frequently followed by suffering.

Transferred from Superior Court, Rockingham County; Sawyer, Judge.

Case by William Casey against the Frank Jones Brewing Company, under Laws 1911, c. 163, to recover for injuries suffered by the plaintiff while employed in rolling barrels of ale across a cellar in the defendant's brewery. Trial by jury, and verdict for the plaintiff. The injury was caused by a sliver of iron, which projected from a hoop on a barrel. The sliver appeared old and rusty, and the barrel was not roughly handled af-

ter it passed from the control of those whose business it was to inspect and repair it. The defendant excepted to the denial of its motion for a nonsuit and to certain instructions given to the jury. Transferred from the May term, 1917, of the superior court by Sawyer, J. Exceptions overruled.

Ralph C. Gray and Ernest L. Guphill, both of Portsmouth, for plaintiff. Charles H. Batchelder and John L. Mitchell, both of Portsmouth, for defendant.

PEASLEE, J. [1] The defendant's claim that it is not liable under Laws 1911, c. 163, because at the time of the accident the plaintiff was not working upon or in proximity to power-driven machinery, is based upon a misconception of the first opinion in the *Lizotte Case*, 78 N. H. 354, 100 Atl. 757. The later decision in that case makes it certain that liability under the act is not so limited. *Morin, Adm'r, v. Company*, 78 N. H. —, 103 Atl. 312.

[2] The defendant also argues that there was no evidence of its fault in permitting the hoop on the barrel the plaintiff was handling to be in a dangerous condition. There was evidence that the defendant provided for more or less inspection to discover such defects, that the sliver which injured the plaintiff was rusty, and that the barrel had not been subjected to rough usage after it left the custody of those who were supposed to put it in order. This affords a substantial basis for a finding that the defect existed, and should have been discovered and remedied, before the barrel was delivered to the plaintiff.

[3, 4] The defendant also excepted to the charge upon the ground that there was no evidence as to pain suffered or likely to be suffered by the plaintiff. The injury consisted of a wound in the hand, from which septic poisoning resulted, necessitating the amputation of the hand and a part of the forearm. There was no testimony on the subject of pain, but it must be evident that it is a usual and ordinary accompaniment of such an injury. It is a matter of common knowledge that old scars are often sensitive, and that amputation is frequently followed by suffering and discomfort for a long period of time. If damages had been asked upon the ground of unusual suffering, the defendant's position would be well taken, and the authority it relies upon (*Jewell v. Railway*, 55 N. H. 84) would be applicable. But the instruction to which exception was taken did not submit that proposition. It merely left the matter to the jury upon the general question. In this situation the jury were to use the knowledge of the subject they possess in common with men in general. *Moran v. Railway*, 74 N. H. 500, 69 Atl. 884, 19 L. R. A. (N. S.) 920, 124 Am. St. Rep. 994; *Wheeler v. Contoucook Mills*, 77 N. H. 551, 94 Atl. 265.

If the defendant's position was that the plaintiff did not and would not suffer any pain, it could have inquired of him, or introduced other evidence upon the subject. It was also open to counsel to argue the absence of suffering, from the fact that the plaintiff failed to produce testimony to show its existence. *Boucher v. Larochelle*, 74 N. H. 433, 68 Atl. 870, 15 L. R. A. (N. S.) 416.

Exceptions overruled. All concurred.

(133 Md. 124)

TURNER et al. v. HUDSON CEMENT &
SUPPLY CO. OF BALTIMORE
CITY et al. (No. 24.)

(Court of Appeals of Maryland. June 20, 1918.)

1. FRAUDULENT CONVEYANCES \S 96(2)—CONVEYANCE TO DAUGHTER.

If husband's creditors will be injured, he, holding as tenant by entireties with his wife six months before her death, cannot during her illness, when there is every probability of surviving her, claim as valid consideration for a transfer to his daughter a request from the wife that he give the property to the daughter.

2. FRAUDULENT CONVEYANCES \S 96(2)—CONVEYANCE TO CHILD—RENDITION OF SERVICES.

Even when a child over age, and while residing with his parents without any agreement for compensation, renders them services, such services do not constitute valuable consideration for a conveyance from one of the parents, as against creditors.

3. FRAUDULENT CONVEYANCES \S 157(1)—KNOWLEDGE OF GRANTEE.

A daughter who kept her father's accounts, drew checks and notes for him, and was familiar with his business, was chargeable with such knowledge of his financial condition as was necessary to bind her as a fraudulent grantee under conveyance from him to her fraudulent as to his creditors.

4. FRAUDULENT CONVEYANCES \S 43(1)—EXTENSION OF CREDIT—FAITH IN GRANTOR'S OWNERSHIP.

If a man is in debt, and inherits property, or it becomes vested in him as a tenant by the entireties, he cannot give it away to the deprivation of his creditors merely because credit was not given him on the faith of his ownership of the property.

5. FRAUDULENT CONVEYANCES \S 208—VOLUNTARY DEED—INTENTION TO DEFRAUD.

A voluntary deed, which is fraudulent in law, is void as against pre-existing creditors, and a voluntary deed, made with the design to defraud subsequent creditors, may be impeached by those so defrauded.

6. FRAUDULENT CONVEYANCES \S 274—SUIT BY SUBSEQUENT CREDITORS—BURDEN OF PROOF.

In suit by subsequent creditors to set aside voluntary deeds, the burden was on such creditors to show that it was the intention and design of the grantor and grantee to defraud subsequent creditors.

7. FRAUDULENT CONVEYANCES \S 298(4)—INTENTION TO DEFRAUD—SUFFICIENCY OF EVIDENCE.

In suit by subsequent creditors to set aside voluntary deeds, evidence held insufficient to show that it was the intention and design of the grantor and grantee, father and daughter, to defraud such creditors.

8. FRAUDULENT CONVEYANCES \S 313(2)—SUIT TO SET ASIDE—RELIEF—SUPPORT BY BILL.

In suit by subsequent creditors to set aside fraudulent conveyances by father to daughter, under prayers, including one for general relief, court can decree sale of whole lot, subject to mortgage, to distribute third of proceeds which creditors are entitled to have, and to pay over balance, if any, to daughter; she being entitled thereto.

9. GIFTS \S 18(1)—DELIVERY.

Where a mother intended her daughter should have a sum of money in the house, or whatever was left of it after her death, but made no delivery of it during her lifetime, there was no complete gift of the money to the daughter.

10. FRAUDULENT CONVEYANCES \S 43(1)—GIFT OF MONEY.

A husband had no right to give away to his daughter, to the prejudice of his creditors, a third of a sum of money belonging to his wife at her death, and therefore coming to him in the settlement of her estate.

11. FRAUDULENT CONVEYANCES \S 312(3)—RIGHT OF GRANTEE—ALLOWANCE OF INTEREST.

In suit to set aside fraudulent conveyances from father to daughter, daughter being adjudged entitled to a sum of money, but having lived in property which is to be sold for division of proceeds between himself and creditors, interest should not be allowed her.

12. FRAUDULENT CONVEYANCES \S 312(3)—RIGHT OF CREDITOR—INEQUITY.

In suit to set aside fraudulent conveyances, held that it would be inequitable to permit a company to furnish materials for the fraudulent grantor's house, receiving payment for them, and, as a subsisting creditor, to profit by the increased value of the property caused by the materials which it furnished and was paid for.

13. FRAUDULENT CONVEYANCES \S 312(3)—RIGHT OF CREDITORS.

What creditors of a voluntary grantor, injured by the transfer, had a right to at the time was the value of the property as it then stood vested in the grantor as a tenant by the entireties.

14. FRAUDULENT CONVEYANCES \S 208—"SUBSISTING CREDITORS."

Though companies received payments in full at times for material furnished builder, and though amount due when his claimed fraudulent transfers were made was afterwards paid, other indebtedness having been created almost immediately, and there being practically a running account, companies were "subsisting creditors" of builder at time of conveyances.

15. FRAUDULENT CONVEYANCES \S 208—"SUBSEQUENT CREDITOR."

Where an account was fully settled, with no arrangement or expectation of immediate continuance, the creditor was a "subsequent creditor," in relation to the debtor's voluntary conveyance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subsequent Creditor.]

Appeal from Circuit Court of Baltimore City; Morris A. Soper, Judge.

Suit by the Hudson Cement & Supply Company of Baltimore City and others against Roberta L. Turner and Carroll A. Turner, her husband, and Frederick E. Tobe. From the decree, defendants appeal. Reversed, and cause remanded.

Argued before BOYD, C. J., and BRIS-

COE, THOMAS, PATTISON, STOCK-BRIDGE, and CONSTABLE, JJ.

Benjamin Rosenheim and Myer Rosenbush, both of Baltimore, for appellants. John C. Kumpf and Ferdinand C. Dugan, both of Baltimore (Meyer Steinberg, of Baltimore, on the brief), for appellees.

BOYD, C. J. The bill of complaint was filed in this case by the appellees against the appellants to set aside two deeds made by Frederick E. Tobe to his daughter, Roberta L., who is now Mrs. Turner, a deed from Roberta L. Turner and her husband to said Tobe, and a lease from him to his daughter, and to sell the property described in the deeds and apply the net proceeds to the payment of the claims alleged to be due the plaintiffs. The American Exchange & Savings Bank and the West North Avenue Savings & Loan Association, mortgagees, were also made defendants. A decree was passed, adjudging (1) that Frederick E. Tobe was indebted to the Lafayette Mill & Lumber Company in the sum of \$6,454, to the Hudson Cement & Supply Company in the sum of \$604.94, to George H. Harrington & Bro. in the sum of \$187.79, and to A. Weiskittel & Son Company in the sum of \$191.39; (2) that the deeds and lease be set aside; and (3) that the properties, or so much thereof as may be necessary, be sold subject to the mortgages thereon. From that decree this appeal was taken.

The evidence shows that Frederick E. Tobe was what is spoken of as a "bonus builder," and had been for some years. In this instance a Mr. Lauer made an arrangement with Mr. Tobe, and after Mr. Lauer's death his wife continued the arrangement, by which she advanced at different stages of completion of the houses built on her property 75 per cent. of the cost, and then made leases to Tobe subject to ground rents, varying from \$70 to \$120 per annum. He then executed mortgages to her to secure the amounts so advanced. The appellees furnished Tobe with materials used in the houses. This had been going on for some years, and the Hudson Cement & Supply Company and the Lafayette Mill & Lumber Company had large dealings with Tobe.

On May 5, 1910, Tobe assigned to his wife, for a consideration named in the deed as \$3,500 a leasehold property known as No. 2403 West North avenue, subject to an annual ground rent of \$120. On the same day she gave a mortgage to the West North Avenue Savings & Loan Association for \$1,040. On May 7, 1914, the Provident Realty Corporation conveyed to her and to her husband, as tenants by the entirety, a property known as 2804 Garrison avenue. On that day they gave a mortgage on that property to the West North Avenue Savings & Loan Association for \$1,768. Mrs. Tobe died on No-

vember 8, 1914, and her husband qualified as her administrator on November 12th. On November 24th an inventory was returned which included the leasehold property on West North avenue, appraised at \$2,500. On the same day the administrator filed an account, distributing that property—one-third to himself, as surviving husband, and two-thirds to his daughter—Roberta L. Tobe (now Turner). On the same day he executed a deed as administrator, conveying the property to himself and his daughter in the proportions mentioned, and also on that day assigned his third interest in that property to his daughter. On February 17, 1915, Roberta L. Tobe gave a mortgage on the North avenue property to the West North Avenue Savings & Loan Association for \$1,976, the other mortgage having been taken up or paid off. On December 3, 1914, Frederick E. Tobe conveyed to his daughter the Garrison avenue property. On August 11, 1915, she mortgaged it to the American Exchange & Savings Bank for \$3,500. The same day she and her husband conveyed it to Frederick E. Tobe, and he leased it to her, reserving a ground rent of one cent per annum.

We do not deem it necessary to discuss the transfer of the Garrison avenue property from Mr. and Mrs. Turner to Tobe and the lease from him to his daughter, as they were evidently made simply for the purpose of making it leasehold, instead of fee-simple property. We do not understand the appellees to question the title of Mrs. Tobe to those two properties, and the bill does not attack the deeds to her. As the one-third interest in the leasehold on West North avenue was distributed to him, and as the survivor of his wife he became entitled to the Garrison avenue property in fee, they being tenants by entirety, our inquiry will be confined to his right to convey them to his daughter.

It would have saved us some labor in ascertaining the amounts of the liabilities and assets of Tobe at the dates of the transfers, if more concise statements giving them had been in the record, but for the purposes of this opinion it will be sufficient to adopt the admission in the appellants' brief and what Mr. Tobe himself testified to. In that brief is the following:

Liabilities of F. E. Tobe, December 3, 1914.	
Lafayette Mill & Lumber Co.....	\$5,455.77
Hudson Cement & Supply Co.....	1,811.00
Harrington & Bro.....	317.00
Sundry other creditors.....	500.00

Total liabilities, December 3, 1914, \$7,583.77

In the examination in chief of Mr. Tobe this appears:

"Q. That made your total assets on December 3, 1914, \$11,725; is that correct? A. About that; yes. Q. And your total liabilities as \$7,583.77? A. About that. Q. Making you have an excess of assets over liabilities of \$4,142; is that right? A. Yes."

The appellants contend that at the dates of those transfers he had ample property to meet his obligations, and hence he had the right to convey the properties to his daughter; but, without taking up each item included in the statement of his resources, it is clear that most of them were subject to reductions. The ground rent and interest on prior mortgages had to be deducted out of the proceeds of sales that he made, but were not allowed in the estimates of resources. There were other items which were at least questionable, and, if not allowed, as the appellees contend they should not be, there was no excess of assets at the time of the transfers. But, without discussing them, and conceding that there was the nominal excess testified to by Tobe, the evidence showed that he was contracting new debts and making use of the assets he had, which were of a very doubtful character—being dependent upon his ability to sell the property. The mortgages he had were second or third mortgages, and the equities in other properties were on unfinished houses and leasehold lots, the titles to which were not as a rule in him. That they were of a most unsatisfactory character is shown by the fact that when there was a foreclosure of some of the mortgages the property brought much less than the estimates of Tobe, and nothing went to the second mortgages on them. The collection of those which were collected was postponed until Tobe could make sales of the properties, which of itself would, in many instances, have delayed the creditors for several years if they had to rely on them. We can have no doubt that when he transferred the properties to his daughter he did not have sufficient assets, or of such kind as authorized him to do so.

In one of the latest cases in this court on the subject (*Wilmer v. Placide*, 131 Md. 399, 102 Atl. 541), we quoted from *Goodman v. Wineland*, 61 Md. 449, where it was said that:

"It is a 'hindrance' to creditors for a debtor to dispose of his real property and tangible chattels, which are readily subjected to execution, and compel them to reply upon merely personal obligations, with the risks and the necessity for numerous attachments usually incident to such a resource."

In the *Wineland* Case it was contended that he had ample means outside of what he had conveyed to his wife, and, immediately preceding what we have quoted above, the court said:

"It is further to be observed that in showing the debts due to *Wineland*, they are not such means as can be considered equal to real and personal property, such as was conveyed to his wife, in their availability to creditors for the prompt satisfaction of their claims."

In *Bullett v. Worthington*, 3 Md. Ch. 99, the chancellor on page 106 said:

"If there be a reasonable doubt of the adequacy of his means, or if his property be so circumstanced that delays, difficulties, and expense must be encountered before it can be made available to his creditors, then, as I con-

ceive, the voluntary conveyance must fall, because then it has the effect to delay and hinder his creditors."

That was quoted with approval by Judge Eccleston in *Williams v. Banks*, 11 Md. 198, and was not disapproved of by the other judges in that case, and was later approved in *Warner v. Dove*, 33 Md. 579. In the latter case, the effort was to set aside three sales of real estate which had been conveyed to the wife by third parties. While under the circumstances there proven the court refused to set aside the deeds, the decision does not support the contention of the appellant that the appellees are not entitled to relief, because the properties owned by Tobe at the time he made the deeds were of the same character as those he had when the debts were contracted, as the facts were so different. It was there said:

"The evidence in our judgment shows beyond reasonable doubt that the husband at the time of these gifts was in prosperous circumstances, unembarrassed, and possessed of ample means, consisting of the same kind of property that he had when the debts of this firm were contracted, to pay all the debts he then owed, and that the settlement was a reasonable one. He had remaining of such property and assets more than ten times the amount of this, the only pre-existing debt."

In this case Tobe was not "in prosperous circumstances, unembarrassed," and it is not shown "beyond reasonable doubt" that he was "possessed of ample means," etc. The court went on to say:

"It is to be observed, this is not a case where a party possessed of real estate and also of assets of this description conveys the former, which is unincumbered, visible, tangible, and easily accessible to creditors, in settlement upon his wife and family and leaves his creditors to resort to the latter, where their remedy might be more precarious and difficult, and the property, at all events, less readily and conveniently accessible to their claims. A conveyance of that character would of necessity operate to hinder and delay creditors in the collection of their debts, and for that reason would be void, though enough might be shown to remain for their eventual satisfaction, as was decided by the Chancellor in *Bullett v. Worthington*, 3 Md. Ch. 90."

The court in another part of the opinion referred to the fact that it did not appear that the husband owned any real estate.

[1, 2] There can be no doubt that these deeds were voluntary and without sufficient consideration to support them. Tobe said, in reply to the request of his attorney to state why he transferred those properties:

"The principal consideration and the whole consideration was that my daughter had taken care of my wife, taken care of the house, looked after everything in general, and my wife wanted her to have it"

—and in reply to another question said:

"The primary interest in that was the service my daughter rendered my wife and myself during my wife's illness, of nearly three years."

The daughter stated the consideration to be that:

"The properties were bought with my mother's own money, and by her request they were given to me—by her request I was to receive everything that was hers."

A sufficient answer might be, as far as the Garrison avenue property is concerned, that it was not her mother's to give, as it was conveyed to her and her husband, as tenants by the entireties, and that too only six months before her death. A wife and husband cannot thus hold property, and then during the illness of the wife, when there is every probability of the husband surviving her, claim, as a valid consideration for the transfer of the property, a request that the husband give it to their daughter, if the husband's creditors will thereby be injured. It is very commendable in a husband to carry out the wishes of his wife, if he is in such financial condition as he can properly do so, but not if it is at the expense of his creditors. According to the evidence of the daughter, her mother dealt very generously with her in her lifetime, gave her nearly \$3,000 in cash, bank stock, and some other property, but she did not either give her the North avenue property in her lifetime or leave it to her by will. The daughter was just 21 years of age when her mother died, and had lived with her parents all of her life up to that time. Since then she has lived with her father, or, as she says, her father lives with her. Even when a child is over age, and, while residing with his parents without any agreement for compensation, renders them services, that does not constitute a valuable consideration for a conveyance, as against creditors. *Sunderland v. Ebling*, 125 Md. 686, 94 Atl. 344.

[3] There can be no doubt in this case about the knowledge of the grantee of her father's financial condition. She kept his accounts, drew checks and notes for him, and in most respects seemed to be as familiar with his affairs as he was. She is clearly chargeable with such knowledge as is necessary to bind a grantee, in a proceeding to set aside deeds, and we will not discuss that branch of the case further.

[4] It is said on the part of the appellants that the credits were not given on the faith of the ownership of the properties in question. From the 7th of May, 1914, the creditors had the right to look to some interest of Tobe in the property on Garrison avenue, and the Lafayette Mill & Lumber Company accepted renewals of some of its notes between that date and the transfers to the daughter, but we do not understand that to be a material question in this case. He had the titles to the properties in him, and he was largely indebted when he transferred them to his daughter. It could scarcely be contended that if a man is in debt and inherits property, or it becomes vested in him as a tenant by entireties, he can give it away and deprive his creditors of it, merely because he did not own it when the debts were contracted.

[5] The law in this state is well settled as to the rights of creditors against debtors making voluntary deeds. In *Kane v. Rob-*

erts, 40 Md. 590, after citing *Williams v. Banks*, supra, *Cooke v. Kell*, 13 Md. 469, and *Moore v. Blondheim*, 19 Md. 175, the court said:

"These cases hold that a voluntary deed, which is fraudulent in law, is void as against pre-existing creditors, and also that a voluntary deed, which is made with the design to defraud subsequent creditors, may be impeached by those so defrauded. But they also hold that where a voluntary deed is made without design to defraud subsequent creditors and is recorded, it is valid against all subsequent creditors, because they deal with the party with knowledge, either actual or constructive, of the existence of the conveyance."

It is there also said that a deed that is fraudulent and void against the grantor's subsisting creditors is valid if recorded against subsequent creditors "when there is nothing in the deed itself, and no evidence offered tending to prove that any fraud was intended against the latter."

In *Matthal, Ingram & Co. v. Heather*, 57 Md. 483, the court reiterated the rule announced in prior cases that a voluntary conveyance made by a party solvent at the time may be impeached and set aside by subsequent creditors, "provided it be executed with the intention and design to defraud those who should thereafter become his creditors," but it was there said that in such case "the fraudulent purpose will not be presumed but must be proved. The onus rests on the parties assailing the deed to establish the fraudulent intent by satisfactory proof." In *Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453, the court quoted from *Moore v. Blondheim*, supra, and held, referring to the syllabus for convenience:

"A deed, fraudulent in fact cannot by registration be made effective against subsequent creditors whom it was made to defraud, or bar their right to impeach it"

—and it was decreed that the deeds assailed were executed with the intent to hinder and delay creditors, and to defraud persons who might become creditors thereafter, and that in consequence they were void and must be set aside. In *Scott v. Keane*, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359, it was contended that there was no such thing as fraud in law as affecting subsequent creditors, and that, as no actual fraud was proven, the bill should be dismissed, but it was held that a voluntary deed may be avoided by subsequent creditors where no actual fraud is proved to have existed, if the provisions of the deed itself are fraudulent in law. It was held that the deed in that case was void as to subsequent creditors, whether they had notice of it or not.

In *Spuck v. Logan & Uhl*, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427, it was shown that there were running accounts between Spuck and the appellees—the course of dealing at first being, that for purchases made one month Spuck paid the next month, etc. He did not always pay in full, and the indebtedness increased. The amount Spuck

owed the appellees when the deed was made was subsequently paid, but before it was paid he had incurred other indebtedness to them, for a larger amount, and that course of dealing continued until finally Spuck was indebted to them in the sum named in the opinion in that case. The court said:

"If that was all, we would find difficulty in reaching the conclusion contended for by the appellants that the appellees were merely subsequent creditors. In *Paulk v. Cooke*, 39 Conn. 572, it was contended that the debts which existed at the time the conveyance attacked was made had been paid with one exception, and that a voluntary conveyance could only be impeached by existing, and not by subsequent, creditors, but that court thus replied: "This principle clearly has no application where there has been a continued, unbroken indebtedness. The debts are owed though they may be due to new creditors. It is a most unsubstantial mode of paying a debt to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt." In *Wait on Fraud*, Con. § 108, that author, in speaking of the subject, says: "The case should be treated as if the prior indebtedness had continued throughout, or as a case of a continued or unbroken indebtedness." In this case there is all the more reason to adopt that rule, as Spuck was indebted to the appellees (not merely to new parties) constantly and without interruption from January 1, 1898, and to say that under those circumstances they must be denied any rights that subsisting creditors have against a fraudulent conveyance would be protecting fraud by a distinction that should not be made in favor of the guilty against the defrauded."

[8-9] Under the authorities there can be no doubt that the one-third interest of Tobe in the North avenue property and his interest in the Garrison avenue property were liable to his subsisting creditors, but we do not think the evidence proves that those properties, or either of them, were conveyed with the intent to hinder, delay, or defraud his subsequent creditors. The deeds were promptly placed on record; and, although the burden is on subsequent creditors to show that it was the intention and design of the grantor and grantee to defraud those who would thereafter become creditors, *Matthal, Ingram & Co. v. Heather*, supra, that is not satisfactorily shown. The principal difficulty we have is to apply the law to the peculiar facts of this case. Two-thirds of the North avenue property belonged to Mrs. Turner, and were properly distributed to her (as Miss Tobe), but the one-third of it should go to her father's subsisting creditors. She has burdened that third by the mortgage to the West North Avenue Savings & Loan Association for \$1,976 dated February 17, 1915, which is conceded to be valid, although we do not know the precise amount now due on it. If a sale is made of the one-third, subject to the mortgage, it will necessarily reduce the value of it to the extent of one-third of the mortgage or more. Any one who would buy the third would take into consideration the possibility of default in the mortgage, and a sale of the whole lot, unless the mortgage in full was paid. That would have a tendency to reduce the value of the

third still further. So the only equitable way of disposing of it which occurs to us is to decree a sale of the whole lot subject to the mortgage, and take out of the proceeds of sale the value of the third interest if free of the mortgage, and the balance, if any, to be paid over to Mrs. Turner. We think that can be done under the prayers in the bill, including the one for general relief. Mrs. Turner has no right to complain of that because it was her act which makes it necessary. If the parties can agree upon the value of the third interest, and that is paid, a sale can be avoided, and the decree can so provide.

The creditors have actually been only deprived of the value of the Garrison avenue lot unimproved, excepting such as the little work spoken of, trenches for foundations and some stonework, which may or may not have added something to the value of the lot, subject to the mortgage on it for \$1,768, given by Mr. and Mrs. Tobe when it was purchased. All that Mrs. Turner claims to have expended in making the improvements on the lot is the proceeds of the mortgage given to the West North Avenue Savings & Loan Association (\$1,976), the difference between the mortgage given August 11, 1915, on the Garrison avenue property for \$3,500 and the mortgage given on it May 7, 1914, for \$1,768, which difference she and her father estimate at \$2,000 (part of the \$1,768 mortgage having been previously paid, and the balance having been paid when the new mortgage was given) and \$2,929 which she says her mother had in cash and gave to her.

[9, 10] Mrs. Turner and Mr. Tobe both swore that the sum of \$2,929, or thereabouts, was in the safe at the house in the lifetime of Mrs. Tobe, and belonged to her. Without prolonging this opinion by giving our reasons, we are compelled to say that there is some doubt as to whether it was there, but, giving them the benefit of the doubt, we are convinced that there was no such gift of that money as the law can recognize. Mrs. Turner was asked, "Whose (money) was it at the time of your mother's death?" and replied:

"It was her money at the time of her death. Q. Her money? A. It was her money, and she had given it to me. She had collected it and given it to me before her death. It was to be my money."

On cross-examination she testified:

"Q. You got some of it away back in 1913, and some back in 1912, you were not going to use it then, were you? A. It was my mother's at that time, it was not mine. Q. When did it become yours? A. It became mine at her death. It was mine in word and deed, but hers to use as she saw fit up until that time."

That and other evidence we might refer to satisfy us that her mother never did in fact part with it, and the most that could be said was that she intended that her daughter should have whatever was left of it af-

ter her death, but she left no will, and made no sufficient delivery of it in her lifetime. It should therefore have been accounted for in the settlement of her estate, and her husband was entitled to one-third of it, which he had no right to give away to the prejudice of his creditors.

Some doubt is cast on the \$1,976 transaction by reason of the fact that the same amount was deposited in Tobe's bank account on the day the mortgage for that sum was given, but Tobe denied that it was the same, and it was not traced. But, assuming that it was the same, if it was paid out on account of the improvements, it can make but little difference whether it was deposited in his account or placed in the safe as Tobe and his daughter said. If the appellees' evidence that the property is worth from \$14,000 to \$15,000 is correct, undoubtedly as much as appellants claim went into the house was spent on the improvements, and the mortgage was given for the \$1,976, as shown above.

[11] We thus have the \$1,976 given by Mrs. Turner, subject to what we have said above, the \$3,500, and she was entitled to two-thirds of the \$2,929, as the only child of Mrs. Tobe. The property will have to be sold subject to the \$3,500 mortgage, and Mrs. Turner will be entitled to be repaid the \$1,976 obtained through the mortgage spoken of above (provided the North avenue property protects the creditors from loss as to the third interest of Tobe, and, if it does not, they should be protected out of the proceeds of the Garrison avenue property) and two-thirds of the \$2,929. As she has lived in the property, we do not think interest should be allowed her.

[12, 13] The evidence shows that the Lafayette Mill & Lumber Company, sold considerable quantities of materials for the house erected on Garrison avenue, and it was paid for it. The exact amount we do not know. The company had furnished some material for it before the death of Mrs. Tobe, in her name. After her death the manager of that company called on Mr. Tobe to see what was to be done. It was agreed that the materials were still to be furnished in the name of Mrs. Tobe, which was done. Tobe told him that he had the money to pay all the bills contracted for that house, and that the account would be paid the first of every month. He said that Tobe told him when they started the job that it was Mrs. Tobe's house, and he was going to pay the bills on that every month. The bills were paid, and there is nothing due that company on account of that house. Nor is there anything to show that any misrepresentation was made to the company, and, although it is not proved that the officers had actual knowledge of the deed that Tobe made to his daughter, it was on record, and the manager certainly knew enough to put him on

inquiry. Under those circumstances, it would seem to be inequitable to permit that company to furnish materials for the house, get paid for them, and then, as a subsisting creditor at the time of the transfer, profit by the increased value of the property caused by the materials which it furnished and was paid for. It must be remembered that what the creditors had the right to, at the time of the transfer, was the value of the property as it then stood, which had vested in Tobe as a tenant by the entirety. The only doubt we have had is whether or not under the circumstances the Lafayette Company should not be held to be estopped to make any claim against this property. The facts in the record do not seem to justify that, but we are of the opinion that it should not be permitted to participate in the distribution of the proceeds of sale of that property without first deducting from its account the amount it furnished, and was paid, for that house.

[14, 15] The same principle should be applied to the Hudson Cement & Supply Company's account. The company is a subsisting creditor within the meaning of what we have said in Spuck's Case. While payments in full were made at times, and the amount due when these transfers were made was afterwards paid, almost immediately other indebtedness was created. There was practically a running account right along. Sometimes there was a day or two between the payment and the new indebtedness, but the debt was practically a continuous one. The same thing seems to be the case as to the account of George H. Harrington & Bro. From the statement in the record there is nothing to show that the account of A. Weiskittel & Son Company was in existence prior to July 10, 1915. If that is the case, it cannot be allowed.

The lower court can take testimony, if it deems that proper, as to these and other accounts, so as to ascertain whether the claims are held by subsisting creditors within the meaning of what we have said, remembering that where there was a running account, the fact that it was settled in full, but immediately, or within a day or two, a new indebtedness was contracted, such creditor, under the principle announced in Spuck v. Logan & Uhl, can be treated as subsisting; but, where the account was fully settled, with no arrangement or expectation of immediate continuance, the party must be held to be a subsequent creditor, and as such no distribution can be allowed in this case.

It follows that the decree must be reversed and the cause remanded, so that a decree may be passed in accordance with this opinion, after taking such testimony as authorized above or the lower court may deem proper. Much of the evidence in the record is in regard to the resources and liabilities of

Tobe, but there can be no doubt that he was not authorized to convey those two properties, and no further testimony is needed on that question. Most of the questions of fact left in doubt should readily be agreed to, or so presented by an agreed statement as to avoid taking much, if any, new testimony. We will direct that the costs be equally divided between the appellants and the appellees.

Decree reversed, and cause remanded, the costs to be equally divided between the appellants and the appellees.

(133 Md. 1)

BOWIE v. WESTERN MARYLAND R. TERMINAL CO. (No. 15.)

(Court of Appeals of Maryland. April 26, 1918.)

1. EJECTMENT §85(1)—RIGHT TO RECOVER—SUFFICIENCY OF EVIDENCE.

In ejectment for land in the city of Baltimore, patented to an individual in 1668 by Lord Baltimore, evidence held insufficient to entitle plaintiff to recover.

2. PUBLIC LANDS §196—LAND COVERED BY NAVIGABLE WATERS—RIGHT OF COLONIAL PROPRIETOR.

Lord Baltimore, the colonial proprietor of Maryland, acquired the same right to dispose of land covered by navigable waters under his charter from the king as the king had prior to the charter, subject to the public's right of user for fishing and navigation, and the right afterwards became vested in the state, subject to the same restrictions.

3. DEEDS §111 — LAND BORDERING ON STREET OR STREAM — EXTENT OF CONVEYANCE.

In absence of statute, the deed of an owner of land abutting on a stream conveys as far as his title extends, unless he limits the conveyance by appropriate terms.

4. NAVIGABLE WATERS §37(4) — CONVEYANCE TO MIDDLE OF STREAM.

A deed describing the land as running to the water of Herring Pond, then running and bounding on the water of Herring Pond by two courses, conveyed to the middle of the bed of the stream.

5. DEDICATION §20—STREET—REVOCATION.

Title to both sides of a street and to its bed being vested in defendant in ejectment, for the purposes of the case, the dedication of the street, if any, by defendant's predecessor, the city not being a party, must be treated as revoked.

6. BOUNDARIES §14 — WATERS — LAND IN FRONT OF STREET.

Dedication of a street being revoked, conveyance of its bed from its northerly terminus to its southerly terminus at a pond is sufficient to carry whatever right the grantor's estate had in the bed of the pond in front of the street.

7. EJECTMENT §84(3)—PLEA OF NOT GUILTY—RIGHT OF POSSESSION.

In ejectment, the plea of not guilty not only puts in issue the title to the premises but the right of possession.

Appeal from Superior Court of Baltimore City; Robert F. Stanton, Judge.

Action by Carter Lee Bowie, trustee, against the Western Maryland Railroad Terminal Company. From judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Alexander Preston and Frederick W. Story, both of Baltimore, for appellant. George R. Gaither, of Baltimore (George P. Bagby, of Baltimore, on the brief), for appellee.

BOYD, C. J. This is an action of ejectment, brought by the appellant against the appellee in the superior court of Baltimore City for—

"all that portion of Upton Court, in the city of Baltimore, which is described as follows, to wit: All that portion of the Herring Pond which lies to the east and north of the middle file thereof, from the southeastern outline of that part thereof heretofore on the sixth day of January, in the year eighteen hundred and fifty-nine (by deed now recorded among the Land Records of Baltimore City in liber G. M. S. No. 162, folio 413, etc.) conveyed by Alexander Gould to Thomas Winans, southerly and then easterly to and into the northwest branch of the Patapsco river."

A plea of not guilty was filed, and the case was tried before the court without a jury. The court rejected the plaintiff's prayer, and granted the defendant's third and fourth, which held that the plaintiff was not entitled to recover. The verdict was accordingly rendered for the defendant, and from a judgment entered thereon this appeal was taken.

A tract called "Upton Court," containing 500 acres more or less, was patented on the 2d of August, 1668, by Lord Baltimore to David Pool, which became vested in John Giles by deed on June 18, 1720. John Giles, by his will proven in 1725, devised a part of his "dwelling plantation and land adjacent, which is between a pond called Herring Pond and the Middle Pond," etc., to his wife for life, and after her death to his son John. He then devised part of that tract to his son John, and the remainder to his son Jacob. Before John Giles, Sr., died, he had applied for a resurvey of said tract; but he died before it was patented, and on August 12, 1731, a patent was issued to John Giles, Jr.

The will of John Giles, Sr., certainly leaves in grave doubt the question whether he intended to give his son John (whom for convenience we have designated in this opinion John Giles, Jr.) any, or, if some, what part, of Herring Pond. The description of what he left to Jacob does not say whether the beginning was to be on the one side or the other of the mouth of Herring Pond, and, if it must therefore begin in the center of the mouth, there is nothing to show where the trees at the head of the Pond stood, although, of course, the call would take the line to the trees. The rest of the will would seem to indicate that John was not to have any part of Herring Pond. The patent granted to him on the 12th of August, 1731,

does not help, because by the deed made by him to Jacob February 28, 1732, he undertook to convey to Jacob what was left him by their father's will.

Then the deed from Gerard Hopkins to Hugh Young, dated November 20, 1778, is very indefinite. It began at a point somewhere "20 feet southeast from a poplar and two oak stumps formerly marked trees," etc. Apparently, or at least probably, they were the poplar, red oak, and "water oak" referred to in the will of John Giles, Sr., at the head of Herring Pond. The deed then calls to run to the southwest branch of Patapsco river, thence running and bounding on and with the said branch by several lines given, and then "south 55 degrees west 11 perches to the mouth of a small branch called the Herring Pond, and running and bounding on and with the said pond west 10 perches," etc. The courses and distances of 12 other lines are then given, without any calls, and "then by a straight line to the beginning." Where the beginning was depends upon where the trees were, and then some point from which the trees were "at the distance of 20 feet southeast" would be adopted; but it will be observed that the call is to the mouth of Herring Pond "and running and bounding on and with the said ponds." It is not "to the south side of the mouth of the said Herring Pond, thence on and with the said Herring Pond," as in the partition deed between Sarah Hopkins and Elizabeth Webster of September 8, 1768. Upon what principle of construction or locations the call in the Hopkins-Young deed could be taken to the south side of the mouth of Herring Pond we do not understand. It may or may not have been a mistake, but it may have been that Hopkins had some such idea as the appellant attributes to Gould—that it would be well to hold on to this pond, although he sold his land abutting on it. Whatever the reason was, if the description set out at length in the record is correct, it did not take the grant to the south side of the mouth of the pond, and hence did not convey any of the pond, unless the home line—then by a straight line to the beginning—included some portion up about the head.

[1] Inasmuch as Gould claimed through John Giles, Jr., and Hugh Young, if Herring Pond was not conveyed by them, or either of them, then Gould did not acquire it. As the record stands, we cannot see how the court below, sitting as a jury, could have rendered a verdict for the plaintiff, and he would have been justified in declaring as a matter of law that under the proper construction of the Hopkins-Young deed the plaintiff could not recover. It is not in the record, but the appellee's brief states that it did offer a prayer that there was no legally sufficient evidence to entitle the plaintiff to recover, and we think that could have been granted.

But as the lower court relied on other grounds, which must have assumed that title to the part of Herring Pond in controversy in this case became vested in Alexander Gould, we will further consider the case with that assumption, which makes it unnecessary to go beyond him. It may be well to add that the appellee does not deny that Gould had title to the land outside of the pond, and claims that he conveyed whatever title he had to that pond, which has now become vested in it. If he never had any title in the bed of the pond, of course he cannot maintain the action of ejectment for it, and any rights he had as riparian owner have undoubtedly passed out of him.

Alexander Gould and wife, by deed dated the 24th day of January, 1853, conveyed to J. Washington Tyson two parcels of land which were parts of Upton Court, both of them being on the easterly side of Herring Pond. They were separated by a street 50 feet wide, which the deed says was "laid out by the said Gould for the benefit of the purchasers of his ground fronting thereon." The first parcel is described as beginning on the southeast side of that street (which in later deeds is called Gould street) at a point described, "and running thence bounding on the southeast side of said 50-foot street south 46½ degrees west 282 feet to the water of Herring Pond; then running and bounding on the water of Herring Pond the two following courses, viz.: south 22½ — west 562 feet, north 85 degrees east 354 feet to the water of Patapsco river," etc. The second parcel begins on the northwest side of that street and calls to run "to the water of Herring Pond, then running and bounding on the water of Herring Pond, south 12½ degrees east 120 feet to the northwest side of said 50-foot street." James R. Read, trustee, conveyed to William P. Twamley seven different properties, including one that is described as follows:

"First, all of the bed of Gould street 50 feet wide extending from its northerly terminus at the northeasternmost outline of the property formerly belonging to the estate of Alexander Gould, deceased, to its southerly terminus at the Herring Pond, a distance of about 1,800 feet."

Twamley and wife subsequently conveyed the same property to the appellee, but we do not find the dates of either of those deeds in the record. The two parcels conveyed to Tyson by the above-mentioned deed became vested in Thomas Winans by deed of April 25, 1850, and subsequently the Winans interest became vested in the appellee.

We will first consider the effect of the deed from Gould to Tyson for the two parcels of land. The appellant contends that, as the deed from Gould to Winans, dated January 6, 1850, expressly called to run to the margin and then to the center of Herring Pond, etc., it shows that it was not intended to so run by the deed from Gould to Tyson, made six years before; but that would be a

violent presumption, and inasmuch as Winans purchased the property acquired by Tyson a few months after he purchased the property from Gould, it is more likely that he thought that the Tyson property extended into the pond, if he thought anything about it. Before Gould sold to Winans he had ample front on the pond for that property, after he had sold to Tyson, and it is difficult to see any possible use he could have made of it, excepting in front of the property he retained until he sold it to Winans.

[2] The case of *Browne v. Kennedy*, 5 Har. & J. 195, 9 Am. Dec. 503, seems to us to be conclusive of most of the questions. Whatever the law was elsewhere, that case settled it for this state, and has never been overruled or qualified. It was there held that Lord Baltimore, a proprietor of Maryland, acquired the same right to dispose of land covered by navigable waters within the province, under the charter granted to him by the king, as the king had prior to granting the charter—subject to the right of the public to use it for fishing and navigation. The right to grant land covered by navigable waters afterwards became vested in the state—subject to the same restrictions. In June, 1700, a tract of land called Todd's Range, being a resurvey of Cole's Harbor, was granted to James Todd. The courses and distances included Jones' Falls, and at the time of the grant, and until 1788, the ordinary tides flowed up Jones' Falls to a place marked on the plat, and boats went to that place until 1787. By mesme conveyances and devises the tract called Todd's Range became vested in Charles Carroll of Annapolis, who on April 18, 1787, conveyed a part of the tract on the northwest side of Jones' Falls to William Lyon, which called to run "unto Jones' Falls, then bounding down and with the said falls the twelve following courses," etc. On the 20th of May, 1787, said Carroll conveyed to Alexander Lawson another part of said tract, also binding on Jones' Falls, on the southeast side. That was described as running "unto Jones' Falls, then bounding upon and with the said falls the seven following courses," etc. On January 28, 1795, Charles Carroll of Carrollton, the heir at law of Charles Carroll of Annapolis, made a deed to John Smith, Benjamin Williams, and others, by which he conveyed all that part of Todd's Range which is described as "beginning for the same at," etc., "and running * * * to the middle or center of the bed of Jones' Falls, thence running in the middle or center of said falls," etc. The question was whether, by the deeds of Charles Carroll of Annapolis, Lyon and Lawson, the grantees, and those claiming under them, were entitled to the land under Jones' Falls to the middle of the stream, or whether the title remained in Charles Carroll of Annapolis, so that his heir could convey it to other parties. Chief Judge Chase filed a separate opinion, in which he held that the plaintiff, who claimed under

Lawson, had a right to recover the land in question to the middle of the bed of Jones' Falls; that Charles Carroll, having title to the land in question, and all rights, privileges, and advantages derivable therefrom, did by his two deeds to William Lyon and Alexander Lawson convey the same to them, and thereby did divest himself of all right and interest in the same. The Chief Judge reached the same conclusion as the majority of the court, but on different grounds, and Judge Buchanan delivered the opinion for the majority. The case was represented by distinguished attorneys. Messrs. Harper and Taney (afterwards Chief Justice of the United States) were for the appellants, and Messrs. Pinkney, Winder, and Williams (Assistant Attorney General) for the appellee. Judge Buchanan said:

"It is very certain that by the common law the right was in the king of England; and it seems equally clear to me that he had the capacity to dispose of it *sub modo*. Whatever doubts are entertained on the subject, they probably have arisen from inattention to the distinction between the power of granting an exclusive privilege in violation or restraint of a common piscarial right, or other common right, as that of navigation, and the power of granting the soil *aqua cooperta*, subject to the common user. The subject has, *de communi jure*, an interest in a navigable stream, such as a right of fishing and of navigating, which cannot be abridged or restrained by any charter or grant of the soil or fishery, since *Magna Charta* at least. But the property in the soil may be transferred by grant (*Hargrave's Law Tracts*, 17, 22, 36, 37)—subject, however, to the *jus publicum*, which cannot be prejudiced by the *jus privatum* acquired under the grant. This distinction runs through all the books, and, wherever grants have been held not to pass the soil, it was not because the king had not the capacity or right to grant it, but because there were not apt words in the grant to effect the purpose."

Again he said:

"It seems to be admitted that as the lands conveyed by Carroll to William Lyon and Alexander Lawson are described in the deeds as bounding upon Jones' Falls, if that had been a private river, they would have been entitled to hold to the middle of the stream; and, if I am right in supposing that the property in the soil was Carroll's, subject only to the common user, I cannot perceive why Jones' Falls, when the bed had become private property, should not be subject, *sub modo*, to the same rules (as to the right to the soil) that prevail in relation to private rivers, which are private property. In many respects the same rules do prevail."

Then on page 206 of 5 Har. & J. (9 Am. Dec. 511) he said:

"If, therefore, where a man, having an estate through which a private river runs, conveys away his land lying on one side of the stream, and describes it as bounding on the river, the purchaser will, by operation of law, hold to the middle, it would seem, by parity of reason, that if the same man, having an estate through which a public river runs, the soil of the bed of which makes a part of his estate, as in the case of a private river, conveys away the land lying on one side, and makes the river the boundary, the purchaser would by the same operation of law be entitled to hold, in respect of the right of soil, to the middle of the stream."

He concluded his opinion by saying:

"All the lands in this state have not been distributed or granted out to the citizens as they are supposed to have been in England; but unnavigable rivers, and lands not patented, are as much the property of the state as public rivers in England are the property of the king. And if the state grants a tract of land, bounding on an unnavigable river, I hold the rule, before alluded to, to apply, and that the grantees will be entitled to the soil to the middle of the stream. And applying the same rule to this case, I think that Alexander Lawson, under his deed from Charles Carroll, was entitled to hold to the middle of Jones' Falls, and agree with the Chief Judge that the appellant is entitled to recover the land which forms the subject of this suit."

Judges Johnson and Martin concurred in that opinion. Judge Earle dissented, holding that the bed of Jones' Falls still belonged to Carroll after the deeds made by him to Lyon and Lawson.

[3] It is therefore seen that the question was directly presented, and our predecessors held that, although the deeds called to run "unto Jones' Falls, then bounding down and with the said falls," in the one case, and "unto Jones' Falls, then bounding upon and with the said falls," in the other, the grantees took title to the middle of the bed of the stream, which was conceded to be a navigable stream. Although that case has been cited at least 14 times (see Shepard's Md. Clt.), it has never been overruled, and it might affect titles to land to overrule a case which had been accepted as law for so many years. The act of 1862 (chapter 129) which is now embraced in sections 47, 48, and 49 of article 54 of the Annotated Code, made considerable changes in the laws of this state as to rights on navigable waters; but, as that act is not applicable to this case, we need not refer to it further, except to say it now prohibits patents for lands covered by navigable waters, and gives valuable riparian rights to the proprietors of land bordering on them. Other acts, such as that of 1745 (chapter 9), had been passed years before, and they had in view giving such proprietors of land the benefit of the waters on which their lands bordered. The decision in *Browne v. Kennedy* was a logical one, as the general principle is that, in the absence of a statute regulating it, the extent to which a deed of an owner of land abutting on a street or stream goes depends upon how far his title extends, unless he limits the conveyance by appropriate terms. In 2 Devlin on Real Estate, § 1028, it is said that the rule is that, when lands are bounded by navigable streams or tide waters, the grantee's right extends only to high-water mark, but that is because it is very unusual for the grantor to own the bed of a navigable stream, and if he does, according to *Browne v. Kennedy*, the same rule applies as in case of nonnavigable waters. After giving some illustrations in section 1028, the author in section 1028a gives reasons which are very applicable to

this case when we keep in mind *Browne v. Kennedy*. That section in part is:

"Reasons for These Rules.—The natural presumption, where a deed conveys land bordering on a stream or highway, is that the grantor means to convey what he owns, and not to reserve a strip of land of no value to him, but the loss of which to the grantee might be productive of great injury. He has power by apt words to reserve what and as much as he pleases, or so to frame the language of his conveyance as to limit the land conveyed to the line of the stream or highway, without extending further, and in all such cases courts are bound to give effect to his expressed intention. But, in the absence of words showing such an intention, it is not presumed that the grantor intended to retain in himself the fee to the street or stream when he has parted with the adjoining land. Therefore it may be said to be a universal rule that a deed giving a stream as a boundary will convey title to the center of the stream or to low or high water mark, depending upon how far the grantor's title extends. By such a description the grantor will convey all that he owns, unless a contrary intent appears from the language of the deed. The deed is taken most strongly against the grantor in the application of this rule, and courts will not favor the presumption that he has retained title to the bed of the stream."

In the note to the case of *Hanlon v. Hobson*, 24 Colo. 284, 51 Pac. 433, as reported in 42 L. R. A. 502, the annotator says:

"A grant bounding on a stream or on tide water will be held to carry all the land owned by the grantor, in the absence of anything to show an intention not to do so. If the grantor owns to the thread of the stream, the grantee will also do so."

See, also, *Braxton v. Bressler*, 64 Ill. 489, *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90; *Richardson v. Prentiss*, 48 Mich. 90, 11 N. W. 819; *Hardin v. Jordan*, 140 U. S. 890, 11 Sup. Ct. 808, 838, 35 L. Ed. 423; *Boston v. Richardson*, 95 Mass. (13 Allen) 155. Although some of these cases are controlled by statutes or ordinances, the principles are discussed.

[4] The language of the deed from Gould to Tyson seems to us to clearly convey the right of Tyson's successors to the middle of the bed of the stream. There can be no intelligent meaning given to the reference "to the waters," if it was not intended to give the grantee the right to use the waters. That is what in reality is done, as the grantee takes it subservient to the rights of the public, and the main advantage in having the title to the bed is to prevent the grantor from interfering with the grantee's use of it. Such rights of the grantees are very similar to those given proprietors of lands on navigable waters by sections 47, 48, and 49 of article 54, above referred to.

[5-7] We see no difficulty about the deed for the bed of Gould street. The plaintiff's predecessor conveyed that. The appellee has acquired all the land on both sides of that street, which one or more of the deeds speaks of as vacated, and also the title to the bed of the street. Any attempted dedication of it was not, so far as the record shows, accepted, or anything done by the city in reference

to it. As the city is not a party to this case, of course what we say will not affect any right it may have; but, as we are informed by the record that the title to both sides of the street and to the bed of the street is vested in the appellee, we can have no doubt that, at least for the purposes of this case, the dedication, if any, must be treated as revoked. *Clendenin v. Md. Construction Co.*, 86 Md. 80, 37 Atl. 709. That being so, the conveyance of the bed of the street from its northerly terminus to its southerly terminus at Herring Pond is sufficient to carry whatever right the Gould estate had in the bed of the pond in front of the street. When the street was laid out by Gould "for the benefit of the purchasers of his ground fronting thereon," and went to Herring Pond, the purchasers surely were intended to have the right to use that pond in any way not contrary to the rights of the public, and, as the appellee is the sole owner of the properties binding on it, the appellant would have no right to eject it from the pond, regardless of the question whether the dedication is revoked. The plea of "not guilty," not only puts in issue the title to the premises, but the right of possession.

So, without prolonging this opinion further, by discussing other questions raised, we are satisfied that the plaintiff is not entitled to recover, and we will not discuss the prayers separately. We will require the appellant to pay the costs. As there is nothing in the record to show whether the suit was brought with the approval of the equity court that had jurisdiction over the trust, that court can determine whether he shall be reimbursed out of the trust funds for the costs to be paid by him.

Judgment affirmed; the appellant to pay the costs.

(133 Md. 219)

BALTIMORE & O. R. CO. v. STATE, to Use of McCABE. (No. 28.)

(Court of Appeals of Maryland. July 9, 1918.)

1. NEGLIGENCE §93(1) — IMPUTED NEGLIGENCE—COLLISION AT CROSSING.

The negligence of the driver of the automobile, in which plaintiff's intestate was riding at the time of collision with defendant's train at railroad crossing, and over which intestate had no control, could not be imputed to intestate.

2. DEATH §23—CONTRIBUTORY NEGLIGENCE.

The right of plaintiff to recover for death of his minor son, killed in collision with train at railroad crossing while son was a passenger in automobile driven by another, would be defeated by a showing that son contributed to the accident by his own negligence.

3. RAILROADS §350(13) — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action for damages sustained by plaintiff because of death of his infant son, killed when automobile in which son was a passenger collided with defendant's train at a railroad crossing, question of son's contributory negligence held, under evidence, for jury.

Appeal from Circuit Court, Frederick County; Hammond Urner, Glenn H. Worthington, and Edward C. Peter, Judges.

Action in the name of the State, for the use of John R. McCabe, against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

F. Neal Parke and James A. C. Bond, both of Westminster, for appellant. George A. Pearre, Jr., of Frederick (Edwin E. Garrett and Richard H. Tebbs, both of Leesburg, Va., on the brief), for appellee.

PATTISON, J. This action was brought in the name of the state, for the use of John R. McCabe, against the appellant, the defendant corporation, for loss and damage sustained by him in the death of his infant son, John R. McCabe, Jr., caused by the alleged negligence of the defendant in the management and operation of its train. The trial resulted in a verdict for the plaintiff, upon which a judgment was entered. It is from that judgment that this appeal has been taken.

The accident happened at a public crossing in the town of Point of Rocks, in Frederick county, Md., through which the defendant's road, with its double tracks, passes from east to west. The said crossing is about 1,900 feet west from Washington Junction, where the Metropolitan branch from Washington joins the main line of the road, and where the station for that vicinity is located. A watchman's box, 7 feet and 6 inches square, and about 8 feet high, is located immediately east of said crossing, and 7 feet north of the north rail of the west-bound track. East of this box, starting at a point 122 feet therefrom, is a switch on the north side of the tracks, and north of the switch and tracks is a public road running parallel therewith and extending westward to and beyond the said box and road that crosses the tracks of the defendant's road at the place of the accident.

McCabe, with one Newton, both residents of Leesburg, Va., on the evening preceding the accident, which occurred about 1 o'clock in the morning of September 11, 1915, had attended a corn boiling party at Taylorsville, a town in Virginia, several miles from Point of Rocks. Each of them carried with him to the party a young lady from the last-named place. The party was over about 12 o'clock, and they returned to the homes of their lady companions, in Point of Rocks. McCabe left at this place the machine he had driven to the party, and he, with Newton, started to return to their homes in Virginia in the automobile driven by Newton, one that he had borrowed in Virginia for the

occasion. In reaching their homes they again had to cross the tracks of the defendant, this time from north to south. The automobile, in which they were to return, was described as a very large one, with a wheel base of 144 inches. Both McCabe and Newton were seated upon the front seat, Newton on the right, at the wheel, and McCabe upon his left. To reach the crossing they rode south on one of the streets or roads of the town to the street we have described as running north of and parallel with the switch and tracks of the defendant's road. Upon reaching that road they turned to the right, and proceeded westward toward the watchman's box and road that crosses the tracks at the place of the accident. When they turned in said road, running parallel with the railroad, there were upon the switch to the left of them four or five box cars which prevented them, at such time, from seeing up the track toward the junction. These cars, Newton said, extended westward to about the beginning of the switch, which is 122 feet east from the watchman's box. Newton, the only witness who saw the accident, testified that at the time they reached that point both he and McCabe looked and listened for trains that might be coming from either direction, but heard no whistles or bells. They proceeded to a point in the road where the beaten way curved somewhat to the right and away from the tracks in order to pass around the box and to better enable persons to ascend the grade of the road that passed over the tracks, the grade of the same being so much as 14 to 18 inches in 30 feet. At this point, which they regarded as a good position from which to ascertain whether or not a train was approaching the crossing, he stopped his machine, and they both looked up and down the track, and also listened for an approaching train, but they neither saw nor heard any. Newton testified that at this time he asked McCabe, who was upon the left and was looking to the left, "if he saw any lights anywhere or heard a whistle, and we talked just a second or two, and he said he did not see anything, looked like the road was clear to him, and it looked clear to me. I couldn't see down the track all the way, I could see down just only a short way, and then these box cars had me cut off from any view of that track." He then started forward toward the tracks, which were then about 30 or 35 feet away. In going this distance his view eastward up the tracks was obstructed by the watchman's box until he got within a few feet of the west-bound track.

It will be remembered that the distance from the box to the north rail of the west-bound track was only 7 feet. After getting to a point where the box was no longer an obstruction to his view, he could see eastward to the junction, if the track was clear. He explained, however, that seated upon the

seat of the car its fenders and front wheels would be nearly upon the track before the view, after passing the box, would be opened to him. He said that McCabe was looking eastward for a train, and as "I pulled up on the track, pulled around, straightened the car, and was up on the track, when young McCabe jumped against me, and about the same time the engine struck me." McCabe was thrown from the car, and his skull was fractured, from which he died.

Miss Louise Hardy of Washington, who was then visiting her grandmother at Point of Rocks, and whose father was at such time a railway mail clerk upon that run, testified that her father's train was due at Point of Rocks "some time around 12 o'clock"; that, after retiring she remained awake, listening for the whistle of her father's train, but had not heard it at the time she heard the crash caused by the collision of the engine with the automobile in this case; that she heard no whistle nor bell preceding the crash.

A civil engineer of the defendant company, when placed upon the stand by it, testified that:

"At a distance of 11 feet from the north rail of the west-bound track you can see from the center of the traveled way down the west-bound track to the east, at least 122 feet from the crossing; and at a distance of 13 feet you can see 62 feet from the center of the crossing."

At the conclusion of the evidence the plaintiff offered seven prayers; of these the fourth and fifth were granted as offered, the seventh was granted as modified by the court, and the others were refused. The defendant offered three prayers, all of which were refused. The first asked the court to direct a verdict for the defendant because of a want of evidence legally sufficient to entitle the plaintiff to recover. The second asked for an instruction that there was no evidence legally sufficient to entitle the plaintiff to recover under the first count of the declaration, while the third asked for a similar instruction as to the second count of the declaration.

The plaintiff's fifth prayer instructed the jury:

"That if they shall find from the evidence that the defendant, on or about the 11th day of September, 1915, was the owner and operator of a certain railroad running from Washington city and points west to and beyond Point of Rocks, Md., and run, controlled, and operated thereon certain locomotives and trains of cars attached thereto, and if the jury shall find from the evidence that on or about said date a certain public road crossing and public highway crossed the said railroad tracks of the said defendant at the village of Point of Rocks, and that the said John R. McCabe, Jr., was at the time being run, guided, and driven over and along said public road and highway in a certain automobile, in the direction of and at and near said public crossing, if the jury shall find the same, and that the defendant at the same time was driving, running, and directing its said cars and trains over and along said railroad in the direction of said public crossing, then it was and became the duty of the defendant, its agents and

servants, in approaching said crossing with its locomotives and trains, to give proper and sufficient signals by blowing their whistles or ringing their bells so as to warn persons from their tracks; and if the jury shall find from the evidence that the said John R. McCabe was injured and killed at said public crossing, while using due care and caution, by reason of the failure of the defendant, its servants and agents, in charge of its locomotive and cars, to give proper and sufficient signals of their approach, then the verdict of the jury must be for the plaintiff."

The plaintiff's fourth prayer defined "ordinary care," and his seventh prayer stated the measure of damages.

It is from the rulings of the court in granting the plaintiff's said fourth, fifth, and seventh prayers and in refusing the defendant's prayers that this appeal is taken.

The plaintiff's fifth prayer is in full accord with the principle enunciated in *P. W. & B. R. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, *B. & O. R. R. Co. v. State, Use of Struntz*, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415, *United Rys. Co. v. Biedler*, 98 Md. 564, 56 Atl. 813, and *United Rys. & Elec. Co. v. Crain*, 123 Md. 332, 91 Atl. 405, that:

"The contributory negligence of a carrier, or of the driver of a public or private vehicle, not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received."

[1, 2] It is well settled by the above-cited cases and others that the negligence of the driver in such cases cannot be imputed to the passenger injured or killed, but it is equally well settled in all such cases that the right to recover for the injury or death of such party is defeated, when it is shown that he has contributed to the accident by his own negligence, and therefore, when there is any evidence tending to show such negligence legally sufficient to go to the jury, it should be submitted to it. *United Rys. & Elec. Co. v. Crain*, *supra*.

[3] The evidence in this case was legally sufficient to go to the jury, tending to show contributory negligence on the part of McCabe, but it was not of a character that warranted the court in holding that he was guilty of contributory negligence as a matter of law.

It is shown by the evidence that McCabe did about all he could to learn of the approaching train, unless it was to warn Newton, the driver of the automobile, not to cross the tracks of the defendant company without again stopping at a point beyond the watchman's box, where he could have seen the oncoming train. He may have thought Newton was going to stop at such point, and, after reaching it, there was little or no time for him to warn Newton before the train was upon them. When the box ceased to obstruct their view up the track, the front of the machine was only a few feet from the

west-bound track, and the first thing McCabe saw, or could have seen, when the view opened to him was the onrushing train only a few feet away. What effect this had upon him we do not know. Newton says he fell against him, and about that time the engine struck the automobile. Under these circumstances it could not properly be said as a matter of law that McCabe was guilty of contributory negligence in not warning Newton against crossing the track at such time. The question of his negligence was properly submitted to the jury.

The plaintiff's fourth and seventh prayers were also properly granted, and from what we have said the court properly refused the defendant's first prayer, and we discover no reversible error in the court's ruling upon the defendant's third and fourth prayers, or upon its action upon the demurrer to the declaration.

We will therefore affirm the judgment of the court below.

Judgment affirmed, with cost to appellee.

(133 Md. 61)

BLISS v. BLISS et al. (No. 12.)

(Court of Appeals of Maryland. June 19, 1918.)

1. APPEAL AND ERROR §628(2) — TIME FOR FILING TRANSCRIPT—EXCUSE.

An appellant cannot be held responsible for failure of a transcript of record to reach Court of Appeals within required time, if the delay is chargeable to clerk of lower court or an express company.

2. INSANE PERSONS §32—APPOINTMENT OF GUARDIAN.

Under Code Pub. Civ. Laws, art. 16, § 114, court of equity may intrust person of a lunatic to one committee and the estate to another.

3. INSANE PERSONS §30—MANAGEMENT OF ESTATE.

Under Code Pub. Civ. Laws, art. 16, § 114, the chief concern of court in selection of persons for management of estates of lunatics and care and custody of their persons is to advance their welfare and comfort.

4. COURTS §138—CIRCUIT COURTS—EQUITY JURISDICTION.

The judges of the circuit courts have all the power, authority, and jurisdiction which the court of chancery formerly held and exercised, except as modified by statute (Code Pub. Civ. Laws, art. 16, § 85).

5. INSANE PERSONS §8—NONRESIDENT—JURISDICTION OF COURT.

The court has jurisdiction to inquire into and adjudge insane a nonresident within the state, although he has no property in the state.

6. INSANE PERSONS §48—EXPENSES—PAYMENT.

A court having jurisdiction of the person and estate of a lunatic must see that proper care and comfort are provided for out of the funds under its control, leaving the question of the liability of others for the expenses incurred to be determined in some appropriate proceeding.

7. INSANE PERSONS §27—PROCESS—REVIEW—WHO ENTITLED TO NOTICE.

Code Pub. Civ. Laws, art. 5, § 37, providing that complaint cannot be made on appeal of lack of notice of proceedings in certain cases applies only to defendants in a suit in equity, and not to

a proceeding to inquire into the sanity of a person.

8. INSANE PERSONS §—13 — HEARINGS — NOTICE TO LUNATIC.

In a proceeding to inquire into the sanity of a person, the alleged lunatic is entitled, except in the most extreme cases, if at all, to notice and an opportunity to be heard.

Appeal from Circuit Court, Prince George's County, in Equity; Fillmore Beall, Judge.

"To be officially reported."

Proceeding by Eva Jackson Bliss, by her next friends, Sallie F. Jackson and Vivia G. Holmes, against Alonzo O. Bliss and R. A. Bennett, committee of Eva Jackson Bliss, to set aside a decree adjudging her insane and appointing a commission. From an order dismissing the petition, she appeals. Case remanded without reversing or affirming, with directions.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Eugene A. Jones, of Washington, D. C. (William J. Neale, of Washington, D. C., on the brief), for appellant. Ogle Marbury, of Baltimore, and George P. Hoover, of Washington, D. C., for appellees.

THOMAS, J. On the 7th of September, 1917, Alonzo O. Bliss filed in the circuit court for Prince George's county a petition, alleging that his wife, Eva Jackson Bliss, was, and had been "for some time past," of unsound mind and incapable of the government of herself or the management of her estate; that she had "little property," and was dependent upon the petitioner "for her support and livelihood," and that it was necessary for her protection that a suitable committee be appointed for her person and estate; that she was then undergoing treatment at the Laurel Sanitarium, near Laurel, in Prince George's county, Md.; that the petitioner was informed by her physicians that it was "important and essential to her welfare" that she be allowed "to remain quiet and undisturbed for an indefinite time"; that it would greatly excite and injure her to remove her from said sanitarium; and that it would be impractical, dangerous, and injurious to her to have her brought before a jury. The petition then prayed that a "writ de lunatico inquirendo be issued to the sheriff of Prince George's county to inquire into the lunacy of the said Eva Jackson Bliss," and that by the order of the court her actual presence before the jury of inquisition and notice to her of the time of the sitting of said jury be dispensed with. The petition further prayed for a writ of subpoena, directed against Mrs. Bliss, commanding her to be and appear in said court on some certain day to be named therein, "and to answer the premises and abide by and perform such decrees" as might be passed. The petition was sworn to by the

petitioner, and there was filed with it the affidavit of Dr. Cornelius De Weese, physician of Laurel Sanitarium, as to the mental condition of Mrs. Bliss, and that it would greatly excite and injure her to bring her before a jury, and on the same day the court ordered the writ de lunatico inquirendo, and the writ of subpoena, to issue as prayed, and further ordered that in the execution of the first-mentioned writ the presence of Mrs. Bliss before the jury, "and notice to her of the time of the sitting" of the jury, be dispensed with.

The inquisition was taken on the 18th of September, 1915, at Laurel, and the jury found that Mrs. Bliss was of unsound mind and not capable of the government of herself or the management of her estate, and that she was possessed of the property described in the inventory as "\$50,000 30-year 4 per cent. bonds Alonzo O. Bliss properties" and "\$2,000 worth of securities. All in a safe deposit box in District National Bank, Washington, D. C.—Total value \$52,000." The record shows that the writ of subpoena was returned by the sheriff, "served this 18th day of September, 1915." The inquisition was confirmed on the 28th of September, 1915, and Arthur L. Bliss and Cornelius De Weese were appointed committee of the person and estate of Mrs. Bliss. On the 23d of March, 1916, Arthur L. Bliss and Cornelius De Weese filed a petition to be relieved of their duties as such committee, and with it an account in which they charge themselves with three months' interest on the \$50,000 4 per cent. mortgage bonds of the Alonzo O. Bliss property, amounting to \$500, claimed credit for board, and attention at Laurel Sanitarium, costs, expenses, etc., amounting to \$1,939.25, and stated that the amount of expenses in excess of income was advanced by Alonzo O. Bliss. They also filed an inventory of the estate of Mrs. Bliss, consisting of \$50,000 bonds of the Alonzo O. Bliss property, a policy of life insurance in the Prudential Life Insurance Company, and a number of chattels, all of which were stated to be in the possession of Alonzo O. Bliss, and on the 28th of March, 1917, the court below passed an order, discharging the petitioners and appointing Alonzo O. Bliss and R. A. Bennett committee of the person and estate of Mrs. Bliss.

On the 8d of July, 1917, Mrs. Bliss, by her mother, Sallie F. Jackson, and her sister, Vivia G. Holmes, as her next friends, filed a petition in the cause, in which, after referring to the previous proceedings, including the appointment of Alonzo O. Bliss and R. A. Bennett committee of her person and estate, she alleged that at the time of the appointment of said committee she was a patient at the Laurel Sanitarium; but, as her condition did not improve while there, she was, with the advice and consent of her said committee, removed to the home of her

sister, Vivia G. Holmes, near Wheaton, in the state of Maryland, where she still resided, and that since then she had shown marked improvement in her mental and physical condition; that for three months or more Alonzo O. Bliss had not been inclined to contribute to her proper support and maintenance, and had from time to time threatened to remove her from the home of her sister. The petition further alleged that the said mother and sister of Mrs. Bliss, as her next friends, had filed a bill of complaint in the Supreme Court of the District of Columbia against Alonzo O. Bliss, in which they sought to compel him to contribute out of his own estate to her support; to have set aside a deed alleged to have been executed by her and procured by him while she was insane, and to have a proper person appointed trustee on the ground that, as she was a resident of the District of Columbia, and had no property in the state of Maryland, the circuit court for Prince George's county had no jurisdiction to entertain the proceedings in which she was adjudged insane and Alonzo O. Bliss and R. A. Bennett were appointed committee of her person and estate, but that Alonzo O. Bliss had evaded service of process in that case. The petition then alleged that Alonzo O. Bliss, in execution of his threats, had induced R. A. Bennett to unite with him in an order directing one of the deputy sheriffs of Montgomery county to take forcible possession of Mrs. Bliss and to remove her from the house of her sister to the Springfield Hospital for the Insane, at Sykesville, in the state of Maryland; that the deputy sheriff, accompanied by certain physicians, had attempted to execute the order by going upon the premises of Vivia G. Holmes and demanding the custody of Mrs. Bliss, but that the demand was refused because the welfare of Mrs. Bliss, "mentally and otherwise," depends upon her being taken care of in the home of friends and relations, and because to subject her to the excitement incident to her removal and association with the violent insane would impair her chances of ultimate recovery; that Alonzo O. Bliss was threatening further and other attempts to secure possession of the person of Mrs. Bliss; that as she was not a resident of the state of Maryland and had no property in that state, the circuit court for Prince George's county had no jurisdiction to appoint Alonzo O. Bliss and R. A. Bennett committee of her person and estate, and that they were not lawfully entitled to the custody of Mrs. Bliss, and that the proceedings instituted by Alonzo O. Bliss in said court was a fraud upon that court and the Supreme Court of the District of Columbia. The petition prayed that Alonzo O. Bliss and R. A. Bennett be restrained "from in any wise molesting the said Eva Jackson Bliss"; that the order appointing them committee

be vacated and set aside, and for further relief. The court passed an order restraining the committee as prayed until the further order of the court to be passed after a hearing to be had on the 10th of July, 1917.

On the 24th of July, the committee filed in the court below a petition, setting out the proceedings in the case, and alleging that while Mrs. Bliss was a patient at Laurel Sanitarium, some of the members of her family expressed doubt as to her mental condition, and that with the view of convincing them of her insanity, and at their request, they permitted her to be removed to the home of Vivia G. Holmes, in Montgomery county, Md., with the understanding that she was to remain there temporarily; that upon information that came to them from time to time they concluded that she was not receiving in the home of Mrs. Holmes the care and attention she required, and that, after consulting eminent physicians they decided that it would be to her interest to remove her to some proper institution; that accordingly they arranged to have her received as a patient at Springfield State Hospital, at Sykesville, Md., and gave an order to Dr. Charles O. Marbury for her removal from the home of Mrs. Holmes to that institution. The petition prayed for an order, commanding Mrs. Holmes to surrender the custody of Mrs. Bliss to the petitioners. On the same day the committee answered the petition of Mrs. Bliss, by her mother and sister as her next friends, and filed a demurrer "to so much and such part of the petition" as questioned the jurisdiction of the court and alleged that the orders thereof were procured by fraud. The court below passed an order, requiring Mrs. Holmes to show cause why the prayer of the petition of the committee should not be granted, and setting the matter for hearing on August 3d, on which date the court sustained the demurrer of the committee, and ordered "that testimony be taken in open court on the remaining allegations of the petition, the answer of the committee thereto, the petition of the committee, and the answer of Vivia G. Holmes to said petition."

The record contains about 200 pages of testimony taken in pursuance of the order of August 3d, and on October 30, 1917, the court below passed an order, dismissing the petition filed by Mrs. Bliss, by Mrs. Jackson and Mrs. Holmes, as her next friends, requiring Mrs. Holmes to deliver Mrs. Bliss to her committee, and requiring the committee to place her in the Shephard and Enoch Pratt Hospital, and to "provide for her there all necessary requirements of a person in her mental condition, including the regular and permanent care of two nurses." The order further provided that Mrs. Bliss should not be removed from said hospital without an order of the court, directed the committee to pay for her care there out of

the income from her estate in their hands, and further provided:

"And in case said fund shall not be sufficient said committee are required and directed to demand and collect from Alonzo O. Bliss, husband of Eva Jackson Bliss, the necessary and additional amount therefor."

On the 2d of November, 1917, Mrs. Jackson and Mrs. Holmes, as next friends of Mrs. Bliss, filed an order for an appeal from the order of October 30th, "as well as from the order of the court sustaining a demurrer of the respondents to their petition," and the appellees have filed in this court a motion to dismiss the appeal on the ground that the record was not transmitted to this court within three months from the time the appeal was prayed, and a further motion to dismiss the appeal from the order of the court below, sustaining the demurrer to the petition of Mrs. Bliss, by her next friends, on the ground that said order was an order in the nature of a final decree, and the appeal therefrom was not entered within two months from the date thereof.

[1] In regard to the first of these motions, it is only necessary to say that it appears from the affidavit of the clerk of the circuit court for Prince George's county that the transcript of the record was completed on January 1, 1918, was paid for on the 17th of January, and was deposited in the express office on the 29th of January for delivery to the clerk of this court. Under such circumstances the appellants cannot be held responsible for the failure of the record to reach this court within the required time. If the delay is chargeable to any one other than the express company, it must be attributed to the neglect of the clerk of the court below, who held the transcript 12 days after it was completed and paid for before attempting to transmit it to this court.

Section 26 of article 5 of the Code authorizes an appeal from any final decree "or order in the nature of a final decree," and section 28 provides that "on an appeal from a final decree or order, all previous orders which may have been passed in the cause shall be open for revision in the Court of Appeals," unless an appeal has been previously taken under section 27, allowing appeals in certain specified cases. In construing these sections, this court has held that an order in the nature of a final decree, from which an appeal lies under section 26, cannot be reviewed on an appeal from a final decree under section 28 (*Peoples v. Ault*, 117 Md. 631, 84 Atl. 60), and the contention of the appellees in support of their second motion is that the order of the court below, sustaining their demurrer to the appellants' petition, was an order in the nature of a final decree, from which an appeal should have been entered within two months from its date, and that it cannot therefore be reviewed under the appeal taken on November 2,

1917. They rely upon the case of *Hendrickson v. Standard Oil Company*, 126 Md. 577, 95 Atl. 153, where the court upheld the right of immediate appeal from an order sustaining a demurrer to three paragraphs of a bill of complaint, each one of which alleged distinct acts of the defendant, or causes of injury, in respect to which relief by injunction was sought, and referred to sections 26 and 27 as authorizing the appeal. In the later case of *Reynolds v. Russler*, 128 Md. 606, 98 Atl. 75, the court refused to extend the doctrine of *Hendrickson's Case* to a case in which three distinct grounds for the relief claimed were set out in the same paragraph of the bill of complaint, and the appeal was from an order sustaining a demurrer to one of them. But as the demurrer in this case was to so much of the petition as attacked the jurisdiction of the court below on the ground that Mrs. Bliss was not a resident of and had no property in the state of Maryland, and as we concur in the view of the court below upon that question, it is not necessary to determine whether the order sustaining the demurrer was one from which the appellants were bound to appeal within two months from its date.

[2-5] Learned counsel for the appellants, in carefully prepared briefs, have collected and cited many cases bearing upon the question of jurisdiction in such cases, but none of them goes to the extent of holding that where the alleged lunatic is within the jurisdiction of the court at the time the writ is applied for and issued, the court is without jurisdiction unless she is a resident of or has property within the state. In the case of *In re Fowler*, 2 Barb. (N. Y.) 305, decided in 1847, where the alleged lunatic formerly resided in New York, but was at the time the commission was applied for a resident of the state of Ohio, the chancellor said:

"The court had no jurisdiction to issue a commission unless the alleged lunatic resided here, or was the owner of property in this state. And that in case of his nonresidence, the fact of his owning property here must be stated in the petition."

It does not appear, however, from the report of that case that Fowler was, at the time the commission was applied for, in the state of New York. In *re Devausney*, 52 N. J. Eq. 506, 28 Atl. 459, quoted by the appellants, sustains the jurisdiction of the court of chancery to issue a commission if the alleged lunatic is a nonresident and has property in the state. The court stated that the duty of the care of the person and property of the lunatic, formerly imposed on the chancellor, had been transferred by a statute of that state to a guardian appointed by the orphans' court of the county in which the lunatic resided, and also referred to statutes of that state providing for the care of estates of nonresident lunatics, but the court did not decide that a court of chancery had no jurisdiction to issue a commission where

the alleged lunatic was in the state, unless he was a resident of or had property in that state.

The origin of the jurisdiction of the courts of equity of this state in such cases is stated by Judge McSherry in *Hamilton v. Traber*, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258, from which it appears that the authority to direct an inquisition to be taken did not belong to the English Court of Chancery, but was a portion of the King's executive power as *parens patriæ*, and was delegated by an instrument called the "sign manual" to the chancellor, as the personal representative of the crown, to be exercised by him alone, and not by the Court of Chancery. When this special jurisdiction had been exercised by adjudging an "individual to be a lunatic and by appointing a committee of his person and property, a further jurisdiction then arose in the Court of Chancery to supervise and control the official conduct of the committee." 3 Pom. Eq. § 1811. It is said in 14 R. C. L. 554, § 4:

"In this country, after the Revolution, the care and custody of persons of unsound mind, and the possession and control of their estates, which in England belonged to the King as a part of his prerogative, were deemed to be vested in the people, and the courts of equity of the various states have, either by inheritance from the English courts of chancery, or by express constitutional or statutory provisions, full and complete jurisdiction over the persons and property of idiots and lunatics"

—and on page 556, section 7, of the same volume, it is said:

"In this country, as has been seen, jurisdiction over the persons and property of the insane is exercised by the courts of equity of the various states as the representatives of the people of the state, and from this general jurisdiction, in the absence of statute authorizing any particular court or officer to issue a commission of inquiry, the right to ascertain judicially whether or not a person is of unsound mind is deemed to be implied."

See, also, *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386. Section 114 of article 16 of the Code (which was originally enacted by the act of 1785, chapter 72, section 6), provides:

"The court [court of equity] shall have full power and authority, in all cases, to superintend and direct the affairs, of persons non compos mentis, both as to the care of their persons and the management of their estates, and may appoint a committee or a trustee or trustees for such persons, and may make such orders and decrees respecting their persons and estates as to the court may seem proper."

In the exercise of this jurisdiction, the court may intrust the person of a lunatic to one committee and the estate to another (*Rutledge v. Rutledge*, 118 Md. 552, 85 Atl. 661), and the leading object and chief concern of the court in the selection of the persons for the management of the estate of lunatics and the care and custody of their persons is to advance their welfare and com-

fort. *Estate of Rachel Colvin*, 3 Md. Ch. 278, 286; In the Matter of Colah, 3 Daly (N. Y.) 529. In *Colah's Case*, Chief Justice Daly, speaking for the court, said:

"The jurisdiction assumed to be inherent in a state over that unfortunate class of persons within its limits, who are deprived of the use of their mental faculties, may be said to rest upon two grounds: First, its duty to protect the community from the acts of those who are not under the guidance of reason; and, secondly, its duty to protect them, as a class incapable of protecting themselves, which has its foundation in the reciprocal obligations of allegiance and protection, which extends to aliens and strangers who, while they are within the limits of a state, are under the obligations of a temporary and local allegiance, and are entitled to its protection."

In the case of *Gerke v. Colonial Tr. Co.*, 117 Md. 579, 83 Atl. 1092, this court, referring to lunacy cases, said:

"It is a matter of frequent occurrence that proceedings of this character are set in motion by some friend or acquaintance of the lunatic, or even by a law officer of the state where no such proceeding has been started by relatives and friends, and that with which the courts are mainly concerned is not who institutes the proceedings, but whether the proceeding is for the best interest of the individual alleged to be a lunatic, and of the people among whom he lives."

In *Campbell's Case*, 2 Bland, 209, Chancellor Bland, referring to a writ de lunatico inquirendo, said:

"With regard to the county to which it must be directed; it is, in general, proper, and may, in some cases, be indispensably necessary, that the person alleged to be of unsound mind should be brought before the jury who are convened by the sheriff to ascertain his intellectual condition, and for that reason the writ is almost always directed to the sheriff of the county in which the person said to be insane resides, or may at the time be placed; but, if he is out of the state at the time, or it is impractical, or, as in this case, it would be attended with great inconvenience and injury to the afflicted person to have him brought before the jury, his actual presence may be dispensed with, and the writ may be directed to the sheriff of the county in which he last actually resided, or in which the principal part of his estate lies. *Ex parte Southcott*, 2 Ves., 402."

The judges of the circuit courts have, in their respective circuits, all the power, authority, and jurisdiction which the court of chancery formerly held and exercised, except as modified by statute (Code, art. 16, § 85), and as the jurisdiction of courts of equity to issue writs de lunatico inquirendo is exercised for the protection of the community, and the protection of the person and property of the alleged lunatic, there is no reason why it should be confined to cases in which the unfortunate persons are residents of or have property in the state. It is their presence within the limits of the state that necessitates the exercise of the power to protect their persons and the community in which they may be placed, and the jurisdiction of the court does not depend upon whether they also have property within the state. In *re John Houston*, 38 Eng. Reprint,

121; In re Princess Bariatinski, 41 Eng. Reprint, 674; In re Sottomaior, L. R. Ch. Appeal Cases, vol. 9, 677; In re Burbidge, 1 L. R. Ch. Div. 1902, p. 426; In the Matter of Child, 16 N. J. Eq. 498; In the Matter of Nealy, 26 How. Prac. Rep. (N. Y.) 402.

[6] We have carefully examined the evidence in the case upon which the court below based its order or decree of October 30th, and, apart from a further question as to the jurisdiction of the court, to which we shall refer, we see no reason to disturb that order. As we have said, section 114 of article 16 of the Code authorizes the court to make such orders and decrees respecting the person and estate of a lunatic as to the court may seem proper, and, assuming that we have authority to review the action of the court below in requiring Mrs. Bliss to be placed in the Shephard and Enoch Pratt Hospital, as to which we express no opinion, we think the evidence fully sustains the propriety of the court's action, and we do not understand the appellants to question it on this appeal. They suggest, however, that there was error in that part of the order requiring the expenses of her care at the hospital to be paid out of her property, on the ground that her husband is liable for such expenses. It is said in 16 Am. & Eng. Ency. of Law (2d Ed.) 596:

"It is the husband's primary duty to support his insane wife, and it is only when he is unable to do so that resort can be had for her maintenance to her separate estate"

—and in 4 Am. & Eng. Ann. Cases, 787, many cases to the same effect are collected. In this state it has been held that the statutes preserving to the wife the ownership and enjoyment of her property do not relieve the husband of his common-law obligation to maintain his wife and to pay for medical attendance upon her and her funeral expenses. *Willis v. Jones*, 57 Md. 368; *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139. But we are not required in this case to determine whether Mrs. Bliss' husband is legally liable for her care at the Shephard and Enoch Pratt Hospital. The court having jurisdiction of the person and estate of a lunatic must see that her proper care and comfort are provided for out of the funds under its control, leaving the question of the liability of others for the expenses incurred to be determined in some appropriate proceeding. *Estate of Colvin*, supra; In the Matter of Colah, supra; 16 Am. & Eng. Ency. of Law, p. 579; Code, art. 16, § 121.

[7, 8] It is further urged by the appellants that the proceedings in the court below are void because Mrs. Bliss was not given any notice of the time and place of taking the inquisition and an opportunity to be heard. Whatever may be the rule in other jurisdictions, the necessity for such notice was determined by this court in the case of *Royal Arcanum v. Nicholson*, 104 Md. 472, 65 Atl.

320, 10 Ann. Cas. 213. In that case, after reviewing the decisions in other states, Judge Burke, speaking for this court, said:

"There is no statute in Maryland providing for notice to the person alleged to be non compos, and therefore the authorities we have cited have a direct bearing upon the point under consideration, and are so in consonance with the dictates of the plainest justice that we are disposed to approve them, so far as they declare the general rule that the party proceeded against must be given timely notice of the proceedings and an opportunity to be heard."

In the later case of *Packard v. Ulrich*, 106 Md. 246, 67 Atl. 246, 12 L. R. A. (N. S.) 895, this court held that the failure to give notice to the alleged lunatic did not render the proceedings absolutely void or open to collateral attack, and Judge Pearce said:

"Here, there is no intervention by the alleged lunatic, no direct attack upon the proceedings by any one in her behalf, or by any one having direct interest in the prior proceedings."

In the case at bar, the petition was filed by Mrs. Bliss, by her mother and sister as her next friends, and prayed that the order appointing the committee be vacated and set aside on the ground that the court below had no jurisdiction to appoint them. It is true the petition did not attack the jurisdiction of the court on the ground that Mrs. Bliss did not have notice of the proceedings, and it is suggested on behalf of the appellees that under section 37 of article 5 of the Code the question cannot be raised in this court. That section, however, applies only to defendants in a suit in equity. In *Wicks v. Westcott*, 59 Md. 270, the court said:

The Code, art. 5, § 27 (now section 37), "does not meet the case, for that section is applicable only to defendants in a regular chancery proceeding, who, having been brought in and submitted to the jurisdiction without question, will not be permitted to question the jurisdiction on appeal."

Mrs. Bliss, by whom the petition was filed, cannot be said to be in the attitude of a defendant who submitted without question to the jurisdiction of the court below. In *Royal Arcanum v. Nicholson*, supra, Judge Burke referred to the case of *Matter of Vanauken*, 10 N. J. Eq. 190, in which it was said: "In cases of confirmed and dangerous madness it [an opportunity to be heard] may be dispensed with, but then only by the express order of court," and also to the statement in *Campbell's Case*, supra, "but if he [alleged lunatic] is out of the state at the time, or it is impractical, or, as in this instance, it would be attended by great inconvenience and injury to the afflicted person to have him brought before a jury, his actual presence may be dispensed with," and then said: "The person alleged to be non compos must have reasonable notice of the proceedings and opportunity afforded to him to contest the truth of the allegations in the petition, and must be produced before the jury, unless the court, for sufficient reasons shown, similar to those stated in *Campbell's Case*, supra, and

Vanauken's Case, *supra*, should dispense with notice and personal attendance." In that case the question of the authority of the court below to dispense with notice to the lunatic under certain circumstances was not involved; but, even if we treat the case as decisive of that question, the rule announced in Vanauken's Case cannot be said to apply to the case at bar. There is nothing in the record to indicate that Mrs. Bliss' condition was such as deprived her of the right to timely notice of the proceedings and an opportunity to defend herself. The rule stated in Campbell's Case refers only to the "actual presence" of the alleged lunatic, and makes no reference to dispensing with notice of the proceedings. When we consider the serious consequences that follow an adjudication of insanity, in respect to both the person and property of the alleged lunatic, and the possibility of such proceedings being suggested by considerations foreign to the purposes for which the jurisdiction of the court may properly be invoked, it is obvious that persons against whom such charges are made cannot, except in the most extreme cases, if at all, be deprived of notice and an opportunity to contest before the jury the truth of the allegations in the petition.

The contention that the court had no power to set aside the order appointing the committee, because it had become enrolled, is disposed of in *Royal Arcanum v. Nicholson*, *supra*, and *Packard v. Ulrich*, *supra*.

The writ of subpoena, which was returnable on the first Monday of October, and which appears to have been "served" on the 18th of September, the day the inquisition was taken, did not give Mrs. Bliss any notice of the allegations of the petition, or of the time of the sitting of the jury. While the order of the court below dispensed with notice to her of the time of the sitting of the "jury of inquisition," it may nevertheless be that she did in fact have timely notice of the proceedings and an opportunity to be heard, and if it so appeared by the record, we would affirm the order appealed from. But, as it does not so appear, we will remand the case under section 38 of article 5 of the Code, without reversing or affirming the decree, in order that testimony may be taken to show whether Mrs. Bliss had such notice of the proceedings under the petition of Alonzo O. Bliss, filed on the 7th of September, 1915, as afforded her an opportunity to appear before the jury of inquisition and to contest the allegations of the petition. If the court shall find that she did not have such notice, the inquisition, return, and the order of confirmation thereof should be set aside, and a new jury summoned and inquisition taken.

Case remanded, without reversing or affirming the decree, the costs above and below to abide the final result.

(133 Md. 48)

CASTELBERG et al. v. HAMBURGER. (No. 7.)

(Court of Appeals of Maryland. June 19, 1918.)

APPEAL AND ERROR '628(1) — FILING OF TRANSCRIPT—EXCUSES FOR DELAY.

Under Code Pub. Civ. Laws, art. 5, § 6, requiring transmission of transcripts of record within three months from time appeal is taken, and section 40, excusing delay in transmission when occasioned by the neglect of clerk or appellee, failure to transmit record until two days after expiration of three-month period is fatal; the misapprehension of appellant's attorney as to expiration of time, and the fact that he was assisting draft registrants in filling out questionnaires, being no excuse, where transcript was ready for transmission 10 days before expiration of period, and held by clerk upon request of appellant's attorney, who desired to inspect it.

Appeal from Superior Court of Baltimore City; Robert F. Stanton, Judge.

"To be officially reported."

Action between Henry Castelberg and others and Oscar Hamburger. Judgment for the latter and the former appeal. Appeal dismissed.

Argued before BRISCOE, THOMAS, PAT-TISON, URNER, STOCKBRIDGE, and CON-STABLE, JJ.

B. H. Hartogensis and Howard Bryant, both of Baltimore, for appellants. S. S. Field and R. Contee Rose, both of Baltimore, for appellee.

URNER, J. If this appeal could be entertained, the judgment would be affirmed, as the rulings of the trial court are free of error; but it is our plain duty to grant the motion of the appellee to dismiss the appeal, on the ground that the record was not transmitted to this court within the time prescribed by law.

The appeal was entered on October 10, 1917, and the period of three months allowed for the transmission of the record to this court expired on January 10, 1918. It was not until January 12, 1918, that the record was in fact transmitted. The transcript of the record was completed and certified by the clerk of the court below on December 31, 1917. It was thereafter held subject to the order of Mr. Hartogensis, one of the appellant's counsel, who wished to examine it further, and he had possession of it for that purpose during the greater part of the ensuing time until it was forwarded to the clerk of this court. On January 8th Mr. Hartogensis wrote to Chief Judge Boyd, inquiring whether the period for the transmission of the record could be extended, as he had not been able to find time to examine it, because of the pressure of his duties as a member of the legal advisory board in the work, then in progress, of aiding registrants to answer their questionnaires under the federal selective service system. In the course of his im-

mediate reply to this inquiry Chief Judge Boyd said:

"I would be glad to do anything within my power to avoid interference in any way with the kind of work you are engaged in for the government, and I know that all of the judges feel the same way; but I am not authorized to extend the time for sending up the record, even if the court could do so, which I question."

In his affidavit filed in opposition to the motion to dismiss the appeal, Mr. Hartogensis stated that after the signing of the bills of exception in the case, which was done on December 4th, some delay, for which he was not responsible, occurred in procuring certain documentary evidence to be included in the record, and that after the transcript was completed he addressed himself to its verification, and was able to point out several small clerical errors, which were corrected, but that he found it would be necessary to search for other errors, and to compare the copies of exhibits with the record as transcribed, and, not having them sufficient time for such further examination, in view of the patriotic service he was performing, and being under the erroneous impression that the period for the transmission of the record would not expire until January 12th, he wrote to Chief Judge Boyd, and also to Mr. Magruder, clerk of this court, in an effort to secure an extension of the time. Upon learning that this could not be accomplished, the affidavit states, Mr. Hartogensis on the afternoon of January 11th communicated with his colleague, Mr. Bryant, who had been unable to give his personal attention to the appeal at that juncture because of the legislative duties in which he was then actively engaged. The following morning Mr. Bryant delivered to the clerk a check drawn by Mr. Hartogensis for the payment of the cost of the transcript, which was then at once mailed to the clerk of this court, who received it on the afternoon of that day.

The affidavit of Mr. Thomas A. Campbell, the deputy clerk of the lower court who prepared the record for this appeal, is to the effect, in part, that after the transcript was completed on December 31st it was held subject to the order of Mr. Hartogensis, or was in his possession, until January 12th, and upon its return on that day, and the payment of the cost of its preparation, it was immediately mailed to the clerk of the Court of Appeals.

It has been repeatedly emphasized that the rule (Code, art. 5, § 6) requiring transcripts of records on appeal to this court to be transmitted within three months from the time of the taking of the appeal has the controlling force of a statute, and is binding upon the court as well as upon the parties, so long as it remains unrevoked. When the record, as in this case, has been in fact transmitted after the expiration of the period limited by the rule, it is obligatory upon the court to dismiss the appeal, unless the appellant proves that the delay was occasioned by "the

neglect, omission or inability of the clerk or appellee." Code, art. 5, § 40; *Steiner v. Harding*, 88 Md. 345, 41 Atl. 799; *Horsey v. Woodward*, 124 Md. 361, 93 Atl. 9; *M., D. & V. Ry. Co. v. Hammond*, 110 Md. 124, 72 Atl. 650; *Estep v. Tuck*, 109 Md. 528, 72 Atl. 459; *Parsons v. Padgett*, 65 Md. 356, 4 Atl. 410; *Willis v. Jones*, 57 Md. 362; *Warburton v. Robinson*, 113 Md. 24, 77 Atl. 127; *Horseman v. Furbush*, 124 Md. 581, 93 Atl. 149. The rule expressly forbids any presumption that the clerk or appellee was delinquent in regard to the transmission of the record in due time, and places upon the appellant the burden of thus shifting the responsibility for the delay. In this case it is plainly apparent from the evidence on both sides that neither the clerk nor the appellee can be held accountable for the fact that the record reached this court after the time allowed by the rule. The clerk had the transcript ready to be forwarded ten days before the expiration of the three-month period, and it is not suggested that there was any subsequent act or omission on the part of the appellee that resulted in the further detention of the record. It was wholly because of the desire of Mr. Hartogensis to inspect the transcript after its completion, and because of his misapprehension as to the time yet available for its transmission, that the delay beyond the period limited by the rule occurred. Neither of these causes of delay is recognized by the rule as a proper ground of exemption from the effect of its plain and imperative terms. There was no necessity for counsel to detain the transcript after its completion and certification, in order that it might be examined for possible errors. When the clerk had certified that it was a true record, its verity might have been safely assumed, and if any errors had been discovered after the case reached this court there were means to be provided here for their correction. The mistake of counsel as to the time remaining for the transmission of the record is of course not a sufficient reason for suspending the operation of the rule in this instance.

Great stress was laid in argument upon the fact that the counsel in charge of the appeal was closely engaged in the performance of an important patriotic duty, which prevented the attention he desired to give to the inspection of the record during the time available under the rule, and we are urged on this ground to disregard the slight extent to which the specified period has been exceeded. With the strongest disposition to deal sympathetically with such a plea, we have been altogether unable to find that the failure to transmit the record in time can properly be attributed to the patriotic service which the counsel had undertaken and was zealously performing. After the record was completed on December 31st, he had no affirmative duty in reference to its transmission with which the questionnaire work, in which he was engaged, can be said to have

interfered. It was simply necessary for him to withdraw his request that the record be held for his inspection, and to direct that it be transmitted, and, if required, to pay the cost of its preparation. This was done on January 12th, while the questionnaire work was still in progress, and there is nothing to suggest that the same course could not have been as readily adopted ten days previously, when the record was finished and certified. The time employed in the effort to obtain an extension of the period for the transmission of the record would have been more than sufficient to secure the forwarding of the transcript. It was the assumption of the unnecessary task of verifying the certified record, and not the pressure of the patriotic duty, that appears to have caused the delay with which we are now concerned.

It may be said in this case, as we observed in *Horseman v. Furbush*, supra, where the record was only one day late in reaching this court:

"While we are naturally reluctant to enforce the rule when the time it allows for the transmission has been exceeded by such a narrow margin as on this appeal, we could not rightfully modify its express and definite terms, or make its application depend upon a mere measurement of the extent to which it has been transgressed, in order to avoid the prescribed consequence of the delay in a particular case."

Appeal dismissed.

(132 Md. 412)

TAYLOR v. COMMISSIONERS OF PERRYVILLE. (No. 17.)

(Court of Appeals of Maryland. April 2, 1918.)

1. TRIAL §=386(4)—INSTRUCTIONS—GENERALITY.

In trial to court without jury, prayer that "the court instructs the court sitting as a jury that under the pleadings and evidence in the case their verdict must be for the defendant" was too general, and technically defective.

2. LIMITATION OF ACTIONS §=151(3)—REMOVAL OF BAR.

Published financial statement of town, acknowledging some indebtedness to plaintiff, published nearly 7 years before action was brought, was of no effect in removing the bar of the statute of limitations.

3. TRIAL §=51—RECEPTION OF EVIDENCE—PROVISIONAL ADMISSION—STRIKING TESTIMONY.

Where testimony was admitted subject to exception and was stricken out on general motion, but which in fact could not have been misleading, there was no error.

4. LIMITATION OF ACTIONS §=143(1)—MUNICIPAL CORPORATIONS—ACKNOWLEDGMENT OF INDEBTEDNESS—POWERS OF OFFICER.

Since one member of the city council cannot validly acknowledge city's indebtedness to an individual, evidence of such acknowledgment is incompetent to establish removal of the bar of the statute of limitations.

5. LIMITATION OF ACTIONS §=148(1)—REMOVAL OF BAR—LETTERS—SUFFICIENCY.

Letter from board of commissioners to plaintiff, asking him to submit bill and stating that the writers had no account of a bill owing plaintiff, was insufficient to remove any account

which plaintiff had against the city from the statute of limitations.

6. APPEAL AND ERROR §=1064(1)—HARMLESS ERROR.

Though the instruction merely that verdict should be for defendant was technically erroneous, the judgment would be affirmed where no prejudice resulted therefrom.

Appeal from Circuit Court, Caroline County; W. H. Adkins and Philemon B. Hopper, Judges.

Action by Orion Taylor against the Commissioners of Perryville. From a judgment for defendants, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

T. Alan Goldsborough, of Denton, and James F. Evans, of Elkton (Wm. S. Evans, of Elkton, on the brief), for appellant. H. A. Warburton, of Elkton (M. H. Fahey, of Havre de Grace, Fred R. Owens, of Denton, and W. T. Warburton, of Elkton, on the brief), for appellees.

BOYD, C. J. The record in this case does not show that there was an entry of final judgment before the appeal was taken, but as the clerk of the lower court has certified that it was merely an oversight of his which he has since corrected, with the authority of the court, by entering the judgment as of the date the motion for the new trial was overruled, and as the attorneys have filed in this court an agreement that the judgment so entered shall be considered as having been entered before the appeal was taken, we will so treat it. By that agreement the attorneys also waived the effect of the omission to file a replication and join issue on the plea of the statute of limitations, which the record does not show had been done. We will therefore pass on the merits of the case regardless of those irregularities.

[1] The prayer granted by the lower court was unquestionably too general, and therefore technically defective. It was:

"The court instructs the court, sitting as a jury, that under the pleadings and evidence in the case their verdict must be for the defendant."

When a case is tried before the court, as much attention is sometimes not given to the form of a prayer as would have been if tried before a jury, especially one seeking to reach the end that this was intended to accomplish, but that sort of a prayer has been held to be bad a number of times by this court, although we will only refer to 2 Poe, § 297. As the real question in the case is whether there was legally sufficient evidence to take the plaintiff's claim out of the statute of limitations, we will pass on that.

The account of the plaintiff is for the most part made up of a number of small items

which cover over 25 pages of the printed record. The first item is "June 4, 1901. To bill rendered to date, \$254.46"—and after that there are charges running from August 20, 1902, to July 14, 1906, amounting in all, including the one of June 4, 1901, to \$1,801.86. There are also three items in April, 1910, amounting to \$8.75. There is a credit of \$150 on June 15, 1906, and one of \$100 July 5, 1906, leaving a balance of \$1,559.81, due on the last-named date, as stated in the account filed, which should have been \$1 more according to the figures given. The account is for work and labor done and materials furnished by the plaintiff to the defendant.

[2] The plaintiff offered as evidence to remove the bar what is entitled "Financial Statement, Town of Perryville, Md.," published in a newspaper at Elkton. It is addressed "To the Taxpayers and Citizens of the Town of Perryville, Md.," signed by A. H. Owens, secretary and treasurer, and purports to give the receipts and payments. At the end of it there is an item as follows: "Due Orion Taylor, as near as we can find out, being unable to get bill, \$1,000.00"—but the statement is dated June 26, 1906, having been published July 11th of that year, and as the suit was not instituted until January 4, 1915, it is clear that it cannot affect the question of the removal of the bar of the statute of limitations.

[3] When the plaintiff was on the stand he was asked as to a conversation between him and Mr. Campbell (the record says "Cameron" in some places, but "Campbell" was doubtless intended), who was one of the commissioners of Perryville, and also acted as secretary. The testimony was admitted subject to exceptions, and was subsequently stricken out on motion. That constitutes the first exception. The ruling is objected to because the motion was too general. It ought to have stated the questions objected to more specifically, but it must have been thoroughly understood that it related to the conversation between the plaintiff and Mr. Campbell which had been admitted subject to exception. There are only three questions and answers, and, especially as the case was being tried before the court, there would seem to have been no room for misunderstanding as to what was intended to be, and what was stricken out.

[4] It would be a dangerous practice to permit one of three or more commissioners, councilmen, or whatever their official titles may be, of a municipal corporation to bind the corporation by statements he might make in reference to claims against it, unless he was duly authorized to act for the municipality. Mr. Campbell did not become one of the commissioners until 1911, and he testified, when called by the plaintiff, that he knew nothing whatever about the account alleged by the plaintiff to be due, and he said

that they never did "business single handed. We always had the others to do business." The members of a municipal body "cannot make a valid determination binding upon the corporation by their assent separately and individually expressed." 2 Dillon on Mun. Cor. (5th Ed.) § 501. The court was clearly right in striking out the evidence.

The only possible ground for contending that the alleged indebtedness to the plaintiff was admitted or so acknowledged as to revive it is a letter which was in evidence and is as follows:

"Perryville, Md., Jan. 13, 1913.

"Mr. Orion Taylor, Aikins, Maryland—Dear Sir: I have been instructed by the board of town commissioners as follows: 'As we have no account or record of any bill which the town of Perryville owes Mr. O. Taylor, the secretary will on or before the 15th day of January, mail Mr. Taylor a request for to place an itemized bill of all work done and materials furnished which he claims the town owes him for; same to be in the hands of the secretary on or before February 3, 1913, as any bill or claim for work done or material furnished previous to February 3, 1910, will not be recognized after Feb. 3, 1913.'

"Yours truly,

"The Commissioners of Perryville,
"George B. Campbell, Secretary."

The commissioners were Messrs. Campbell, Rutter, and Gorrell. Mr. Rutter did not testify, but Mr. Campbell did, and Mr. Gorrell testified that he did not become a commissioner until 1912. The evidence implies that neither of the three was a commissioner until some time after 1910. There is enough in the record to show that the appellant was claiming that the town owed him a bill, and that the three commissioners were trying to ascertain the facts about it. They knew nothing themselves, but the plaintiff was endeavoring at the trial to prove some admissions, promises, or something that would take the claim out of the statute, and called Messrs. Campbell and Gorrell, two of the commissioners, to the stand. All the evidence in the record was offered by the plaintiff, the prayer having been granted at the conclusion of his testimony. This appears in the testimony of Mr. Gorrell in reference to the letter above quoted:

"Q. Will you explain what you meant by this letter, or by this resolution which is contained in this letter: 'As we have no account or record of any bill which the town of Perryville owes Mr. Taylor,' etc.? As a matter of fact you didn't have a record of a great many things, did you? A. We didn't have any record pertaining to his accounts. Q. Were your records faulty, not only as far as he was concerned, but in a great many other cases? Were the records imperfect, incomplete? A. What I mean, there was no regular meetings all along the line. Of course what records was there we couldn't dispute, what records was on the books, but there was nothing that showed any record in regard to Mr. Taylor all along the line. Q. You knew that Mr. Taylor had a bill of some kind, didn't you? A. All I knew was what he presented

us. Q. Why did you write him this letter if you didn't know he had a bill? A. I can tell you how the letter came about. Q. All right, go ahead. A. Mr. Campbell was out at the station one time, and he heard Mr. Taylor talking about the commissioners. * * * The witness, continuing his answer, further states: Mr. 'Cam-eron,' when he heard he mentioned the commissioners' names, he stopped to hear what he was talking about, and he said that he said, 'These other commissioners in before this,' he said, 'he couldn't get a d— cent out of them,' and he said, 'These s— of b—s are a great sight worse.' That's why we wrote the letter, to know why we were called s— of b—s, and to know if he had any claim against the town of Perryville. If there was, we wanted it."

[8] The letter was not sufficient to remove the bar of the statute. It is not only the right, but the duty, of municipal officers to require claims to be presented for their consideration. The bill that was produced before the commissioners ran from 1901 to July 14, 1906, and then had added to it the three small items referred to, in April, 1910. Nothing had been paid on it since July, 1906. The only credits on it amounted to \$250, which was not quite enough to pay the bill rendered June 4, 1901. The account amounted to over \$1,500, consisting for the most part of what seem to be day wages and teams hired from time to time. If the plaintiff had informed the commissioners in office in 1913 of the character of the bill claimed to be due him, they would naturally be suspicious of it, and would not be ready to acknowledge it as correct. They would be derelict in their duties if they paid such a claim without thoroughly investigating it, but at the same time were justified in calling upon the plaintiff to file it, especially if he was using such language in reference to them as we have quoted above. It would be difficult to find any acknowledgment, recognition, or admission in this letter. Mr. Gorrell and Mr. Campbell both testified that they could find no record of the account, and they wanted and had the right to demand an itemized bill. The account was long since barred, except the three items for work in April, 1910, amounting to \$8.75. As the other items were from 6 to 10 or 11 years old, they were perfectly right in naming a time, by which the itemized bill was to be left with the secretary, if they then had any idea of the amount the plaintiff claimed, and if they did not know what he claimed, they had the right to know it, and have the account in such shape as they could investigate it. The letter does not admit that they owed him anything, and does not promise, expressly or by implication, that they would pay him anything, although they do say that any bill or claim for work done or material furnished previous to February 8, 1910, will not be recognized after February 8, 1913, and they do not intimate that they would recognize any part of his bill as due. Shortly after he filed this claim they notified him they would not pay it, but he

still waited for nearly 2 years before bringing suit.

It is not unusual for municipalities to publish notices requiring claims to be filed within a certain time named—the charters of many of them require such claims to be filed properly proven. Mr. Campbell testified that they found that they did not owe the account, and refused to pay it, and Mr. Gorrell's evidence is to the same effect. They ought to have returned his account, but they probably thought it safer to keep it, so as to have something to show what he was claiming in case of suit. It would be giving our decisions on the subject, some of which have already gone quite far, a dangerous construction to hold that officers of municipalities, who know nothing whatever about claims, acknowledge them by writing such a letter as this. They could not properly admit them to be due, as they were not in office at the time they were alleged to be contracted and did not know whether they were due or not. It would open the door for the grossest fraud to permit a stale claim of this sort to be revived by such a letter. It might be impossible for the commissioners then in office to procure testimony to meet that of the plaintiff as to whether the account was due, or had been paid, if it ever was due. If the publication in the newspaper offered by the plaintiff was given effect, it showed that the secretary and treasurer thought there was due \$1,000 in June, 1908, but in February, 1913, the plaintiff claimed over \$1,500, besides interest, although according to his account only \$8.75 had become due after 1906. That statement shows that they were unable to get a bill. It is so improbable that any one would permit a claim of that kind to run from year to year without being paid, and then for 2 years after the last item not even present a bill, that it behooved the officials to very carefully scrutinize one which was finally presented years after the claim was barred by the statute of limitations. The account does not show where the men named in it worked, what the teams were employed for, nor does it show why the plaintiff was employing persons or teams for the town of Perryville. In 25 Cyc. 1361, the rule is thus announced as to municipalities:

"The statute may be suspended as to debts of a municipality by acknowledgment, which may be made by ordinance duly passed by the legislative body or by procuring legislation providing for the payment of such debts and the levy of taxes therefor. But it is not suspended by a promise or acknowledgment made by an officer, not expressly authorized to bind the city; by levying and collecting taxes to pay interest on debts generally; by reference of a claim to experts; or to a committee; by including it in a statement of indebtedness prepared in obedience to a statute; by an acknowledgment of it in the annual report of an officer; by the adoption of such report; by a reference to it in a report of a committee, or by the adoption of such report."

See, also, 17 R. C. L. 920, § 282.

This entire account was barred, except the three items in 1910, when the letter was written, if it ever was due, and commissioners or councilmen of a municipality should not be permitted, much less be held to have intended, to have acknowledged an account by such a letter as this, written under the circumstances it was. It might result in the commissioners who were in office during the years the account covered refusing, for proper reasons, to pay it, and then, by calling upon those who knew nothing about it to pay it, have them agree to look into it, and, if they happen to use some expression from which it could be contended that there was an acknowledgment, make the municipality liable. "There must be shown to exist one of three things to take a case out of the operation of the statute of limitations: First, an admission or acknowledgment by the debtor of a subsisting debt from which a promise to pay may be implied; secondly, an unconditional promise to pay the debt; or, thirdly, a conditional promise to pay the debt, and evidence which shows that the condition has been performed or gratified." *Wilmer, Trustee, v. Galtner*, 68 Md. 342, 345, 12 Atl. 8, 253. While under some of our decisions it has not required very much to establish an admission or acknowledgment by the debtor, who is presumed to know whether he owes the debt, when it is sought to hold a municipality for statements made by officers, who know nothing whatever about the account, it would be a great injustice to taxpayers if the officers were permitted to make them responsible for something that they knew nothing about. We are satisfied that the letter is not an acknowledgment or recognition of any debt due by the commissioners of Perryville to the plaintiff, and that, even if the terms used might be held sufficient if used by an individual debtor in reference to a debt claimed to be due by him, it is not sufficient to bind the commissioners of Perryville.

[6] Although we have said the prayer was too general, as the only question in the case was in reference to the statute of limitations, no harm was done the appellant by its form. A prayer that there was no legally sufficient evidence to take the case out of the operation of the statute of limitations, and the verdict must be for the defendant, would have been sufficient, and, as that is manifestly what the lower court meant by granting the one it did, and we are satisfied that the plaintiff is not prejudiced by the error as to the form of the prayer, we will follow the course adopted in *White v. Bramble*, 124 Md. 395, 92 Atl. 763, and affirm the judgment.

Judgment affirmed; the appellant to pay the costs.

(123 Md. 14)

MAYOR, ETC., OF BALTIMORE v. MATTERN. (No. 10.)

(Court of Appeals of Maryland. April 28, 1918.)

1. MUNICIPAL CORPORATIONS \Leftrightarrow 821(20)—**INJURIES IN STREET — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

In an action against a city by a pedestrian for injuries from a defective street crossing, question as to plaintiff's care *held* for the jury, under evidence that she was carrying her child and was as careful as she could be.

2. NEGLIGENCE \Leftrightarrow 136(26) — **CONTRIBUTORY NEGLIGENCE—WITHDRAWAL OF ISSUE FROM JURY.**

Before plaintiff's right to have the jury pass on the issue of her negligence could be denied by the court, her conduct must have been found so manifestly reckless as to leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men.

3. EVIDENCE \Leftrightarrow 553(4)—**EXPERT TESTIMONY—HYPOTHETICAL QUESTION.**

Testimony of plaintiff's physician, in answer to question partly hypothetical and partly based on knowledge, was admissible, where there was no substantial difference between plaintiff's testimony and that attributed to her in question, while answer showed opinion was based largely on observation.

Appeal from Court of Common Pleas of Baltimore City; Morris A. Soper, Judge.

"To be officially reported."

Action by Mary Mattern against the Mayor and City Council of Baltimore. From judgment for plaintiff, defendant appeals. Affirmed.

Argued before **BOYD, C. J.**, and **BRISCOE, THOMAS, URNER, STOCKBRIDGE**, and **CONSTABLE, JJ.**

S. S. Field, City Sol., of Baltimore (Edw. J. Colgan, Jr., Asst. City Sol., of Baltimore, on the brief), for appellant. **J. Cookman Boyd** and **Peter J. Campbell**, both of Baltimore, for appellee.

URNER, J. While the appellee was passing over a street crossing in Baltimore, with her little child in her arms, her foot was caught in a hole between two flagstones, and she was thrown down and sustained a serious injury to her knee, for which she brought suit against the city and recovered the judgment which is the occasion of this appeal.

The principal exception in the record was taken to the refusal of the trial court to instruct the jury that according to the undisputed evidence the plaintiff did not exercise reasonable care to avoid the accident, but by her negligence contributed directly to the injury of which she complains, and that the verdict should therefore be for the defendant. This prayer, of course, presupposed the existence of primary negligence on the part of the city in respect to the condition of the street crossing at the point where the plaintiff was injured. It was estimated by the witnesses that the hole between the flagstones was

6 or 8 inches deep, about 6 inches wide, and from 6 to 12 inches long. It had been there for a period of four or five months before the accident. Apparently it had resulted from the wear of wagon wheels in the space between the two stones.

[1, 2] The accident occurred in the daytime, and the theory of the city's prayer was that the defect in the street was obvious to any one using due care, and that because of her failure to avoid it the plaintiff should be judicially declared to have been guilty of contributory negligence. It was testified by the plaintiff that, when she came to the street crossing she took up her 17 months old baby in her arms to help it over to the other side, and that in passing over she did not see the hole between the stones, as she was looking toward the opposite gutter and curb, beyond which the child was to be carried. She stated that, if she had been looking for defects in the street, she might have seen the hole into which she stepped, but that she supposed the crossing was all right, and she was going over it as carefully as she could under the circumstances.

Upon this evidence the court below was clearly right in declining to hold the plaintiff guilty of contributory negligence as a matter of law. The question as to whether she exercised ordinary care to avoid the accident was properly submitted to the jury as an issue of fact, in a prayer granted at the defendant's request; but it would be pressing the doctrine of contributory negligence very far to hold that a case like the present should be withdrawn from the jury on that ground. It was entirely natural that the plaintiff should have carried her child over the crossing, and it is easy to understand how the hole, as located, could escape her attention while she was thus engaged. The fact that she failed to notice the defect in the crossing and assumed it to be safe, as she passed over it with her child in her arms, is certainly not such a conclusive indication of negligence as to prevent the submission of the question to the jury. Her conduct was not so manifestly reckless as to "leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men." It would have to deserve such a characterization before her right to have the jury pass upon the issue could be denied. *B. & O. R. R. Co. v. Wiley*, 72 Md. 40, 18 Atl. 1107, 6 L. R. A. 708, 20 Am. St. Rep. 454; *McCarthy v. Clark*, 115 Md. 464, 81 Atl. 12; *Com'rs of Delmar v. Venables*, 125 Md. 478, 94 Atl. 89.

In the case of *Knight v. Baltimore*, 97 Md. 647, 55 Atl. 388, cited by the appellant, the driver of a wagon was thrown from his seat and injured when one of the wheels ran into a hole in the middle of the street. It was held that his own negligence contributed to his injury because he could readily have seen the hole, which was visible at a distance of

half a square; but he was talking to a companion and was not looking ahead as due care would have prompted him to do in such a situation. But in stating that conclusion this court observed that:

"Greater watchfulness * * * is required of the driver of a team upon a city street than of a pedestrian upon a sidewalk."

The only other grounds on which the appellant contends for a reversal are that the physician who attended the plaintiff was permitted to be asked as a witness whether the condition in which he found her knee three days after the accident could have resulted from that occurrence, as described in the plaintiff's testimony, and that a hypothetical question, allowed to be propounded to the same witness, as to the permanence of the injury was an incorrect statement of the facts upon which his expert opinion was to be based. The point sought to be raised in the objection to the first of the questions just noted is that the accident as described by the plaintiff did not necessarily involve any injury to her knee. This objection is without force, in view of the testimony of the plaintiff that, when her foot went into the hole, she was thrown down and sustained an injury to her knee, by which it has ever since continued to be affected.

[3] The other question objected to was partly hypothetical and was based in part upon the direct knowledge of the witness, as the physician who observed and treated the injury in regard to the permanence of its effects. It is urged that the hypothetical portion of the question overstated the plaintiff's testimony as to the extent to which the injury disabled her from performing her usual household duties. It was assumed by the question that she had testified to being unable to attend to her housework and move around because of the condition of her knee, and it is said that her testimony in fact did not disclose such a complete state of disability. When the interrogatory is taken as a whole, it does not convey the idea that the plaintiff had described her condition as being one of total incapacity for work or movement about her home. It refers to her testimony as being to the effect that since the accident she suffers severe pain in her knee, when it is about to rain; that before this injury she was able to do her own housework, but that now when she attempts to do any washing, there are times when her knee apparently gives way, and she must sit down and rest for hours, and sometimes as much as a day. It is immediately in this connection in the question that the statement occurs as to her being unable to move around and do her housework. The plaintiff actually testified on this subject, in part, as follows:

"Now in cloudy weather the pain is terrible; they shoot up and down in me, and I have to sit down for hours, and if I am washing at the tub, I have to sit down until the pain leaves me, and then maybe go back and try to do some

more washing, a little more, but I cannot do it. I have been sending my wash to the laundry, but a few fine pieces I try to keep home and do myself, and I have to do my own housework, what I can, and what I cannot has to go dirty, as I am no millionaire, and I cannot afford to hire any one. My knee, even when it does not hurt, is all trembling."

There does not appear to us to be any substantial difference between the testimony given by the plaintiff and that attributed to her in the hypothetical question. Besides, the answer of the physician to the question shows that his opinion as to the permanence of the injury was based largely upon his own professional observation of its condition. For the reasons stated, we think this evidence was properly admitted.

Judgment affirmed, with costs.

428 Md. 546

MT. SAVAGE GEORGE'S CREEK COAL CO. et al. v. MONAHAN et al.
(No. 27.)

(Court of Appeals of Maryland. April 8, 1918.)

1. APPEAL AND ERROR ¶847(1)—**REVIEW—SCOPE—EQUITY CASES.**

In equity cases, fact findings of the trial court are reviewable on appeal, notwithstanding stipulations or agreements made by the parties.

2. APPEAL AND ERROR ¶544(3)—**BILL OF EXCEPTION—NECESSITY.**

In action for damages for mining coal from plaintiff's land, where some prayers suggested question of negligence, and the judge rejected all the prayers indorsing the disposition of them, such record sufficiently presented the right to review the finding as to negligence, though no bill of exception was filed.

3. MINES AND MINERALS ¶125—**TRESPASS—NEGLIGENCE—EVIDENCE.**

Evidence held to show negligence of defendants in mining coal belonging to plaintiffs with knowledge that they were approaching or had passed the boundary.

4. MINES AND MINERALS ¶125—**TRESPASS—MINING COAL—MEASURE OF DAMAGES.**

Landowner's measure of damages for negligent mining of coal from under his land is the value of the coal when severed and at the mouth of the mine.

5. MINES AND MINERALS ¶125—**TRESPASS—MINING COAL—MEASURE OF DAMAGES.**

Code Pub. Civ. Laws, art. 75, § 92, providing that if one furtively or in bad faith abstracts minerals from the land of another he may be charged with their whole value and allowed no deduction for labor and expenses in mining, does not change the rule as to liability in cases of negligent mining of another's coal.

6. INJUNCTION ¶198—**RELIEF—DAMAGES—ASSESSMENT.**

That a suit is in equity for injunction and for damages for negligent mining of another's coal does not require imposition of a different measure of damages than if the suit were at law.

7. MINES AND MINERALS ¶125—**TRESPASS—MEASURE OF DAMAGES.**

That value of coal when mined may exceed and be disproportionate to value of the land does not prevent allowance to owner, against whom trespass is committed of the value of the coal when severed.

8. MINES AND MINERALS ¶125—**TRESPASS—MEASURE OF DAMAGES.**

In action for mining coal by trespass where the verdict, though large, actually charged the defendants with only five per cent. of the amount allowed, by reason of the profits made from the coal, the award was not excessive.

9. MINES AND MINERALS ¶51(5)—**STATUTE—LEGISLATIVE INTENT.**

Code Pub. Civ. Laws, art. 75, § 92, changing rule of damages for trespass on mineral land, being contrary to the long-established rule, should not be extended beyond the clear intention of the Legislature.

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Bill by Andrew Monahan and others against the Mt. Savage George's Creek Coal Company and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

W. Calvin Chestnut, of Baltimore, and Albert A. Doub, of Cumberland, for appellants. William E. Walsh and Walter C. Capper, both of Cumberland (William C. Walsh, of Cumberland, on the brief), for appellees.

BOYD, C. J. The bill in this case was filed by Andrew Monahan and others, the appellees, against the Mt. Savage George's Creek Coal Company, and certain of its officers, to enjoin the defendants: (1) From trespassing upon the plaintiffs' land and mining and carrying away their coal; (2) from removing supports, etc., necessary to keep open the passages through the defendant company's mines leading to the plaintiffs' coal; and (3) from preventing the plaintiffs, their surveyor and helpers, from going into the company's mines and thence into plaintiffs' coal, and the places from which said company had carried it away, and from interfering with the surveyor from measuring and ascertaining how much of plaintiffs' coal had been taken and carried away by said company. There are also prayers to require the defendants to disclose how much of said coal the company had taken, when and to whom sold, to account for that taken, as well as for the damages to the plaintiffs' remaining coal, and for general relief. The defendants filed an answer in which they denied that they had trespassed upon the plaintiffs' property or removed any coal therefrom, but subsequently they filed an amended answer, in which they admitted that the company had sold and marketed coal estimated at 3,250 tons taken from the land of the plaintiffs, admitted that the company had been paid for said coal, and stated that it was ready to compensate the plaintiffs for it. They denied that:

"The said coal was worked or removed from the plaintiffs' land fraudulently, negligently, or willfully, but say that the said coal was taken purely by accident, without fraud, and without negligence on the part of the said defendants, and also with the utmost good faith, and with

the belief on the part of the said defendants that they were taking and removing coal which belonged only to the Mt. Savage George's Creek Coal Company; and these defendants further say that the defendants ought not to be required to pay for the said minerals more than its value in its native state before severance, to the said plaintiffs."

The defendants in open court waived "any objection to the jurisdiction of the court in this case as to the determination of the question as to the quantity of coal removed and the value of the coal, all of which will be determined, and the court can pass upon the issues in this case the same as if it were a trial at law and the same as if the case were tried by the court sitting as a jury." The attorneys for the plaintiffs assented to that agreement, and it was made a matter of record.

[1, 2] The lower court adopted the defendants' evidence in regard to the amount of coal taken out of the land of the appellees by the company, the cost of severing, loading, and transporting it to the mouth of the mine, and there seemed to be no controversy as to its market value. The principal questions, therefore, to be determined are whether the court was right in finding that 4,508 tons of the coal were negligently mined, and, if so, what measure of damages should be allowed. We cannot agree with the appellees that as it was a question of fact whether the coal was negligently mined the decision of the lower court as to that is conclusive and cannot be reviewed. In equity cases findings of the lower court as to questions of fact are reviewable on appeals, and if the agreement referred to above be construed as changing that rule in some respects, it could not have been intended to have such an effect as that contended for. The agreement suggested some uncertainty as to the mode of procedure, and the plan of offering instructions was adopted; Judge Henderson remarking that that could be done so as to secure the right of appeal. Some of the prayers clearly presented the question of negligence, and while bills of exception were not filed, the judge in his opinion rejected all of the prayers offered by the defendants, except the first, which does not refer to that subject. The prayers in the record, together with the indorsement on them of the disposition made of them by the judge, and the statement in the opinion that "all the prayers submitted by the defendant, except the first, are rejected," must, under the circumstances, be regarded as sufficiently presenting the right to have his finding reviewed.

1. There is no real controversy about the division line between the properties. That could have been ascertained before the defendant company commenced mining in November, 1916, as well as in March, 1917. Mr. Stern, the president of the company, testified that they commenced mining some time from the 10th to the 15th of November. The Maryland Coal & Iron Company formerly operated this mine, and Mr. Stern was treas-

urer of that company, and Mr. Avery, one of the defendants, was president. Both before and after the defendant company commenced operations Mr. Stern and Mr. Farrell, a director of the defendant company, tried to get a lease of the Monahan coal, but the owners declined to lease it, and warned Messrs. Stern and Farrell not to get over the line. The defendants either knew, or were grossly negligent in not knowing, that the workings were at least close to the line, yet, although the line could have been easily and promptly established, it is now said that it was not fixed in the mine until after the injunction was issued. Anthony Monahan testified that on the 5th of November, 1916, Mr. Avery, of the defendant company, told him, "We are up to your line, your property line, and he says, 'We can't go no further if we don't get your coal.'" He told him they would not lease the property; that the heirs were opposed to a lease; and "I told him all we wanted him to do was to keep off our line." Francis Monahan testified that he heard that conversation. Mr. Avery denied it, but said that he understood they were from 75 to 100 feet from the line. Mr. Stern said the reason they were anxious to get the Monahan coal was "because it was very close to our property," and in reply to the question, "You knew it was very close to your workings in there?" he said, "Yes, sir." On cross-examination of Mr. Farrell, in reference to the lease, this appears:

"Q. The reason was that you were close to their coal, or on their coal? A. I didn't know it. Q. In a general way, isn't that the reason you tried to get this lease? A. The reason we tried to get a lease was because we wanted their coal. Q. Isn't that the reason, because you were up to it? A. Might have been it. Q. It was it? A. Well, yes."

Mr. Spear testified that he went with the defendant company about February 1, 1917, first as mine foreman and then as superintendent, and "just as soon as I got there I said to Mr. Stern that we should make some inquiry about the lines," and Mr. Stern employed Mr. Haverstick as engineer. This also appears in his evidence:

"Q. Did Mr. Stern tell you it was all right? A. No, sir, he didn't. He didn't say anything about it. He didn't know. I didn't know anything about it until the surveyors told us. Q. Did Mr. Haverstick ever tell you it was all right? A. As soon as Mr. Haverstick made his survey, he told me we would have to stop the left. Q. When was that? A. I couldn't tell just when; I couldn't remember the dates."

Mr. Matthias, a mining engineer, testified as to the distances the various headings were run beyond the line before the injunction was served. Two of them were run over the line 325 or more feet, one about 400 feet, one about 186 feet, three 150 or more feet, two about 125 feet, and four varying from 75 to 115 feet, although they were not all run at right angles to the line, as shown by the plat, and hence the end of the headings would not be as far beyond the boundary, in a straight

line, in some instances as the above figures might suggest.

[3] The evidence was therefore ample to show negligence of a very decided character. It may be that no one actually knew that the defendant company was working beyond the line, but they at least knew that they were near it, and had been warned not to get over it. Why it would take from early in November until after the injunction was served, in March, to find out where the line was is not satisfactorily explained, especially as it was so soon ascertained after the injunction was served. It ought to have been a very simple matter for an engineer to locate a line such as this, about which there seems to be no real controversy. They knew that some time before the company commenced operations the former company was within from 75 to 100 feet of the line, and some of the officers of that company were officers of this one, yet several of these headings were run between three and four hundred feet beyond the line. The circumstances were such as to suggest the propriety, not to say necessity, of fixing the line in the mines definitely before any coal was taken out in that direction. Nothing said by Mr. Matthias excused the defendants, unless it be what he told them about the line at the point where the court below only required the company to pay the royalty of ten cents a ton for coal taken out, but he did not then know definitely where the line was, and the officers and agents of the defendant company had a much better opportunity to know it, as they had access to the mines at all times. The defendants knew he had not connected up the lines with their workings, but after the injunction was gotten out it only took a few days to find out that the defendants had taken out large quantities of the plaintiffs' coal. If the defendants' theory be adopted, all that would be necessary for a trespasser to do would be not to have the lines established until proceedings were taken against him, and then claim he did not know he was over. That will not do in a case such as this, where there was manifestly good reason to fix the line, if the defendant company was anxious to keep within its own boundaries.

[4] 2. The next and most important question is the measure of damages to be allowed. The rule in this state was definitely fixed prior to the act of 1894, which is now section 92 of article 75 of the Annotated Code. It may be that the decisions of this court are not in accord with some of those cited by the appellants from other jurisdictions, but the measure of damages fixed in *Barton Coal Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525, *Franklin Coal Co. v. McMillan*, 49 Md. 549, 38 Am. Rep. 280, and *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 Am. Rep. 560, has not only not been disturbed but has been recognized in *Parker v. Wallis*, 60 Md. 15, 45 Am. Rep. 703; *Atlantic, etc., Coal Co. v. Md. Coal Co.*, 62 Md. 135, and *Peters v. Tilgh-*

man, 111 Md. 227, 73 Atl. 726. In the *Barton Coal Company Case* the question was fully argued by some of the ablest attorneys in the state and heard by Chief Judge Bartol and Judges Bowie, Miller, Alvey, and Robinson. The court thoroughly reviewed the English decisions and other authorities, and sustained the third prayer of the plaintiffs, which, after referring to certain facts not necessary to repeat, concluded as follows:

"Then the plaintiffs are entitled to recover such sum per ton as the jury may find the said coal so mined was worth when first severed from its native bed, and before it was put upon mine cars, without deducting the expense of severing said coal from its native bed."

It further sustained a prayer to the effect that if the jury found that the defendant knew that the lands were not its own, the plaintiffs were entitled to exemplary damages. The court said that the rule prescribed in the plaintiffs' third prayer conformed in principle to that in *Martin v. Porter*, 5 M. & W. 351, *Morgan v. Powell*, 3 Ad. & El., N. S. 278, and *Wild and Others v. Holt*, 9 M. & W. 672. In *Martin v. Porter*, Baron Parke expressly ruled, as quoted in the *Barton Coal Company Case*, that the plaintiff "was entitled to the value of the coal as a chattel at the time when the defendant company began to take it away, that is, as soon as it existed as a chattel, which value would be its price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were dug, to the pit's mouth."

Judge Robinson dissented in the *Barton Coal Company Case*, and when the case of the *Franklin Coal Co. v. McMillan* came before the court filed a vigorous dissent on the ground that in his opinion the *Franklin Coal Company Case* was distinguishable from that because the defendant contended that the coal was taken under a claim of title. He relied on the case of *Wood v. Morewood*, 3 Ad. & El. N. S. 440, and others cited by him, and he quoted from it to show that if there was fraud or negligence on the part of the defendant, damages could be given on the principle of *Martin v. Porter*, but in the absence of fraud or negligence the damages could be confined to the value of the coal in its native bed. We refer to Judge Robinson's opinion to show that the question was distinctly raised in the *Franklin Coal Company Case*, but the majority of the court refused to follow the view contended for, and the rule announced in the *Barton Coal Company Case* was followed. It will be noted that in *Wood v. Morewood*, Baron Parke said that if there was fraud or negligence the jury could give the damages settled in *Martin v. Porter*.

In the *Blaen Avon Coal Company Case*, this court again followed the rule adopted in the *Barton Coal Company Case*, and repeated in the *Franklin Coal Company Case*. In addition to the English cases cited the court referred to decisions in North Carolina,

Maine, California, and Illinois which announced the same rule of compensation. Judge Ritchie, who delivered the opinion, called attention to the fact that in the Illinois cases, and in *Martin v. Porter*, and *Morgan v. Powell*:

"While the amount to be recovered is fixed by the worth of the coal when first dug, the mode of reaching the value is through the price of the coal after it arrived at the pit's mouth, and allowing a deduction for the cost of conveying it thither from the place where it was mined. This is said to be because it could have no value as a salable article without being taken from the pits, and that was the earliest moment at which the plaintiff could have repossessed himself of the coal. But, as Lord Denman, in *Morgan v. Powell*, says: 'Instances may be easily supposed where particular circumstances would vary this mode of calculating the damage.'"

Judge Ritchie then went on to show that, where the coal is actually carried away and sold—

"it does not seem material in a case like this whether the value of the coal at the mine's mouth be first ascertained and then an allowance be made for the bare expense incurred in its simple conveyance thither, or witnesses be asked to estimate directly its value just prior to its removal. The rule of compensation is practically observed in either case."

See, also, what he said on page 420 of 59 Md. It is not difficult to see why this is so. The plaintiff is entitled to recover the value of the coal per ton, after it is severed, without deducting the cost of severing it; that is to say, its value after it has become a chattel, which it has so become by the illegal act of the trespasser. If it be permitted to lie there without removing it, and the owner has no way to get it out, or did not know of it in time to take it out before the roof fell in, it might be difficult to establish the value beyond what it had in its native bed. But if, as was done in this case, it was removed by the trespasser, and at the mouth of the mine it had a value which is capable of being easily established, that would seem to be the fair and just way to do so. The trespasser surely has no right to complain of that mode being adopted. But the cases, including that of the Blaen Avon Coal Company, sufficiently show the reason for the rule to avoid the necessity of further discussion of that subject.

3. The three Maryland cases met nearly every question that was liable to be raised, but the further question now is the applicability vel non of the statute referred to. Section 92 of article 75. We have seen that the rule in Maryland when the statute was passed was that, even if the coal was taken under a bona fide claim of title, the measure of damages was as announced in the Barton Coal Company Case, while there was a line of cases in England and elsewhere that, in the absence of fraud or negligence, only the value of the coal in its native bed would be allowed. In the Franklin Coal Company Case Chief Judge Bartol said:

"Trespasses on the land of another, if not willful, always imply some degree of negligence. * * * As said in *Maye et al. v. Yappen*, 23 Cal. 306: 'Where a party has the means of ascertaining the dividing line, he is guilty of negligence in not ascertaining its location.'"

The first paragraph of the statute is:

"In the absence of fraud, negligence or willful trespass, the measure of damages for the wrongful working and abstracting of another's minerals is the value of the minerals in their native state, before severance, to the person from whose property they were taken at the time of the taking."

It could not be contended that under that alone the measure of damages has been changed, if there was fraud, negligence or willful trespass, but the statute proceeds with only a semicolon after the above, "but if one furtively or in bad faith works and abstracts minerals from the land of another, the party so offending may be charged with the whole value of the minerals taken and allowed no deduction in respect of his labor and expenses in getting them." The measure of damages provided in that paragraph is not materially different from the rule before the act of 1894, excepting the party would not be entitled to deduct the cost of removing the coal to the mouth of the mine, when that mode of ascertaining the value is adopted, if done furtively or in bad faith. It does not say "without deducting the cost of severing the coal," but is to be allowed "no deduction in respect of his labor and expenses in getting them." He might in addition to that be liable for exemplary damages, as the statute should not be construed to prohibit such damages if the circumstances justified them.

[5] It would seem to be clear that the rule in reference to minerals taken negligently was not changed. Why it was not, we have no means of knowing, unless it was simply that the Legislature would not make such a change, for reasons of public policy. The work is done underground, when ordinarily the owner of adjoining property has little, if any, means of knowing that his property is being encroached upon. Baron Parke, in referring to the rule laid down in *Martin v. Porter* said:

"Which is a very salutary one, because the parties must know—at least, they may know by proper dialing—that they are trespassing on their neighbor's property."

The measure of damages fixed by the first paragraph does not apply, if the party taking the coal was negligent, because it is only in the absence of fraud, negligence, or willful trespass that the rule applies. If "negligence," as used in the first paragraph, is not embraced in one of the terms "furtively or in bad faith," as used in the second paragraph—and it would scarcely be contended that it is—then there is no part of the statute applicable to a case where there was negligence, and, if it is included, then the appellant cannot complain of the measure of damages allowed, as it even got the benefit of the deduction for the cost of removing the

coal to the mouth of the mines. But it is clear that the statute does not change the rule when the minerals are taken as the result of the negligence of the defendant. The fact is that the defendant company was not only getting over the line of the plaintiffs' property, but it was working the coal very close to the line between good faith and bad faith. It may be that the officers did not know they were over the line until so informed by the surveyor, after this bill was filed, but they did not know they were not over the line, and could have easily found out whether they were, as it was their duty to do. But it is not necessary to go further into the question whether the acts of omission and commission of the defendant company amounted to bad faith, within the meaning of that term as used in the statute, as we are satisfied that there was great, not to say gross, negligence, and that the statute does not relieve parties guilty of negligence from the measure of damages fixed by our decisions prior to its passage.

The quotation from the amended answer in the first part of this opinion would seem to indicate that the defendants then interpreted this statute as we have done. If the fact of its being negligently done does not take it out of this statute, or make it inapplicable, then why would the defendants have denied that the coal was worked or removed from the plaintiffs' land "fraudulently, negligently, or willfully"? Of course, we understand they were denying that it was so taken, but the inference would be that if taken negligently they could not ask for the measure of damages which they claimed to be applicable.

[§] 4. The appellants also contend that, inasmuch as the case is in equity, a different rule should be applied. There are several answers to that. In the first place the defendants agreed that:

"The court can pass upon the issues in this case the same as if it were a trial at law and the same as if the case was tried by the court sitting as a jury."

That would hardly leave room for the contention that there should be a difference between the amount allowed in this case and what might have been allowed if the case had been before a jury, or the court sitting as a jury. But beyond that our own decisions are clear on that point. In the *Atlantic, etc., Coal Co. v. Maryland Coal Co.*, 62 Md. 135, 143, after speaking of cases where courts of equity would assess damages, it was said:

"In a case of trespass where no such relations exist, we are aware of no ground upon which a court of equity can set up any other rule of damages than that which prevails at law. The rule for trespass in mining coal is well settled in Maryland. * * * The owner of adjoining property is held to know the boundaries between him and his neighbor. If he has made a mistake bona fide as to his title or boundaries in mining coal, the lowest measure of damages applicable is the value of the coal immediately upon its conversion into a chat-

tel without abatement of the cost of severance. If the trespass has been committed through negligence or design, punitive damages in addition may be recovered."

Then after citing the three leading cases in Maryland, the opinion continues:

"An unwitting trespasser, merely as such, could not change the amount of his liability by simply changing the forum. No lower measure of damages for trespasses not negligent nor willful could be substituted in equity for that fixed at law, on general principles, for such trespasses. If a lower measure could be there applied merely because the trespasser was honestly mistaken, all such trespassers would seek the courts of equity when sued, and thus evade the rule established as applicable to them in the foregoing authorities."

The appellants quoted an expression used in the *Barton Coal Company Case*, where, after affirming the rule adopted, the court said:

"The cases to the contrary are generally cases in equity, where greater latitude is assumed by the courts in controlling the rights of the parties"

—but in the case in 62 Md. 135, where a different rule was sought to be established in equity, this court announced its views in terms which leave no doubt on the subject, as will be seen by the quotation above.

[7] Again, the theory of the appellants for asking the court to adopt a different rule in this case, being in equity, is that the amount allowed is out of all proportion to the value of the land. That was urged in some of the English cases, and in each of the three principal cases in this state referred to above the amount recovered was far beyond the value of the land affected. But the recovery for the most part was not for the land, but for the value of the coal as a chattel. The amount of recovery in this case is large by reason of the unusual price of coal when it was taken. That could make no real difference, however, as by the rule adopted by the lower court the appellant company is only held for money belonging to the appellees, which was actually received by it. It is true that the higher the market value, the more there is to be returned, but whether small or large, it in justice and equity belongs to the owners of the land from which the coal was taken. Upon what principle, then, ought the court to change the rule for the measure of damages at the instance of the appellants? The company sold the appellees' coal, and actually got the money for it. Should a court of equity give a favorable hearing to a party who comes before it confessing that it took the plaintiffs' chattels, sold them for their market value (shown to have been \$4.90 per ton, and not denied), and collected the money, but asks that it be relieved from paying any of it except 10 cents a ton, because that is all it was worth in its native bed? Assuming the very liberal allowance made by Judge Henderson for costs in severing and getting the coal to market, at the mouth of the mine, to be correct, namely \$2.41, the appellant has or had in its treasury

\$2.49 per ton profit, made on the sales of the appellees' coal, and yet asks the court to require the appellees to accept 10 cents a ton in full of all claims for the 4,508 tons and let it keep \$2.39 per ton, or \$10,774.12 profits made out of the coal which was admittedly unlawfully taken from the appellees by the appellants, although claimed to have been done in good faith. That does not seem to us to be equity, or to give the appellants any standing for relief in a court of equity, if any distinction could otherwise be made, because the parties are in a court of equity.

[8] No contest is made about the 912 tons taken under circumstances which excused the appellants, as held by the lower court, from paying more than 10 cents a ton, amounting to \$91.20. The decree also allowed \$1,000 damages to the remaining land. The rule for the latter is well settled in our decisions, and is not affected by the act of 1894. The only question that could possibly be raised is as to the amount, which seems to have been sufficiently proven in this case, and is much less than the appellees claimed. So the only actual loss that the appellant company has sustained is the cost of severance of the 4,508 tons which the lower court fixed at 63½ cents a ton, and in the aggregate is \$2,862.58, and \$1,000 to the remaining coal and land. Indeed in comparing the net results to the appellant company, if it had kept off the appellees' land, with what it is now held for, it would not be out of place to remember that, although the lower court only charged it with ten cents a ton for the 912 tons, it actually made a profit of \$2.49 per ton on those 912 tons, equal to \$2,270.88, thus leaving it a net profit of \$2,179.68 on those tons. If that be deducted from the cost of severance of the 4,508 tons (\$2,862.58), which we have said above is the net loss of the appellant company in the whole transaction, it in reality only loses \$682.90, in addition to the \$1,000 damages referred to. While in his application of the rule established by our decisions Judge Henderson did not charge the appellant company with that profit, it was undoubtedly made out of the appellees' coal. So although the decree is for a large sum of money, in reality nearly four-fifths of the portion of it allowed for coal negligently taken is to be paid with profits made out of appellees' coal, and if the profits made out of the 912 tons be taken into consideration less than 5 per cent. of the amount allowed for coal negligently taken is in addition to the profits actually received by the appellant company. When those facts are considered, the supposed equities in favor of the appellant company seem to a great extent to disappear.

[9] We have not thought it necessary to discuss the authorities outside of this state, collected with the usual diligence of the attorneys for the appellants and presented,

from their standpoint, with force and ability, because we are of the opinion that the decisions of this court are conclusive of most of the questions raised, and we cannot adopt the construction of the act of 1894 contended for. As late as 1909 this court, in *Peters v. Tilghman*, 111 Md. 227, 73 Atl. 726, applied the rule of the measure of damages laid down in the *Barton Coal Company Case*, and followed by others, to timber taken from another's lands. It would seem to be more important to have such a rule as to coal and other minerals as the owners cannot as well protect themselves against trespass, inasmuch as the minerals are underground. It is for the Legislature to determine the wisdom of such legislation as that of 1894; but, as it is contrary to a rule established after most thorough consideration, and is liable to encourage trespasses, if not properly guarded, it should not be extended beyond what was clearly the intention of the Legislature. We are satisfied, after a careful examination and consideration of the facts, the authorities and the act of 1894 (section 92, art. 75, Code) that the decree of the lower court should be affirmed.

Decree affirmed; the Mt. Savage George's Creek Coal Company to pay the costs.

(98 Conn. 13)

FRANKO v. WILLIAM SCHOLLHORN CO.
et al.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. MASTER AND SERVANT \S 385(4) — WORKMEN'S COMPENSATION ACT — CONSTRUCTION OF STATUTE—"LOSS."

The word "loss," as used in Workmen's Compensation Act, pt. B, \S 11, 12, as amended by Pub. Acts 1915, c. 288, providing for compensation in the case of certain named injuries resulting in the loss of a member or function, means deprivation; the compensation being to compensate employes for handicap of being without the lost member and not for impairment of earning power.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loss.]

2. MASTER AND SERVANT \S 387—WORKMEN'S COMPENSATION—CONSTRUCTION OF STATUTE.

Workmen's Compensation Act, pt. B, \S 12, as amended by Pub. Acts 1915, c. 288, providing that compensation for named injuries shall be in "lieu of all other payments," refers to payments for the named injuries, and does not limit the award to compensation provided for the named injury.

3. MASTER AND SERVANT \S 387—WORKMEN'S COMPENSATION—AMOUNT OF AWARD.

Where employe's finger was lacerated February 7th, totally incapacitating him from working until May 21st, when as a result of the injury two phalanges of the finger were amputated, the compensation awarded the employe for loss of the phalanges of the finger under Workmen's Compensation Act, pt. B, \S 12, as amended by Pub. Acts 1915, c. 288, was not exclusive of compensation for total incapacity under section 11; the loss of the phalanges of the finger and the loss of the use of the finger being separate injuries for each of which compensation is awarded.

Case Reserved from Superior Court, New Haven County; William S. Case, Judge.

Proceedings under the Workmen's Compensation Act by Mariano Franko against the William Schollhorn Company and another. Appeal by defendants from an award by the compensation commissioner of the Third district in favor of plaintiff, taken to the superior court for New Haven County and reserved for the advice of the Supreme Court of Errors upon all questions of law arising upon the record. Judgment advised dismissing appeal.

The claimant and respondent employer were subject to the provisions of part B, c. 138, of the Public Acts of 1913, as amended by chapter 288 of the Public Acts of 1915. The claimant on February 7, 1917, while in the employment of the respondent, suffered a laceration of the first finger of the right hand, which injury arose out of and in the course of his employment. The average weekly wage of the claimant, computed in accordance with the terms of the act, was \$11. On March 13, 1917, there was approved a voluntary agreement to pay claimant on account of the said injury \$5.50 per week beginning February 18th, and extending throughout the period of total incapacity. Compensation on account of said injury has been paid at the rate provided in this agreement for about 25½ weeks. Up to May 21st, the claimant was totally incapacitated as a result of this injury, and on said day on account of this injury it became necessary to amputate two phalanges of this finger. The claimant claimed: First, that he was totally incapacitated from February 7th until May 21st, and that during that time he was entitled to compensation under section 11 as amended, as "compensation for total incapacity." Second, that on May 21st two phalanges of the index finger were removed, and that from that date he was entitled to 25½ weeks additional compensation under section 12 as amended, as "compensation for partial incapacity." The respondent claimed that the compensation that could be awarded was that for 25½ weeks, on the ground that the compensation for the loss of the phalanges of the finger was exclusive of all other compensation. The commissioner sustained claimant's claim 2 and also 1 as to the period from February 18th, and overruled respondent's claim. The commissioner awarded the claimant as compensation on account of said injury \$5.50 a week from February 18 to May 21, 1917, for total incapacity, and at a like rate for the loss of the two phalanges of the index finger beginning May 21st and extending for a period of 25½ weeks after making due allowance for payments heretofore made.

Eugene F. Farley and H. Frederick Day, both of New Haven, for plaintiff. Philip Pond, of New Haven, for defendants.

WHEELER, J. (after stating the facts as above). The question for decision is one of statutory construction. Compensation acts of other states differ as a rule from our act in those provisions which affect the question at issue. Comparison of these with those of our act will not aid us in the interpretation of our act, and the decisions under these acts will be of little help. The acts of some states contain no similar provisions; the acts of other states, such as Massachusetts and New Jersey, are so specific as to determine the point, while in many other states the question has not been the subject of decision.

The commissioner in his memorandum gives an interesting résumé of the decisions of the courts and the rulings of the commissioners in other jurisdictions. From these it appears that, in a majority of the jurisdictions where this question can arise, their compensation acts award compensation in cases such as this for the total incapacity suffered as well as for the loss of a member. New York and Michigan appear to hold the compensation awarded under their act is for disability, not for loss or impairment of earning power. Our own act, as we shall point out, is based upon a different theory. A review of these acts, decisions, and rulings would furnish little aid in solving our problem, nor is it necessary. As we read our act, sections 11 and 12, which alone concern this question, are reasonably clear.

Our act in its original form and in its amended forms of 1915 and 1917 (Pub. Acts 1917C, 368) provides compensation for both total and partial incapacity resulting from injuries which do not prove fatal. Section 11 relates to total incapacity, and provides that the loss of sight, the loss or paralysis of certain physical members, and incurable imbecility or insanity, resulting from the accident, shall be "considered as causing total incapacity." And these and all other injuries resulting in total incapacity to work shall be paid weekly during such incapacity compensation equal to half of his average weekly earnings at the time of the injury with a maximum and minimum limitation of the period of compensation. The obvious theory of this section is that the compensation is dependent upon the loss or impairment of earning power and is to be borne by the employer and employé. The total incapacity may be permanent or temporary, but while it lasts the suffering employé is entitled to compensation for the prescribed period and upon the named scale.

Section 12 provides that, in cases of injury resulting in partial incapacity, there shall be paid the injured employé a weekly compensation during such incapacity equal to half the difference between the average weekly earnings before the injury and the amount he is able to earn thereafter with a maximum and minimum limitation of compensa-

tion and a limitation of the period of compensation. The theory of this section is the same as that of section 11, that the compensation is based upon loss of earning power, and that this loss is to be shared by employer and employé. If these were the only injuries resulting in partial incapacity, it must follow that all such were included in its terms, and that permanent as well as temporary partial incapacity were included. Following this designation in this section is the provision that in certain specified injuries the compensation for the loss, "in lieu of all other payments," shall be half of the average weekly earnings of the injured employé prior to such injury for the term specified in each described injury, but in no case more than \$10 nor less than \$5 weekly. There is no other section of the act which relates to injuries resulting in partial incapacity. The specific instances in which the compensation is definitely fixed are instances falling under the head of partial incapacity. Both the terms and context indicate that the entire section relates to instances of injuries resulting in partial incapacity.

We cannot agree with the appellant that since the loss from February 18th to May 21st was of the use of the two phalanges, and from May 21st of the loss of the two phalanges, the injury was a single one. These two sections provide for compensation in the case of certain named injuries resulting in the loss of a member or function.

[1] The word "loss" is used in the sense of deprivation. It designates the handicap under which the employé will suffer in the future. Compensation is based upon this loss. It is not measured, as are the other injuries resulting in partial incapacity, by impairment of earning power. Each class of injuries results in partial incapacity, but the compensation for each is based upon a different theory. To support the respondent's claim, "loss" in some cases must be construed to mean disability, and in other cases disability plus deprivation. These two classes are distinct classes of partial incapacity. There is no reason why an injury under each class should not be compensated, and, if the injuries in question be as the respondent insists, the loss of the use of the two phalanges and the loss of the two phalanges, these are two independent injuries for each of which compensation is provided measured as to amount and duration. The loss of two phalanges carries a named compensation, and the loss of the use of two phalanges also carries a similar compensation. There is nothing in the act which prevents compensation for any number of the several injuries specifically provided for. Payment for one does not pay for any but the one injury. And if there has been a partial incapacity followed by the loss of a member, there is nothing in the act which forbids the award of compensation for each. And whether the loss of the member follows an injury to the member resulting in a loss

of its use, or follows an injury to some other member, is quite immaterial; the injuries are equally distinct.

[2] The argument of the respondent relies, to a large extent, upon that part of section 11 which provides that the compensation for the named injuries shall be "in lieu of all other payments." This refers to payments for the named injuries. As to these the compensation designated is exclusive. But this does not limit the award to any one of the compensations provided for the named injuries; nor does it purport to be in lieu of payments made for injuries resulting in partial incapacity not among these named injuries. And since these are a distinct class of injuries resulting in partial incapacity, the compensation provided for these specific injuries cannot and does not cover them. It is exclusive of any other payment by way of compensation for the injuries specifically designated.

The commissioner has stated correctly, we think, the legislative purpose in fixing a definite compensation in these cases as an attempt to avoid unnecessary questions and hearings for the trier which would otherwise have resulted. If we look at the practical results of adherence to the respondent's interpretation of section 11, we shall see that its enforcement would result in the gravest injustice to the employé. The loss of some member may cause a total incapacity of far less duration than the period of compensation given by the statute. In a few weeks he will be ready for work, but his handicap is constant and for life. The handicap determines the loss. But when the loss of the member is preceded by a long incapacity while efforts are made to heal and cure the injury, the injured employé has suffered far more than from the mere loss of the member.

[3] Compensation for the loss of the member will not compensate him for the period of incapacity preceding the loss of the member. The just rule of compensation will give compensation for the period of total incapacity as well as for the loss of the member. Our act is uniformly fair in its theory of compensation. We cannot assume a legislative intent in these instances of partial incapacity at variance with this theory. Under the respondent's theory, if the payments for the total incapacity preceding the loss of the member exceeded that provided for the loss of the member, the employé must return the excess and go without compensation for the larger part of his loss. We do not need to multiply these instances. If the theory of these sections of our act be disability, as the respondent insists, it is impossible to justify awards for specific injury, which in many cases will be far less than the incapacity preceding the loss of a member. If the theory of compensation for the loss of a member is because of the handicap resulting from the loss, it is at once logical and understandable and in no wise conflicts with the award of

compensation for incapacity antedating this loss.

Judgment advised, in accordance with foregoing opinion, dismissing the appeal. In this opinion the other Judges concurred.

(33 Conn. 20)

OLMSTEAD v. LAMPHIER et al.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. MASTER AND SERVANT §387—WORKMEN'S COMPENSATION ACT.

Under the Workmen's Compensation Act, one receiving a distinct injury to the shoulder resulting in total incapacity, and in the same accident losing a leg resulting in partial incapacity, the injured employé was entitled to compensation for each injury; the award for the total incapacity to precede in payment that for the partial incapacity.

2. MASTER AND SERVANT §393½—WORKMEN'S COMPENSATION ACT — "SURGICAL AID."

Under Workmen's Compensation Act, § 7, as amended by Pub. Acts 1917, c. 368, requiring employer to furnish injured employés such medical and surgical aid as the physician shall deem reasonable and necessary, employés under the term "surgical aid" are entitled to splints, crutches, artificial legs, artificial eyes, etc.

Prentice, C. J., dissenting.

Case Reserved from Superior Court, Litchfield County; Joel H. Reed, Judge.

Proceedings by Ralph Olmstead against E. P. Lamphier and others, under the Workmen's Compensation Act (Pub. Acts 1913, c. 138), to obtain compensation for personal injury. There was an award by the Compensation Commissioner, and the defendant named appeals. Reserved by the superior court upon an agreed statement of facts for the advice of this court. Judgment advised dismissing appeal.

Harold J. Quinlan, of Hartford, for appellant. Wilson H. Pierce, of Waterbury, for appellee.

WHEELER, J. On September 26, 1916, the claimant suffered the injuries described below by being thrown from a horse. His left leg was so lacerated that it had to be amputated above the knee. His shoulder was so injured as to cause a partial incapacity equal to one-half total incapacity from the date of the injury to the time of the hearing, May 9, 1917, and it continued thereafter. The commissioner included in his award compensation at the rate of \$7.50 a week for 182 weeks, credit to be taken for payments made, including a sum advanced for an artificial leg. Also, \$3.75 a week for the partial incapacity resulting from an injury to the shoulder, to continue during such incapacity, not to exceed the time provided by law. Also, \$115, being the price of an artificial leg. The respondent appealed from so much of the award as gave compen-

sation for the partial incapacity to the shoulder and that for the price of an artificial leg.

The questions submitted on the reservation were the following: (1) Whether or not the Workmen's Compensation Act of the state of Connecticut imposes a legal duty upon the appellant to purchase for the appellee an artificial leg in accordance with the provisions of section 7B of that act, as amended in 1917, as a part of the surgical service and aid therein provided for. (2) Whether or not, under the provisions of said act, upon the foregoing facts, the appellant, respondent, is legally obliged to pay to appellee, claimant, compensation for partial incapacity arising from the injury to claimant's (appellee's) shoulder, in addition to the specific indemnity for the loss of the appellee's leg.

[1] In *Franko v. Schollhorn Co.*, 104 Atl. 485, just decided, we construed section 11 of our act as providing one form of compensation during total incapacity and another for the permanent loss of a member of the body. The injury to the shoulder was a distinct injury, resulting in total incapacity; the loss of the leg was also a distinct injury, resulting in partial incapacity. For each injury, under our construction of this section, the injured employé was entitled to compensation. The fact that each injury resulted from one accident did not make of these a single injury. Nor did the act intend that compensation for the loss of a member should be in lieu of all compensation for other injuries resulting from one accident. The superior court in New Haven county, in *Foley v. Demarest & Company*, pointed out with great force that a contrary construction, carried to its logical conclusion, might limit the compensation in a case of total incapacity to practically nothing. For example: An injury attended with blood poisoning might incapacitate for an entire year, and the injured person would be entitled to compensation for that period, provided no amputation were necessary; but, if such injury was attended with the loss of a small toe of the phalanx of the fourth finger, compensation would be limited to from six to thirteen weeks. Our act does not permit double compensation, and hence the trial court was correct in making these awards consecutive; the award for the total incapacity to precede in payment that for the partial incapacity.

[2] The agreed facts on the reservation fall far short of those found by the commissioner. Who furnished the surgeon, or, if the employer, whether he found the artificial leg "reasonable or necessary," does not appear in the agreed facts. The commissioner found as a fact, upon evidence, that "surgical aid" included an artificial leg. There is no such finding in the agreed facts. We are left with the bald question whether surgical aid or service includes the furnishing of an artificial leg.

There is no specific provision for the furnishing of medicines or any material or apparatus required by the physician. Yet it is clear that all these are included in the term "medical aid or service." It must also be clear that all necessary bandages, materials, splints, and apparatus required by the surgeon in effecting cure are included under the term "surgical aid or service." The fact is that section 7, as amended by chapter 368 of the Public Acts of 1917, is general in its terms and purposely so. In the New York act (Consol. Laws, c. 87), there is a specification of various things to be furnished. We adopted a different course, and in our act used general terms intending, as we think, to include all things which might reasonably fall within its provisions. The employer is required to furnish the employé a physician, and, in addition, "such medical and surgical aid or hospital service as such physician shall deem reasonable or necessary." This language is broad and general. "Medical aid" is relief pertaining to the science of medicine. And "surgical aid" is relief pertaining to surgery or used in surgery. Webster's New International Dictionary. The term in its ordinary significance is not limited to the personal service of the surgeon, but includes all the means and instrumentalities used in surgery which will help effect a cure. Splints and crutches and apparatus for holding the limb manifestly are brought to the patient by the surgeon, adjusted by him, and usually paid for directly by the patient. It is part of the duty of the surgeon to prepare the stump of arm or leg for the artificial leg or arm. It is a part of his duty to adjust it. Why give the patient splints to hold the bones in place or crutches with which to walk, and regard these as used in surgery? Why supply a glass eye? Because it is the everyday duty of the surgeon to order these things for his patient, and they are included as of course under "surgical aid." There is no difference in principle between supplying these and the artificial limb. That pertains to surgery and is used in surgery. The stump must be prepared by the surgeon to receive the artificial limb, and that must be adjusted to the stump by the surgeon. The only difference between the crutch and the artificial limb is the latter costs more than the former.

Our act contemplates the furnishing of all the medical and surgical aid that is reasonable and necessary. The purpose of this provision is to restore the injured employé to a place in our industrial life as soon as possible by the use of all medical and surgical aid and hospital service which the ordinary usages of the modern science of medicine and surgery furnish. Humanity and economic necessity in this instance are in harmony in working for the accomplishment of the individual and of the public welfare. "Surgical aid" is a term of technical significance and has an established meaning in

standard works on surgery. The duty of the surgeon does not end with the healing of the stump. "As soon as all sensitiveness has left the end of the bone, an artificial limb should be fitted and the patient urged to make efforts to use the extremity." Keen's Surgery, vol. 5, p. 951. The duty of the surgeon continues until the artificial limb is adjusted and the patient has learned how, with the help of the surgeon, to use it properly. It would not be questioned that the entire bill of the surgeon for his services would fall under the head "Surgical Aid." It would be difficult to justify this expenditure, as well as that for bandages or ointments or other material used by the surgeon in his treatment of the patient, and not make a like expenditure for the artificial leg in connection with which these things were used.

The commissioner notes that, as a rule, insurers and insurance companies furnish under compensation acts artificial teeth, eyes, and limbs when required. Undoubtedly, the common understanding revolted at the failure to provide the only means by which the injured employé could be restored to the ranks of industry; and perhaps those in interest also had in mind the small cost of an artificial limb and the fact that the compensation awarded by our act was much less than in many other jurisdictions—a fact due in some measure to the complete aid which the act gives to the cure of the injured.

Judgment is advised, in accordance with the foregoing opinion, dismissing the appeal. In this opinion the other Judges concurred, except PRENTICE, C. J., who dissented as to the artificial leg.

PRENTICE, C. J. (dissenting). I am unable to concur in that portion of the majority opinion which approves of the commissioner's allowance for an artificial leg as one justified by the provision of the statute requiring an employer to furnish an injured employé such surgical aid as the attending physician or surgeon shall deem reasonable. To my thinking the provision of artificial limbs for the improvement of physical efficiency following such repair of the consequences of injuries received as the circumstances will permit lies outside the sphere of the surgeon's professional activities as that sphere is commonly understood and established by actual practice. Such provision, as I understand it, partakes of the character of mechanical rather than surgical aid. I am further of the opinion that if it was the legislative intent to impose the burden of supplying such appliances upon the employer, more appropriate and certain language to that end would have been employed and some attempt made to assure the use of the money exacted of the employer for the purpose intended and to prevent its diversion to other purposes or squandered as the employé may prefer.

(93 Conn. 26)

KRAMER v. SARGENT & CO.

(Supreme Court of Errors of Connecticut. July 23, 1918.)

MASTER AND SERVANT—§387 — WORKMEN'S COMPENSATION—AMOUNT OF AWARD—LOSS OF PHALANX OF FINGER.

Where employé's finger was injured resulting in amputation of phalanx on day of injury, employé was not entitled to an award for total incapacity on account of the injury in addition to compensation for the loss of the phalanx; there being but one injury, inasmuch as incapacity immediately followed and resulted from the loss of the phalanx, and compensation therefor under Workmen's Compensation Act, § 12, being "in lieu of all other payments" for such injury.

Case Reserved from Superior Court, New Haven County; Edwin B. Gager, Judge.

Proceedings under the Workmen's Compensation Act by Herman Kramer against Sargent & Co. Appeal by the defendant from a finding and award of the compensation commissioner of the Third district in favor of the plaintiff, taken to and reserved by the superior court for advice of the Supreme Court of Errors. Judgment advised sustaining the appeal.

Frederick H. Wiggin, of New Haven, for defendant.

WHEELER, J. The claimant, on December 4, 1917, suffered an injury to the terminal phalanx of the index finger of his left hand which resulted on the same day in the loss of this phalanx by amputation and in a total incapacity for all labor from the date of injury to the date of hearing, February 8, 1918, which total incapacity will continue for a period of undetermined extent. The claimant claimed one award for the loss of the phalanx and another award for the total incapacity resulting from such loss. The parties made a voluntary agreement, duly approved by the commissioner, for the payment of the medical, surgical, and hospital expenses and for the loss of the phalanx, and left open for future determination any question as to total incapacity on account of this injury. The commissioner confirmed the voluntary agreement and also made an award for the total incapacity on account of this injury.

The claimed errors of the commissioner are summed up by the respondent in one sentence:

"The commissioner erred in ruling, finding, and deciding that compensation for the loss of the phalanx was not exclusive of compensation for total incapacity which occurred after said loss and grew out of the injury to the phalanx."

In *Franko v. Schollhorn Co.*, 104 Atl 485, just decided, there was a total incapacity preceding the loss and resulting from an injury and continuing during the period of the

attempt to cure the injury to the finger. In *Olmstead v. Lamphier*, 104 Atl. 488, just decided, the loss of the leg and the total incapacity resulting from the injury to the shoulder were independent injuries arising out of the one accident. In this case there is one injury and the incapacity follows immediately the loss of the phalanx and results from it. We reached the conclusion in *Franko v. Schollhorn Co.*, supra, that under our act (Laws 1913, c. 138) there may be a total incapacity and a partial incapacity growing out of the same injury for each of which compensation may be awarded. But such an award is not, as we think, contemplated by our act in the case of a loss of a member.

All of the specified injuries in section 12, for which a specially named award is made, will ordinarily involve a period of incapacity of varying duration. And this is the reason the rate of the award in these cases is made the same as in the cases of total incapacity under section 11. The award was made larger because of the extent of the injury. In section 12, the rate of compensation for cases of partial incapacity resulting from injuries not specifically described is "half the difference between his average weekly earnings before the injury and the amount he is able to earn thereafter"; while, in the cases of partial incapacity resulting from injuries specifically described, the rate of compensation is half of the average weekly earnings of the injured employé. This increased scale of compensation was no doubt intended to cover the loss of the member and the handicap of the future through this loss, but it was also intended to cover all of the injuries resulting from the loss of the member. This compensation is made "in lieu of all other payments"; that is, it is exclusive of all other payments for this particular injury which is the loss of the member. This language is used in its ordinary significance. This is made clear by the amendment of section 12 in 1917 (Laws 1917, c. 368), by permitting the commissioner to award a sum proportionate to the amount set forth for total loss in lieu of all other compensation, thus carrying out the idea of the same language found in the section before amendment. The schedules of rates in the cases of the specified injuries described in section 12 are based upon a system of compensation graded to the injury. The employé knows definitely what compensation follows each described injury, and the employer knows the measure of his liability; and this appears to have been precisely the legislative intent.

Judgment advised sustaining the appeal. In this opinion the other Judges concurred.

(93 Conn. 49)

ROBINSON v. STATE.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. MASTER AND SERVANT §=405(4) — WORKMEN'S COMPENSATION ACT—EVIDENCE.

Finding in proceeding under the Workmen's Compensation Act that injured employé, a highway foreman, was crossing the road at the time of the accident to engage in a conversation with a friend held warranted by evidence.

2. MASTER AND SERVANT §=403—WORKMEN'S COMPENSATION ACT—BURDEN OF PROOF.

In proceeding under Workmen's Compensation Act, burden of proof is on the claimant to show that injury arose out of and in the course of the employment.

3. MASTER AND SERVANT §=375(1) — WORKMEN'S COMPENSATION ACT—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where foreman of a repair gang on a much-traveled highway, whose work did not require his uninterrupted attention, was injured while crossing the road to speak to a friend who had driven up, the injury arose out of and in the course of his employment, within Workmen's Compensation Act.

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Proceeding by Julia A. Robinson under the Workmen's Compensation Act, to obtain compensation for the death of her son, Alderbert Robinson, deceased, opposed by the State of Connecticut. The compensation commissioner disallowed the claim, and the superior court confirmed the award, and the claimant appeals. Error and cause remanded.

This is a proceeding under the Workmen's Compensation Act (Pub. Acts 1913, c. 138) by Julia A. Robinson, mother and dependent of Alderbert Robinson, deceased, against the highway department of the state. Robinson was an assistant foreman of the state highway department, and at the time of the injury which caused his death was employed as working foreman of a gang of workmen engaged in repairing the state highway between North Haven and Wallingford, by patching the same with broken stone and oil. He was at work on the easterly side of the middle of the roadway behind a dumpcart, which obstructed to some extent the view of travelers approaching from the north. While so engaged one Palmer drove an automobile delivery wagon in a southerly direction past the place where Robinson was at work, and waved his hand to him, calling "Hello, Dell." Palmer was an old friend of Robinson, knew that he was working somewhere along the road, and intended to have a talk with him, if opportunity occurred. For this purpose Palmer stopped his car on the extreme westerly edge of the road, looked back for an instant, and saw that Robinson was walking diagonally across the road toward him, moving quickly, with his head down. While so crossing the road Robinson was struck and killed by a touring car driv-

en southerly along the highway. The commissioner dismissed the claim on the ground that the injury did not arise out of and in the course of Robinson's employment, and the superior court on appeal ratified and confirmed the commissioner's award. This appeal assigns as error the refusal of the superior court to correct the findings of the commissioner in certain respects, and that the court erred in confirming the award of the commissioner on the facts found.

Harrison Hewitt and Charles E. Clark, both of New Haven, for appellant. George E. Hinman, Atty. Gen., and Jacob P. Goodhart, of New Haven, for the State.

BEACH, J. [1] It is not necessary to discuss the motion to correct the commissioner's findings any further than to say that paragraph 12, which finds that Robinson's object in crossing the road was to converse with Palmer, is an inference of fact which is supported by the evidence. Paragraph 14 is a conclusion of law which is decisive of the case, and the motion to correct this paragraph attempts to raise the same questions of law which are raised by the first, second, and fifth assignments of error, namely, whether the court erred in holding that upon the facts found Robinson's injury did not arise in the course of his employment. Robinson was employed to supervise and inspect the work done by the rest of the gang, and also to assist in the work. If his injury arose out of and in the course of either branch of his work his dependent is entitled to compensation. There is nothing in the finding to indicate how long Robinson intended to talk with Palmer. We have only the bare fact that he started to cross the road, and the fair inference from the surrounding circumstances that his object was to engage in conversation with Palmer for some length of time, however short. The finding that Robinson also performed such physical labor on the road as was in his judgment necessary indicates that the due performance of his supervisory work did not require his continuous presence at any particular place on the roadway, and did not require his uninterrupted attention.

[2] The burden of proof was, of course, on the claimant to show that Robinson's injury arose out of and in the course of his employment. That it arose out of his employment is not denied; and in this respect the case at bar differs from *Jacquemin v. Turner & Seymour Co.*, 92 Conn. 382, 103 Atl. 115, and from all the other cases cited, in which the injury did not arise from a risk incidental to the performance of the contract of employment.

The injury also happened at a place where Robinson might reasonably be, consistently with the due performance of his supervisory

duties, and in this respect the case at bar differs from *O'Toole's Case*, 229 Mass. 185, 118 N. E. 303, and from *Reed v. Great Western Ry. Co.*, L. R. App. Cas. 81, and from the numerous other cases where the injured employé was confined by the nature of his employment to some particular place or machine and had left that place or machine at the time of the injury.

Finally, Robinson's employment as foreman did not require his uninterrupted attention. No doubt he was expected to work on the road in the larger intervals of his supervisory employment, but he was necessarily a foreman at all times, and his conduct must be measured accordingly.

[3] Upon the findings of the commissioner the case turns on the question whether one employed as foreman of a repair gang on a much-traveled state highway does or does not step outside of his employment as matter of law, because he starts to cross the road, in response to a friendly salutation, for the purpose of conversation, when there is no evidence as to how long he intended to talk, and no evidence that his starting to cross the road did interfere, or that his intended conversation would have interfered, with the due performance of his work as foreman. We think this question must be answered in the negative.

There is error, and the case is remanded, with direction to set aside the judgment and to recommit the cause to the commissioner for an award in favor of the claimant. The other Judges concurred.

(261 Pa. 51)

In re SMITH'S ESTATE (No. 1.)

(Supreme Court of Pennsylvania. March 25, 1918.)

1. TAXATION \S 895(1)—COLLATERAL INHERITANCE TAX—DUTIES OF APPRAISER.

Under Collateral Inheritance Tax Acts, the appraiser, in determining value of realty, may consider the price which the property would bring at private as well as at public sale.

2. TAXATION \S 900(5)—COLLATERAL INHERITANCE TAX—REVIEW.

Findings of fact by the orphans' court on appeal from a collateral inheritance tax appraisement will not be disturbed, in absence of clear error.

Appeal from Orphans' Court, Delaware County.

In the matter of the estate of Margaretta Smith, deceased. On appeal from a collateral inheritance tax appraisement. Appraisement reduced, and Benjamin H. Smith, in his own right and as administrator of the estate, appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Lewis Lawrence Smith, of Philadelphia, for appellant. J. C. Taylor, of Chester, and

Francis Shunk Brown, Atty. Gen., and William M. Hargest, Deputy Atty. Gen., for appellee.

FRAZER, J. Margaretta Smith died in 1915, intestate, survived only by collateral heirs. She left considerable personal property and also real estate consisting of undivided interests in farm lands. An appraiser was appointed, and the real estate appraised at \$75,969.48. Benjamin H. Smith, as executor, and also as an heir of decedent, appealed to the orphans' court, alleging the appraisement was excessive, and considerably beyond the assessed valuation of decedent's interests in the several properties for general taxation.

After hearing evidence the orphans' court reduced the appraisement to \$52,750, basing this valuation upon what it considered a fair and conscionable value of what the properties were actually worth, and in so doing took into consideration testimony as to both private and public sale values, allowing a specific reduction for the diminished value of the interests of decedent by reason of the fact of there being but fractional shares of the entire property, which would necessitate the expense and trouble incident to partition proceedings. Notwithstanding the reduction Smith was not satisfied, and appealed from the court's decree, and now contends the court erred in considering the private sale value of decedent's interest, and should have limited the appraisement to what the properties would sell for at public sale, thus adopting the standard applied in assessing real estate for general taxation.

[1] The act of April 22, 1905, P. L. 258, amending section 1 of the act of May 6, 1887, P. L. 79, relating to the assessment and collection of collateral inheritance taxes, imposed upon all estates a fixed tax on every hundred dollars "of the clear value of such estate or estates." Section 12 of the act of 1887 requires the register of wills to appoint an appraiser whose duty it shall be "to make a fair and conscionable appraisement of such estates." The acts contain no express provision as to the basis to be adopted for determining the "clear value" or as to the manner to be pursued by the appraiser in arriving at the sum he considers to be a fair and conscionable valuation. Plaintiff argues the appraiser should be permitted to consider only market value as represented by what the properties would bring at public sale after due notice, and that the court erred in considering testimony of the price, in the opinion of witnesses, the respective interests of decedent would bring at public sale. For instance, several of the experts called to testify to the worth of the properties stated the value at private sale was considerably higher than at public sale, while others thought there was little difference in the price ob-

tainable by either method of disposal. With respect to the decrease in value because the interests of decedent were but a fractional part of the whole, one witness placed such decrease as high as two-thirds of the estimated market value, another one-half, another estimated the depreciation at 10 per cent. and another was of opinion no difference would result in the price realized. The court below considered all the testimony; took into consideration the fact that the sale was only a fractional interest in the properties in question, and that, consequently, an additional outlay must necessarily be incurred in reducing the interest to cash, such as the time and expense of partition proceedings, as well as disinclination of purchasers to bid on property likely to subject them to such charge and annoyance, and, because of the interest being fractional, allowed a deduction of 25 per cent. from the valuation, based upon the value of the properties as a whole.

[2] While the price property would bring at public sale is a proper criterion of value, it does not necessarily follow that such standard is the only evidence to be considered in determining the "clear value" for the purpose of assessment of collateral inheritance tax, nor is the appraiser prevented from taking into consideration other evidence tending to legitimately affect the value of the land. The act requires the "value" to be ascertained, not necessarily the public sale value, and whatever amount is likely to be obtained at either public or private sale is certainly some evidence affecting its value. If, for any reason, a private sale would result in a higher sum being realized than a public sale, such evidence may legitimately be considered by the appraiser. The allowance of 25 per cent. reduction by the court below for the reason decedent's interest in the property was a fractional one does not fix an arbitrary standard binding upon appraisers in all cases, but is merely a finding of fact based upon the testimony before the court in this case, and is subject to the rule that such finding, when supported by the evidence, will not be disturbed in the absence of clear error. *Andrews' Estate*, 251 Pa. 320, 96 Atl. 747.

On the whole, the conclusion reached by the court below seems to be just and equitable and based upon proper principles, and the decree is affirmed.

(261 Pa. 55)

In re SMITH'S ESTATE. (No. 2.)

Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. March 25, 1918.)

EVIDENCE \S 543(3) — EXPERTS — VALUE OF REAL ESTATE.

Experts may testify as to the value of fractional parts of real estate, though they did not know of sales of such fractional parts.

Appeal from Orphans' Court, Delaware County.

In the matter of the estate of Margaretta Smith, deceased. Appeal from an appraisalment of the collateral inheritance tax. Appraisalment reduced, and the Commonwealth appeals. Appeal dismissed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

J. C. Taylor, of Chester, and Francis Shunk Brown, Atty. Gen., and William M. Hargest, Deputy Atty. Gen., for the Commonwealth. Lewis Lawrence Smith, of Philadelphia, for appellee.

FRAZER, J. The commonwealth appeals from the decree of the court below discussed in the preceding opinion, and complains of the act of the court in reducing the value fixed by the appraiser on decedent's real estate. What was said in the preceding opinion with respect to the principles governing the determination of the question of values, and to the conclusiveness of the findings of the court below are equally applicable here. The objection to the qualification of two witnesses who were without experience in the sale of undivided interests in realty cannot be sustained. The witnesses in question were admittedly competent as experts on real estate values as a whole, and their opinions as to the value of fractional parts were competent, even though they had not made and did not know of such sales. *Lewis v. Springfield Water Co.*, 176 Pa. 237, 35 Atl. 187; *White v. Western Allegheny R. R. Co.*, 222 Pa. 584, 71 Atl. 1061. The fact of their not having previously bought or sold undivided interests in land went to their credibility, and was for the court below. As a matter of fact, the court gave no consideration to the testimony of these witnesses on the question of valuation of fractional interests, and, if there was error in the admission of the testimony, it did no harm.

A serious question arises as to the right of the commonwealth to appeal from the decision of the orphans' court under section 12 of the act of May 6, 1887, P. L. 79, 82, which provides that:

"Any person or persons, not satisfied with said appraisalment, shall have the right to appeal, within thirty days, to the orphans' court of the proper county or city on paying or giving security to pay all costs, together with whatever tax shall be fixed by said court; and, upon such appeal, said courts shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme Court as in other cases."

As there is no merit in the appeal, we deem a discussion and decision of this question unnecessary.

The appeal is dismissed.

(261 Pa. 57)

COMMONWEALTH ex rel. LAFEAN, Com'r
of Banking, v. SNYDER, Auditor
General et al.

(Supreme Court of Pennsylvania. April 3,
1918.)

1. MANDAMUS \S 146—SALARY OF PUBLIC OFFICIAL—REFUSAL OF PAYMENT.

Under Act June 8, 1893 (P. L. 346) \S 4, mandamus is properly brought in the name of the commonwealth on relation of a banking commissioner against the auditor general and state treasurer to compel payment of the commissioner's salary.

2. MANDAMUS \S 77(1)—TITLE TO PUBLIC OFFICE—PAYMENT OF SALARY.

Title to public office can be inquired into in mandamus, where merely question of salary is involved which depends upon claimant's right to hold office.

3. CONSTITUTIONAL LAW \S 14—CONSTRUCTION OF PROVISIONS.

Provisions of the Constitution are to be construed in the ordinary sense of the language used, and the consideration of the circumstances attending its formation, so as to give effect to the popular will.

4. CONSTITUTIONAL LAW \S 73—POWERS OF COURT—INSTRUCTION OF GOVERNOR.

A court has no right to instruct the Governor as to matters involving his duties only and not his power.

5. STATES \S 46—POWERS OF GOVERNOR—REJECTION OF APPOINTMENT—REAPPOINTMENT OF REJECTED NOMINEE.

Where the Senate has rejected a nomination by the Governor to an office, he may, under Const. art. 2, \S 8, after adjournment of the Senate, appoint the rejected nominee until the end of the next session of the Senate, but not for the full or unexpired term without constitutional consent of the Senate.

6. APPEAL AND ERROR \S 752—REVIEW—ASSIGNMENTS OF ERROR.

A question not raised in the assignments of error cannot be considered, though it appears in the statement of the questions involved.

Brown, C. J., and Potter and Moschzisker, JJ., dissenting.

Appeal from Court of Common Pleas, Dauphin County.

Petition by the Commonwealth, on relation of Daniel F. Lafean, Commissioner of Banking, against Charles A. Snyder, Auditor General, and others, for a writ of mandamus. Writ granted, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, MOSCH-
ZISKER, FRAZER, and WALLING, JJ.

Hampton L. Carson and Harry S. McDevitt, both of Philadelphia, C. P. Rogers, Jr., of Harrisburg, and Gabriel H. Moyer, of Palmyra, for appellants. Francis Shunk Brown, Atty. Gen., and Wm. H. Hargest and Wm. H. Keller, Deputy Attys. Gen., for appellee.

FRAZER, J. On April 24, 1917, Daniel F. Lafean, the relator, was appointed commissioner of banking to fill a vacancy occurring during a session of the state Senate, and subsequently the Governor forwarded the nomination for the regular term. The Senate rejected the nomination, and shortly after its adjournment the Governor reappointed him

to fill the vacancy and to serve until the end of the next session of the Senate. The appointee entered upon the duties of his office, and subsequently filed with the auditor general a requisition for salary, which the latter refused to honor on the ground that claimant did not legally hold office. Lafean thereupon filed a petition for a mandamus against the auditor general and state treasurer to compel them to approve and pay the requisition for salary due him. An alternative writ was issued, and, upon argument, judgment was entered against defendants and peremptory writ awarded, from which defendants appealed.

Before entering into a discussion of the principal question in the case, to wit, the right of the Governor to appoint to fill a vacancy one whom the Senate has rejected for appointment for the regular term, we will consider and dispose of the questions of practice and procedure raised by appellants.

[1] The first assignment of error is to the conclusion of the court below that the commonwealth is a proper party plaintiff. Counsel for appellants have furnished no argument in support of this assignment, and apparently have little faith in the merits of their contention. The Mandamus Act of June 8, 1893 (P. L. 345) \S 4, provides:

"When the writ is sought to procure the enforcement of a public duty, the proceeding shall be prosecuted in the name of the commonwealth on the relation of the Attorney General: Provided, however, that said proceeding in proper cases shall be on the relation of the district attorney of the proper county: Provided further, that when said proceeding is sought to enforce a duty affecting a particular public interest of the state, it shall be on the relation of the officer intrusted with the management of such interest. In all other cases the party procuring the alternative writ shall be plaintiff, the party to whom said writ is directed shall be defendant."

There can be no doubt that the present proceeding is brought to enforce a public duty and also one affecting a public interest, namely, the banking department of the commonwealth, and therefore is properly brought in the name of the commonwealth on the relation of the commissioner of banking. While the relator has also a private interest in his salary, yet the payment of his compensation, as well as the payment of other expenses of his office, is a necessary incident to the administration of the affairs of the department, and, being paid out of public funds, is a matter of public concern; consequently, the duty of the officials having charge of such payment is a public duty. The case of Commonwealth ex rel. v. Mathues, 210 Pa. 372, 59 Atl. 961, a proceeding in the name of the commonwealth to compel the state treasurer to pay the salaries of certain common pleas and orphans' court judges, would seem to conclusively settle this question against appellants.

[2, 6] Appellants also contend relator's title to office can be inquired into in this pro-

ceeding. The conclusion of the court below to the effect that this case is an exception to the general rule, that the title to office cannot be determined in mandamus proceedings for the reason that there are no conflicting claimants to the office, but merely a question of right to salary, which in turn depends upon whether claimant properly holds office, was in accord with appellants' contention; therefore, a discussion of the question is unnecessary. Furthermore, the question is not raised in the assignments of error, and for that reason has no place in the statement of the questions involved. The second assignment complains of the refusal of the court below to sustain the objection that there was an adequate remedy at law. This assignment is not pressed in the argument, nor is the question included in the statement of questions involved. Its consideration, therefore, is unnecessary.

The main question in the case is whether the Governor had the power to appoint relative to fill the vacancy which existed after the Senate had rejected his nomination for the regular term. Section 2 of the act of February 11, 1895 (P. L. 4) provides:

"The chief officer of the banking department shall be denominated the commissioner of banking. He shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall hold his office for the term of four years and until his successor is duly qualified."

Article 4, § 8, of the Constitution of Pennsylvania, provides that the Governor "shall nominate, and, by and with the advice and consent of two-thirds of all the members of the Senate, appoint * * * such * * * officers of the commonwealth as he is or may be authorized by the Constitution or law, to appoint; he shall have power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session; * * * if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy." It thus appears the Governor is authorized to fill a vacancy temporarily until the end of the next session of the Senate, but not for a full or unexpired term without the advice and consent of the Senate. Appellants do not contend that the vacancy in question was one that had not "happened" during the recess of the Senate, though it in fact arose while the Senate was in session, but base their argument squarely on the contention that the Governor could not fill the vacancy, however or whenever arising, by appointing one whom the Senate had previously rejected for that office.

The constitutional provision places no express limitation upon the choice of the Governor in appointing to fill vacancies. He is accordingly the sole judge of the qualifications of the appointee, unless an implied re-

striction is placed upon this power by reason of the grant of power to the Senate to reject an appointee to fill a regular or unexpired term. Did the people, in adopting the constitutional provision in question, place an implied limitation upon the power of the Governor to fill vacancies by reason of also having provided that appointments for regular terms of service, or for unexpired terms, should require the approval of the Senate? Or, to state the question in a different form, does it follow that the people, in requiring the consent of the Senate to appointments for regular or unexpired terms of service, intended that a rejection by the Senate of an appointee necessarily eliminated him from the list of possible appointments for filling the temporary vacancy created by such rejection without express words to that effect? If this question be answered in the affirmative it is pertinent to inquire, How long must the disqualification of the rejected person continue? Is it for the succeeding vacancy only, or does it disqualify him and consequently limit the power of the Governor for all time? The existence of these further questions which would follow a construction in favor of appellants' contention, and the failure of the Constitution to provide an answer to them, must necessarily have a bearing on the interpretation of the intent of the people as indicated in the language of the provision in question.

[3] A constitution is to be construed in the popular and ordinary sense of the language used, and in the light of the circumstances attending its formation, so as to give effect to the intent of the framers and of the people in adopting it, and also with a view to carry out the general principles of government. *Commonwealth v. Clark*, 7 Watts & S. 127; *Cronise v. Cronise*, 54 Pa. 260; *Commonwealth v. Bell*, 145 Pa. 374, 22 Atl. 641, 644.

In construing particular clauses of the Constitution it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state, but in other states which it used as a guide, and, in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately, and was not merely accidental. A consideration of the earlier Constitutions of this state throws no light on the subject. The Constitution of 1790 gave the governor no power to fill vacancies, while the Constitution of 1838 contained a provision quite similar to that inserted in the present organic law. Turning to the Constitutions of other states for assistance, we find a majority of them, like our own, do not contain restrictions on the power to fill vacancies. On the other hand, the Constitutions of seven states, namely, Illinois, Georgia, Louisiana, Maryland, West Virginia, Ne-

braska and Texas have express provisions to the effect that the Governor shall not, during the same session of the Senate, appoint to fill a vacancy a person who has been rejected by the Senate, thus impliedly recognizing the necessity of such provision if power to make such appointment is to be withheld. No case has been cited which holds authoritatively that, in absence of such express restriction on the power of the Governor, he cannot appoint to fill a vacancy a person who has been rejected by the Senate. On the contrary, under article 2, § 2, cl. 3, of the federal Constitution, which gives the President power to fill "vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session," Congress recognized the power of the President to reappoint to fill a vacancy, after rejection of the appointee by the Senate, for a full term by adding to the army appropriation bill of February 9, 1863 (4 U. S. Comp. St. 1916, § 3228) a clause that:

"No money shall be paid from the treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate"

—the reason for this being, no doubt, as stated in the debate in the Senate, that while it may not be within the power of the Senate to prevent such appointment, it had the power to prevent payment of the salary incident to the office, which would probably put an end to the habit of making such appointments. In 1886 President Cleveland nominated a person for office in the District of Columbia, and, after his rejection by the Senate, appointed the same person to fill the vacancy, and in our own state Governor Pattison in 1891 reappointed two persons following their rejection by the Senate, which action was upheld by the then Attorney General of the commonwealth, Hon. William U. Hensel, as indicated in an opinion to Hon. Henry K. Boyer, state treasurer, as follows:

"I am in receipt of your favor of July 29th, inquiring whether you are authorized and justified in paying the salaries and expenses of the factory inspector and his appointees, and suggesting that the validity of such payments might be questioned because, you say, Robert Watchorn, the present factory inspector, was 'appointed by the Governor during the session of the Senate and rejected by that body and again appointed after its adjournment.' In reply I beg leave to say that, in my opinion, the appointment of Robert Watchorn as factory inspector by Gov. Pattison, was a valid appointment; that he holds and exercises said office rightfully; that his official acts are valid and binding, and certainly that the validity of his appointment cannot be questioned collaterally by you; and that you are justified and authorized in recognizing him and his warrants as those of a de facto and de jure officer."

That case is identical in all respects with the one now before us, and, while the opinion of the Attorney General is not binding

upon this court, his interpretation of the question is strongly persuasive.

There are no Pennsylvania decisions which give material assistance with respect to the question before us. *Lane v. Commonwealth*, 103 Pa. 481, is cited by appellants. The question in that case was as to the power of the Governor to name an officer. No question of appointment was before the court, much less a question of appointment of a person who had been rejected by the Senate for a full term. In the course of the opinion of the court it is said, in discussing the respective powers and duties of the Governor and the Senate (103 Pa. page 485):

"As already shown, the Constitution declares in section 8 cited, the Governor shall nominate and he shall appoint. Before he completes the appointment the Senate shall consent to his appointing the person whom he has named. It may prevent an appointment by the Governor, but it cannot appoint. It may either consent or dissent. That is the extent of its power. There its action ends. It cannot suggest the name of another. If it dissent the Governor cannot appoint the person named. If it consent he may or may not, at his option, make the appointment. If for any reason his views as to the propriety of the proposed appointment change, he may decline to make it. That option is not subject to the will of the Senate. Until the Governor executes the commission, the appointment is not made. Prior to that time, at his mere will, he may supersede all action had in the case. *Marbury v. Madison*, 1 Cranch, 137 [2 L. Ed. 60]; *Story's Con.*, § 1540."

The above statement that, "If it [the Senate] dissent the Governor cannot appoint the person named," viewed in the light of the question under discussion, undoubtedly referred to the regular or unexpired term for which the appointment was made. The question of the subsequent appointment of the rejected person was not before the court.

In *Commonwealth v. Waller*, 145 Pa. 235, 23 Atl. 382, also relied upon by appellants, the question was whether one whose appointment had been confirmed by the Senate had a right to hold office, though not commissioned previous to the expiration of the term of office of the Governor who appointed him. While it appeared the succeeding Governor appointed another person for the same office, and, upon his rejection by the Senate, reappointed him for the full term, the court said (145 Pa. 256, 23 Atl. 382):

"With the validity of the latter appointment we have nothing to do. Our inquiry is merely as to the right of the respondent to hold the office."

The lower court, in discussing the right of the subsequent appointee, said (145 Pa. 246, 23 Atl. 382):

"We have not been referred to any case which decides that the Governor has power to appoint one who has been rejected by the Senate, to the same office and for the same period for which he was nominated and rejected, or any part of such period; and, in the absence of authority we think the spirit and intent of the Constitution forbids this to be done."

The question was not discussed by the appellate court, and, furthermore, as the reappointment was for the full term, even the

language of the lower court was in part dictum.

[4] *Fritts v. Kuhl*, 51 N. J. Law, 191, 17 Atl. 102, appears to be the only decision directly in point, although in that case the discussion in the opinion is based mainly on the meaning of the phrase, "vacancy happening during the recess of the Legislature." The Governor nominated a judge to fill a vacancy occurring while the Senate was in session. That body refused to confirm the nomination, and, subsequently, during the recess of the Legislature, the rejected person was appointed to fill the vacancy. In holding this appointment valid it was said (51 N. J. Law, 208, 17 Atl. 108):

"The propriety of the appointment of Mr. Kuhl, after his rejection by the Senate, was a question for the Governor alone. This court has no right to instruct the Governor as to matters which involve his duty only and not his power. We cannot know the circumstances which influenced his action, and must presume that he acted rightly."

[5] A careful consideration of the argument and authorities cited by counsel for appellants fails to convince us that in framing the Constitution it was intended to limit by implication the choice of the Governor in filling vacancies. It is of no avail to say that to permit the appointment of one who has been rejected for a full term would in effect enable the Governor to evade the constitutional requirements. We cannot assume a public official will abuse his trust (*Lane v. Commonwealth*, supra), or act with a view to evade the duties of his office. The presumption is to the contrary. *Mansel v. Nicely*, 175 Pa. 375, 34 Atl. 793. In *Fritts v. Kuhl*, supra, it is said (51 N. J. Law, 205, 17 Atl. 107):

"The argument of those who deny the power, that it will tend to deprive the Senate of their just participation in appointments to office, is not of controlling force. It is not logical to argue from an abuse of power to a negation of it. Every authority, however indispensable, may be the subject of abuse. Undoubtedly the Governor may abuse this, as he may any other power intrusted to him, but the argument is equally cogent that the Senate may arbitrarily refuse to consent to every nomination made by the Governor, and leave him powerless to execute the laws, unless he will accede to its demands. The consequences likely to flow from a denial of the Governor's power are much more to be deprecated than those that can result from conceding it."

On page 206 of 51 N. J. Law (17 Atl. 107), in the same opinion, the court further says:

"The possibility of abuse loses its significance the moment we distinguish between power and duty. The question of power alone can be considered by this court. For willful breach of official duty, or abuse of the power committed to him, the Governor is, like other civil officers, liable to impeachment, and must answer to the tribunal erected under the Constitution for the trial of such cases. Even though the Governor should be guilty of a breach of duty in refusing to send any nomination at all to the Senate, during its session, it would be none the less within his power and his duty after the adjournment, to fill the vacancy. In that case, the impeachable conduct would be his willful

refusal to advise with the Senate, and not his act in filling the vacancy in the after recess."

Judgment is affirmed.

BROWN, C. J. (dissenting). (What the Constitution forbids may not be done, and its inhibitions need not always be expressed, for they are equally effective and not less to be regarded when they arise by necessary implication. Page v. Allen, 58 Pa. 333, 95 Am. Dec. 272; *Commonwealth ex rel. v. Heck*, 251 Pa. 39, 95 Atl. 929; Storey on the Constitution, § 424. In construing a constitution its words are to receive their popular, natural and ordinary meaning. *Commonwealth v. Bell*, 145 Pa. 374, 22 Atl. 641, 644; *Keller v. Scranton*, 200 Pa. 130, 49 Atl. 781, 86 Am. St. Rep. 708; *Raff v. Philadelphia et al.*, 256 Pa. 312, 100 Atl. 815. When these two propositions are borne in mind there is no escape, it seems to me, from the conclusion that the Governor's appointment of the appellee as commissioner of banking, to serve until the expiration of the next session of the Senate, after he had been rejected by that body at its late session, was in clear, palpable, and plain disregard and defiance of section 8, article 4, of the Constitution. The words of that article can have but one meaning to a layman, and, if this be so, how can a different one be given to them by the courts, whose duty it is to read them as they are popularly, naturally, and ordinarily understood?

During the session of the Senate the Governor could have appointed the appellee commissioner of banking only with the advice and consent of two-thirds of the members of that body. He sought such advice and consent by nominating him for the said office, but the nomination was rejected, and its rejection was, in effect, a declaration by the Senate that the nominee should not serve as commissioner of banking for the succeeding four years. This action of the Senate did not disqualify him generally for appointment as such commissioner, but meant merely that it would not consent to his appointment to serve for a certain period. In so acting the Senate exercised a power expressly conferred upon it by the Constitution as a check upon the appointing power, and yet immediately after it adjourned the Governor, in the face of its rejection of his nominee, appointed him to the office which it had just declared he should not then fill. If the Constitution may be thus circumvented, the executive may do indirectly what that instrument forbids his doing directly, for he can make appointments against the advice and consent of the Senate; and this is just what has been done in the present case. The average man, with the Constitution of his state before him couched in clear and plain terms, will hardly be able to understand how one whose name had been submitted by the Governor to the Senate, as required by the Constitution, for confirma-

tion as his appointee to a certain office, and had been rejected by the Senate, can, as soon as that body adjourns, be constitutionally appointed to the same office, the vacancy therein having been caused by the rejection. If this can be done, a license will be given to every succeeding Governor to fill every appointive office for a full term, not only without the advice and consent of the Senate, but against them. The check upon his appointing power will be gone, for he may, at the two regular sessions of the Senate held during his term of office, do just what the present executive has done, and, by appointing rejected nominees after each adjournment of the Senate, the appointees would be given full terms of at least four years, for each appointment would extend to the end of the next session of the Senate. As to this, it was said by the very learned Judge Cadwalader, in speaking of the constitutional provision in the federal Constitution relating to appointments by the President:

"Thus he might, though the Senate were in session when the vacancy first occurred, or had sat since it thus occurred, appoint in the recess, an officer who would be objectionable to the Senate if in session, and might, in disregard or defiance of the Senate, continue him in office indefinitely." In re Attorney of the United States, 2 Cadwalader's Cases, U. S. District Ct. 138.

As the rejection of the appellee was for a full term of four years, it covered every portion of that term. "*Majus dignum trahit ad se minus dignum.*"

None of our cases support the conclusion reached by the majority of the court, and it is so admitted. In *Fritts v. Kuhl*, 51 N. J. Law, 191, 17 Atl. 102, the case upon which reliance is placed in sustaining the action of the court below, the question involved in this case was not discussed either in the argument of counsel or in the opinion of the court. The sole question there was whether there had been an actual vacancy which had happened during a recess of the Legislature, and the discussion turned entirely upon what was meant by the words of the Constitution of New Jersey, "a vacancy happening during a recess of the Legislature."

While the question before this court in *Lane v. Commonwealth*, 103 Pa. 481, was the Governor's power of removal, we said, through Mr. Chief Justice Mercur:

"As already shown, the Constitution declares, in section 8 cited, the Governor shall nominate and he shall appoint. Before he completes the appointment the Senate shall consent to his appointing the person whom he has named. It may prevent an appointment by the Governor, but it cannot appoint. It may either consent or dissent. That is the extent of its power. There its action ends. It cannot suggest the name of another. If it dissents, the Governor cannot appoint the person named."

In *Commonwealth v. Waller*, 145 Pa. 235, 23 Atl. 382, one of the contentions of the commonwealth in the court below was that:

"After the senate adjourns, the Governor has undoubted right to commission the person rejected by the Senate."

In answer to this Hon. John W. Simon, late president judge of the Twelfth judicial district whose learning and ability are remembered and will not soon be forgotten, said:

"We have not been referred to any case which decides that the Governor has power to appoint one who had been rejected by the Senate, to the same office and for the same period to which he was nominated and rejected, or any part of such period; and, in the absence of authority, we think the spirit and intent of the Constitution forbid this to be done."

While these words may be regarded as obiter dicta, because not pertinent to the question then before the court, they are entitled to a very great weight as the unqualified view of an eminent jurist upon the precise question involved in this appeal. In my judgment they correctly state the law.

For the reasons stated, the writ of mandamus should have been refused, for, the appointment of the appellee was forbidden by clear, necessary implication, by section 8, article 41, of the Constitution. In this dissent, which I cannot withhold, from the contrary view entertained by a majority of the court, my Brothers POTTER and MOSCHZISKER concur.

(261 Pa. 168)

HUNTINGTON v. SUPREME COMMANDERY, UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. APPEAL AND ERROR ¶589—REVIEW—PAPER BOOK.

No questions, except those raised in statement of question involved, will be considered on appeal.

2. JUDGMENT ¶701—PERSONS CONCLUDED—CORPORATION AND MEMBERS.

Where Massachusetts beneficial society and society organized in Tennessee were consolidated, and the membership merged in latter, Tennessee judgment, based on service by publication on the Massachusetts society canceling the merger was not binding on a member of the Massachusetts society.

3. PROCESS ¶86—SERVICE OF PUBLICATION—NATURE OF ACTION.

Where the entire object of an action is to determine the personal rights and obligations of defendants who are nonresidents, service by publication is ineffectual.

4. COURTS ¶12(2)—JURISDICTION—NONRESIDENTS.

Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and to respond to proceedings against them.

5. PROCESS ¶71—SUBSTITUTED SERVICE—NATURE OF ACTION.

Process sent to a nonresident out of the state in an action to establish his personal liability is no more availing than service by publication.

6. INSURANCE ¶812—MUTUAL BENEFIT INSURANCE—ACTION ON POLICY.

Where plaintiff's husband was a member of a benefit society which was merged with defend-

ant society, and a by-law of the original society provided for action on death of member within one year, but a by-law of the society with which it was merged provided for action within two years, an action so brought was within time.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sarah Emma Huntington against the Supreme Commandery, United Order of the Golden Cross of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKE, and FRAZER, JJ.

Albert Morgan, for appellant. Benjamin O. Frick and Prichard, Saul, Bayard & Evans, all of Philadelphia, for appellee.

BROWN, C. J. In 1893 the Supreme Council of the Home Circle, a Massachusetts corporation, hereafter called the Home Circle, issued a beneficiary certificate to George F. Huntington, which provided for the payment of \$2,000 to the appellee, his widow, upon "satisfactory evidence" of his death. In April, 1906, when the certificate was in full force, the Home Circle entered into an agreement with the Supreme Commandery, United Order of the Golden Cross of the World, a Tennessee corporation, hereafter called the Golden Cross, for the consolidation of the two orders by merging the entire membership of the former into the latter. In November of the same year a bill in equity was filed by a number of the members of the Golden Cross, in the chancery court of Knox county, Tenn., against the said order and the Home Circle, alleging that the Golden Cross had no right, under its charter or the laws of the state of Tennessee, to form the said merger or consolidation, and the prayer was for a decree declaring the agreement of merger null and void and ordering it to be canceled and set aside. The decree asked for was made and affirmed by the Supreme Court of the state in November, 1908. *Knapp et al. v. Golden Cross*, 121 Tenn. 212, 118 S. W. 390. The Home Circle was not served with process in the proceeding and did not appear. Notice was given to it by publication, in accordance with the Tennessee statute, and the decree entered against it was taken pro confesso. From August 1, 1906, to December, 1908, Huntington, who had been received as a member of the Golden Cross, paid, at the order's office in Philadelphia, all premiums or assessments due. After the Supreme Court of Tennessee had affirmed the decree of the chancery court, the Golden Cross notified him that it would receive no more premiums or assessments from him, and the last premium or assessment was returned to him by the local treasurer. He died May 29, 1911, and proof of his death was sent to and received by the appellant. Payment on the beneficiary certificate was

refused, and this action was brought May 28, 1913.

[1] The defenses made were that, as the agreement of merger between the two orders had been declared null and void by the Supreme Court of Tennessee, the appellee had no claim against the appellant, and the action had not been instituted until after the expiration of the period within which, according to a by-law of the Home Circle, it ought to have been brought. A verdict for the plaintiff, followed by judgment on it, was directed by the trial judge, who did not pass upon the second defense set up, but held that the proceeding in the Tennessee court did not affect the right of the appellee to recover, because her husband had not been made a party thereto, and the Home Circle had not been served with process and had not appeared. The foregoing are all the facts material to a consideration of the two questions raised by counsel for the appellant in his statement of the questions involved. No other question raised in his brief will be considered. *Bethlehem Steel Company v. Topliss*, 249 Pa. 417, 94 Atl. 1099.

[2-5] The proceeding instituted against the Golden Cross and Home Circle in the Tennessee court was against them both in personam. Due legal service was had on the former, but the latter never was served and did not appear. The purpose of the bill was to deprive it and its members of rights which they claimed under the agreement of consolidation with the Golden Cross; but there could not be such deprivation, to be given effect by the courts of other states, in the absence of legal service upon the Home Circle or its voluntary appearance as a defendant. *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101.

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any great-

er obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

The precise question now under consideration was decided adversely to this appellant by the Supreme Court of Massachusetts in *Timberlake v. Golden Cross*, 208 Mass. 411, 94 N. E. 685, 36 L. R. A. (N. S.) 597. The situation of the plaintiffs there was exactly that of the plaintiff here, and in holding that they could recover the court said:

"The plaintiffs were not parties or privies to the action brought by Knapp and others against the defendant in Tennessee, and are in no way bound by the decision made therein. *Rothrock v. Dwelling House Ins. Co.*, 161 Mass. 423 [37 N. E. 206, 23 L. R. A. 863, 42 Am. St. Rep. 418]; *Pennoyer v. Neff*, 95 U. S. 714 [24 L. Ed. 565]."

But it is urged that this is in conflict with what was held in *Supreme Council, Royal Arcanum, v. Green*, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771. There is no conflict between the two cases. The Royal Arcanum, a beneficial association, of which Green was a member, had, under its by-laws, changed the rates of assessments. The order was a Massachusetts corporation, and some of its members filed a bill in that state to vacate the raised rates. The Massachusetts court held that they were proper. Subsequently Green instituted a proceeding in New York state, upon the same ground, and upon the same facts, and what was decided by the Supreme Court of the United States was that the judgment in Massachusetts was binding on Green, for the reason that a fraternal and beneficial association is, for the purpose of controversies as to assessments, the representative of all its members. It was so held because the rights of members of a corporation of a fraternal or beneficial character have their source in the constitution and by-laws of the corporation, which are to be construed under the law of the state incorporating the order. In *Knapp et al. v. Golden Cross* the Supreme Court of Tennessee undertook to pass upon the validity of a contract between two corporations, one of which had not been served and had not appeared, and set aside the contract, annulling all rights of appellee's husband under it, though he had never even been named as a party to the proceeding. This was dam-

natus inauditus. Whether the appellee would be bound by the decree of the Tennessee court if the Home Circle had appeared, and therefore ought to be regarded as representing her husband, is a question we need not decide, for it never appeared in pursuance of legal process or otherwise.

[6] When appellee's husband was received by the Golden Cross as one of its members under the agreement of consolidation, it did not issue a new certificate to him. It merely assumed the liability of the Home Circle, with a slight modification, which is of no importance in this issue. A by-law of the Home Circle, adopted June 13, 1898, provides that:

"No action at law or in equity in any court shall be brought or maintained in any cause or claim arising out of any membership, benefit certificate, or death of a member, unless such action is brought within one year from the time when such right of action accrues."

This action is based upon the certificate issued by the Home Circle and the agreement of consolidation, and the contention of the appellant is that there can be no recovery, because it was not brought until two years, less one day, after the death of the holder of the certificate. Even if the appellee was bound by the said by-law, passed five years subsequently to the issuing of the certificate to her husband, its requirement is that an action on the certificate must be brought within one year from the time the right to bring it had accrued. There was no right to bring it until proof of her husband's death had been furnished to the defendant, for the payment of \$2,000 to her was to be made "upon satisfactory evidence" of his death. The certificate and the by-laws of the Home Circle are silent as to when proof of death was to be furnished. A by-law of the Golden Cross provides that:

"No action at law or in equity shall be brought or maintained in any court, for any cause or any claim arising out of membership in the order, or upon any benefit certificate, unless the same is commenced within two years from the time when such right of action accrues. Said right of action accrues when official notice of death is received by the supreme keeper of the records."

Notice of the death of Huntington was sent to and received by the appellant within two years, and, as this action was brought within the same period, the second defense cannot prevail. In support of it *Ulman v. Golden Cross* (this defendant) 220 Mass. 422, 107 N. E. 980, is cited. What was there decided is entirely consistent with our own view. Proof of the death of the holder of the beneficiary certificate was furnished to the Golden Cross April 11, 1906, and a cause of action then accrued; but suit was not brought until June 27, 1911, more than three years thereafter, and it was, of course, held that the disregard of the by-law of the Home Circle barred a recovery.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 140)

In re MAXWELL'S ESTATE (two cases).

(Supreme Court of Pennsylvania. April 22, 1918.)

WILLS §551—CONSTRUCTION—TRUSTS.

Where testator devised his property to trustees for the benefit of his children, and directed on the death of his last child the proceeds should be distributed equally among the grandchildren per stirpes, the children and grandchildren were the sole objects of his bounty, and the succession of any child dying without issue passed to the survivors, to the exclusion of personal representatives.

Appeals from Superior Court.

In the matter of the estates of John Maxwell and of Elizabeth Maxwell. Exceptions to adjudications dismissed, and Charles T. Maxwell in each case appeals. Reversed.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Charles S. Wesley and J. W. McWilliams, both of Philadelphia, for appellant.

POTTER, J. We have here two appeals, involving the same question, taken from decrees of the Superior Court, dismissing appeals to that court, from the final decrees of the orphans' court of Philadelphia county, in the adjudication of the accounts of trustees under the will of Elizabeth Maxwell, deceased, and under the will of John Maxwell, deceased.

John Maxwell died July 28, 1907, leaving a will by which he gave his residuary estate to trustees, to pay the income thereof to his wife, Elizabeth Maxwell, for life, and provided as follows:

"And from and immediately after the death of my said wife, Elizabeth Maxwell, I order and direct my trustees hereinafter named, to keep and hold all my stock in the Wilton Hygiene Underwear Knitting Company, for and during the lifetime of my children and the survivor of them and to pay out of the dividends realized therefrom, the sum of six hundred dollars (\$600.00) per annum to my daughter, Jessie May Maxwell, during her lifetime, and the balance of said dividends, if any, to divide equally among my other children, share and share alike, the issue of any deceased child to take its parent's share. And upon the death of my said daughter, Jessie May Maxwell, I order my said trustees to divide the entire dividends realized from my said stock equally among my children share and share alike until the death of my last surviving child. Upon the death of my last surviving child, I order and direct my trustees or their successors to sell my stock in the Wilton Hygiene Underwear Knitting Company, and divide the proceeds equally among my grandchildren per stirpes."

The testator left to survive him his widow and eight children and the child of a deceased son. The widow, Elizabeth Maxwell, died July 8, 1908, leaving a will containing the following provision:

"I give and bequeath all the stock that I own in the Wilton Hygiene Underwear Knitting Company to my executors and trustees hereinafter named, to keep and to hold for and during the lifetime of my children, and the survivor of

them and to divide equally among my said children, share and share alike, the issue of any deceased child to take its parent's share, all dividends realized from said stock, and upon the death of my last surviving child, I order and direct my executors to sell my stock in the Wilton Hygiene Underwear Knitting Company and to divide the proceeds among my grandchildren per stirpes."

William G. Maxwell, one of the children of John and Elizabeth Maxwell, died May 15, 1915, intestate, unmarried and without issue. Thereafter the trustees under both wills filed accounts. Upon the audits, the question arose as to what disposition should be made of the share of the income which had been payable to William G. Maxwell, during his life, and which had accrued after his death. The auditing judge held that W. G. Maxwell had a vested estate in a one-ninth share of the income, accruing between the death of his mother and that of the last survivor of his brothers and sisters, and awarded the income already accrued since his death to his administrator. Exceptions to the adjudication were dismissed by the court in banc, and the finding of the auditing judge sustained. On appeal, the Superior Court affirmed the decrees of the orphans' court.

While there is no express gift over of any part of the income upon the death of one of testator's children before the arrival of the time fixed for final distribution of the principal, the will shows clearly an intention that the entire income shall be paid to testator's children and grandchildren, and to no other persons. It is to be divided equally "among my said children, share and share alike, the issue of any deceased child to take its parent's share." This language is very similar to that of the will construed in Rowland's Estate, 141 Pa. 553, 554, 21 Atl. 735, 736, which was: "The surplus of net income * * * I direct to be annually divided equally, per stirpes and not per capita, between my five children [naming them] and the issue of [naming them] deceased, and the issue of any other of said children that may at any time have died leaving issue."

In that case Mr. Justice Williams said that the intention of the testator was to give the income of his estate to "two classes, viz., living children of the testator, and living issue of deceased children taking in the right of the parent, or per stirpes." This excluded children who were not living when the right to distribution of the income accrued.

Again in Rowland's Estate, 151 Pa. 25, 24 Atl. 1091, a later case involving the construction of the same will, the former ruling was followed and reaffirmed; the case being cited in the opinion (151 Pa. 27, 24 Atl. 1092) as Bomelsler's Appeal, 141 Pa. 553, 21 Atl. 735. Mr. Justice Williams said (151 Pa. 29, 24 Atl. 1092):

"The objects of his [testator's] bounty are ranged in two classes, one of which, comprising his own children living at the time of the distribution, is a constantly decreasing class, upon the extinction of which, by the death of the

last surviving child, the trust ends and the estate goes into final distribution. The other, comprising living issue of his deceased children, is a constantly increasing class, which must finally include all the beneficiaries under the will, and to the members of which the estate is to go in fee simple. This being settled, and the division being made per stirpes, we think all the distributees take the same estate in the income, viz. a life estate with remainder over to living issue, if any, and in default of issue of such decedent then over to surviving distributees, per stirpes."

The latest case involving a similar question, is Huddy's Estate, 257 Pa. 528, 101 Atl. 818, affirming the decision of the Superior Court at 63 Pa. Super. Ct. 34. There the trustee was directed, after the death of the life tenant, "to pay the said income in equal shares to her children, as above set forth and to the children of any of her said children who may be deceased, such children to take their parents' share, until the death of the last of my said niece's children." It was held that the case was ruled by Rowland's Estate. In the opinion of the Superior Court (63 Pa. Super. Ct. 38-40) the resemblance between the two cases is pointed out at length, and in this court it was said per curiam (257 Pa. 534, 101 Atl. 820):

"The clearly expressed intention of the testator confines the distribution of the income from the estate to the children of his deceased niece, Eliza M. Fagan, and their issue. This was the correct conclusion of the Superior Court. Huddy's Estate, 63 Pa. Super. Ct. 34. Helen Fagan Moore, a grandniece, having died without issue, her interest in the income terminated with her death. Rowland's Estate, 141 Pa. 553 [21 Atl. 735]."

In the present case, both the orphans' court and the Superior Court followed the decision in Little's Appeal, 81 Pa. 190, 192, where Mr. Justice Paxson said that the point in controversy, briefly stated, was this:

"The testator gives the entire income from his estate, consisting wholly of personalty, during the life of his daughter Elizabeth, or while she shall remain single, to his two daughters, Mrs. Martha J. Little and the said Elizabeth, the former to receive one-third and the latter two-thirds of the said income. Mrs. Little is now deceased, leaving a husband and children; Elizabeth is still living and unmarried. The principal * * * is not to be distributed until after Elizabeth marries or dies. In the meantime what is to become of the one-third of the income formerly paid to Mrs. Little?"

It was held that it was payable to the legal representatives of the deceased daughter, upon the ground that there was no gift over of the income on the death of Mrs. Little. We are clear, however, that the conclusion there reached is not a rule of law properly to be applied to the case in hand. This case is to be governed by the principle set forth in Rowland's Estate, and as applied in Huddy's Estate, supra. There is nothing in the wills now before us which indicates an intention to make any distinction between the children. It clearly appears that the children who died leaving issue were to have

but a life estate. What is there in the wills to indicate that a child dying without issue should have any greater or other interest in the income than a child dying and leaving issue? Nothing that we can find; and yet such would be the effect of the decision by the orphans' court, and its affirmance by the Superior Court. Then again, admittedly, under the language of the wills, the interest of the last survivor of the children is an estate for life only, as upon such death the estate is to be distributed among the grandchildren per stirpes. What is there in the wills to warrant the award of any greater or other estate to any of the children than was bestowed upon the survivor of them? Technically, the gift was per autre vie; but to allow this consideration to determine the question in favor of vesting, in a child dying without issue, the share in the income to which it was entitled while living, would be to disappoint the intention and purpose of the testator and testatrix, to the extent, at least, that it would make the accumulation of interest on the share of one dying without issue a part of the estate of such a one, and therefore liable for his debts. In neither of the wills do we see that there was in contemplation any such result. It was evidently intended to confine the succession to the share of any dying without issue to the survivors. Only living children or their issue representing them could take. As Williams, J., said in Rowland's Estate, supra, the purpose was to deal with the beneficiaries in classes, and, upon the death of any one without issue, the class as to him failed, and his life estate fell in. Why should a mere fiction of the law be permitted to govern in such a case as this, when it is apparent that the testator intended her children and grandchildren to be the sole objects of her bounty? We adhere to the doctrine of the decision in Rowland's Estate.

The assignments of error in each of these appeals are sustained; the decrees of the Superior Court are reversed, as are also those of the orphans' court in each case; the costs of these appeals to be paid out of the respective funds for distribution. It is further ordered that the records be remitted for distribution in accordance with the view of the law as expressed in this opinion.

(261 Pa. 38)

ROWAN v. COMMONWEALTH.

(Supreme Court of Pennsylvania. April 3, 1918.)

1. APPEAL AND ERROR \Leftrightarrow 731(2) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

On appeal in a case tried by the court, assignments of error complaining of findings of fact and conclusions of law are defective, where they fail to show exceptions taken, or the action thereon, though exceptions were in fact filed and overruled.

2. APPEAL AND ERROR \Leftrightarrow 731(2) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

Where error is assigned to the findings and conclusions of the court below, the particular ones to which exceptions are taken should be quoted and the action of the court set forth together with the exceptions.

3. EMINENT DOMAIN \Leftrightarrow 124—PARKS—RIGHTS OF ADJOINING LANDOWNER.

Under Acts May 30, 1893 (P. L. 183), March 19, 1903 (P. L. 37), April 7, 1905 (P. L. 117), and June 23, 1917 (P. L. 640), relating to acquisition of Valley Forge as a public park, not defining its limits, but authorizing the commissioners to do so, a person purchasing within its possible limits after the passage of the acts was not chargeable with notice that her land would be taken so as to preclude her from recovering the value of the property with improvements.

4. EMINENT DOMAIN \Leftrightarrow 124—AWARD OF DAMAGES.

After Act April 7, 1905, permitting Washington's headquarters at Valley Forge to be included within a park to be established, property adjacent was purchased, considerable improvements being made, and thereafter the park commissioners included the land within the park, plaintiff could recover the value of the land and improvements at the time she was notified of the taking.

5. EMINENT DOMAIN \Leftrightarrow 202(4) — AWARD OF DAMAGES—ELEMENTS.

Where park commissioners condemn land adjoining a park for purposes of its extension, the value of the premises taken and improvements made for purpose of serving refreshments and entertaining visitors should be considered on the question of damages.

Appeal from Court of Common Pleas; Montgomery County.

Proceedings by the Commonwealth for condemnation of property of Mary L. Rowan. Exceptions to the findings of the trial judge were dismissed and judgment entered on the findings, and the Commonwealth appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

J. P. Hale Jenkins, of Norristown, Francis Shunk Brown, of Philadelphia, and Montgomery Evans, of Norristown, for the Commonwealth. J. Washington Logue and M. M. Gibson, both of Philadelphia, for appellee.

FRAZER, J. The commonwealth, through the Valley Forge Park Commission, appropriated plaintiff's property for park purposes, and, being unable to agree with her as to the compensation to be paid, viewers were appointed, from whose award an appeal was taken and the case tried before the court below without a jury. From the decree of the court the commonwealth appealed. The principal questions raised are the proper measure of damages, and the time from which they are to be computed.

[1, 2] The paper book filed on behalf of the commonwealth contained flagrant violations of our rules. The statement of questions involved violates the rule as to length.

This error is attempted to be corrected by filing a typewritten statement, a practice not to be commended. Further, the assignments of error, four in number, are defective. Each alleges error in the findings or conclusions of law of the court below, but not one quotes a finding, nor do they show exceptions taken, or the action of the court thereon, although exceptions to the findings were, in fact, filed and argued and formally overruled. We have repeatedly said assignments of error are an essential part of the pleadings and on appeal must be complete in themselves without reference to other parts of the record. *North Mountain Water Supply Co. v. Troxell*, 223 Pa. 315, 72 Atl. 621; *Burkhard v. Penna. Water Co.*, 243 Pa. 369, 90 Atl. 157. Where error is assigned to the findings and conclusions of the court below, the particular one to which exception is taken should be quoted, and the action of the court set forth, together with the exception, in order that the assignment shall show the complete transaction. *Land Title & Trust Co. v. Shoemaker*, 257 Pa. 213, 101 Atl. 335; *Lehigh Valley Trust Co. v. Strauss*, 258 Pa. 382, 101 Atl. 1047. The appeal might well be quashed because of the defects referred to.

[3, 4] We have examined the case on its merits, however, and find no error in the conclusion reached by the learned judge of the court below. The Act of May 30, 1893 (P. L. 183), relating to the acquisition of Valley Forge as a public park "for the purpose of perpetuating and preserving the site on which the Continental Army under which General George Washington was encamped in winter quarters at Valley Forge," provides, in section 1, that title to the grounds, "including Forts Washington and Huntingdon, and the entrenchments adjacent thereto, and the adjoining grounds, in all not exceeding two hundred and fifty acres, but not including therein the property known as Washington's headquarters, . . . the location and boundaries thereof to be fixed by the commissioners hereafter mentioned," should be "vested in the state of Pennsylvania" and laid out and maintained forever as a public park. Section 3 of the act provides for payment for the property taken and the fixing of the value of such property, in event of their failure to agree with the owners, by a jury to be appointed by the court of quarter sessions, with a further provision that:

"If the said commissioners shall delay petitioning, as aforesaid, for the period of sixty days after notice is given of their taking possession of said ground, then said jury shall be appointed upon the petition of any person whose property shall be so taken."

An amendment to section 1 of the act approved March 19, 1903 (P. L. 37), increased the maximum area of the park to 500 acres, and by Act of April 7, 1905 (P. L. 117), this limit was further augmented to 1,000 acres.

The last-named act also removed the exception appearing in the act of 1893, with reference to Washington's headquarters, thus formally including that property within the possible park area. By Act of June 23, 1917 (P. L. 640), the maximum area was still further increased to 1,500 acres. The amendatory acts preserved in the identical words the provision of the act of 1893 referring to location and boundaries. Plaintiff's property, consisting of a lot on which was erected a dwelling house and a small building used for the purpose of a shooting gallery and for serving refreshments and selling souvenir postal cards to persons visiting the park, adjoined Washington's headquarters on the south. Plaintiff purchased the property in 1908 from her husband, who had become the owner in 1906. They occupied the premises as a residence until 1916, and derived considerable revenue by serving refreshments and entertaining visitors to Washington's headquarters. At a meeting of the Valley Forge Park Commissioners, held June 5, 1916, a resolution was adopted fixing "the location and boundaries and area of the ground to be taken in addition to those heretofore acquired" so as to include plaintiff's premises, and on June 24, 1916, formal notice was given plaintiff that her "land had been appropriated and condemned by said commonwealth of Pennsylvania for public purposes."

The commonwealth contends plaintiff's land was taken and condemned by the act of 1893, and that the value of her property must, accordingly, be determined as of that date.

The statutory provisions quoted clearly indicated that the Legislature contemplated further steps to be taken by the commissioners to fix the location and boundaries of the 250-acre tract they were given power to appropriate. The maximum area merely was given, leaving to the commissioners to fix the exact boundaries; the only positive direction to them being to include the forts and adjacent trenches. Until after the commissioners had fixed the exact location and boundaries, owners of land not covered by these designated objects were without means of determining whether or not their property would be within the area required by the state. Upon the location and boundaries being fixed, section 3 of the act of 1893 contemplates giving notice to the owners, and petition for appraisal by a jury of view within 60 days thereafter. Manifestly, until these preliminary steps are taken by the commissioners, no right to ask for the appointment of a jury accrues to neighboring property owners, as their property may never be taken. This conclusion is strengthened by the subsequent legislation permitting the commissioners to increase the park tract. Surely property owners in the vicinity were not bound to foresee a gradual growth of the park and its extent, and improve their property at the risk of losing the cost of such im-

provements in the event the commissioners should at a future day decide to exercise their powers and include it within the then existing or subsequently enlarged maximum park area.

The commonwealth concedes the general rule that damages for taking or injury to land are to be determined as of the date of the actual taking or the doing of some unequivocal act by which the municipality or the state indicates the possession of the owner is about to be disturbed (*Volkmar Street*, Philadelphia, 124 Pa. 320, 16 Atl. 867; *Whittaker v. Phoenixville Boro.*, 141 Pa. 327, 21 Atl. 604); but relies upon Philadelphia Parkway, 250 Pa. 257, 95 Atl. 429, as bringing this case within the exception to the rule. An examination of the opinion in that case shows the facts there clearly distinguish it from the present case. The court there recognizes the general rule referred to above, but bases the decision on the fact that the city had committed an unequivocal act showing an intention to open the parkway, and had followed its action by actual work covering a period of years; such proceedings the court holds are a sufficient substitute for the formal ordinance usual in street opening cases. It should be noted that in the parkway case (250 Pa. 262, 264, 95 Atl. 429, 431) there was "a defined public way within specified and limited boundaries," and it is said:

"The termini of the boulevard are definitely fixed by city hall at one end and Fairmount Park at the other. The courses and distances are marked on the ground and at some points the parkway is open to public use. Buildings have been torn down at each end and a large amount of work done looking to final completion. As hereinbefore stated, the parkway must be regarded as one entire improvement. It is either this or nothing."

In the Parkway Case, exact boundaries of the highway were designated from the beginning, and property owners knew at that time whether their property was within or without the line of the improvement. The decision merely holds in effect that where such is the case, and the improvement is an entire one and cannot be carried out in part only and yet effectuate the purpose for which it was planned, the adoption of a formal ordinance is not a necessity, but the liability of the city for damages may be fixed by its act in taking physical possession of a portion of the property and beginning the work of improvement, thus indicating an unequivocal intention to take the whole for the purpose for which intended. That case must be confined to its own facts.

In the present case, we are met at the start with the fact that the boundaries of the 250-acre tract were not specified, but left to the discretion of the commissioners to be exercised at such time as they might see fit. No specific area or property, other than the forts and entrenchments named in the act, was necessary to carry out the purpose of

the statute. The Legislature originally limited the park area to a maximum of 250 acres, even excluding Washington's headquarters, the most important part in point of interest, more than likely because the precise extent of the land used by Washington's army was unknown. Until the commissioners acted by definitely fixing the boundaries, there was no means of determining the property to be included within the tract the state proposed to acquire. The subsequent acts increasing the area were equally indefinite. On the whole, there is nothing to take the present case out of the general rule above stated, and the time of appropriation, must be considered as of the date when the commissioners formally concluded to take plaintiff's property and notified her of that fact.

[5] The remaining question is whether the court properly considered, in connection with the question of damages, the value of the premises for the purpose of serving refreshments and otherwise entertaining visitors to the park. The court based its findings on the market value of the premises "for any purpose that would induce persons to purchase it at the time it was taken." This is in accord with the general rule permitting consideration of any use to which the property may fairly be applied and adopted. *Marine Coal Co. v. Pittsburgh, etc., R. Co.*, 246 Pa. 478, 92 Atl. 688; *North Shore R. Co. v. Penna. Co.*, 251 Pa. 445, 96 Atl. 990. The amount fixed by the court below, in view of the testimony of the witnesses on both sides, is conservative, and, in fact, no fault is found with the sum awarded, except the single contention that the court improperly considered plaintiff's use of the property for business purposes as an item in estimating its market value.

The judgment is affirmed.

(261 Pa. 129)

COMMONWEALTH v. PUDER.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. CONSTITUTIONAL LAW §48—VALIDITY OF STATUTE—POWER OF COURTS.

An act must be upheld, unless its provisions plainly violate a constitutional mandate.

2. CONSTITUTIONAL LAW §70(3)—DUTY OF COURTS.

The Legislature is the sole judge of the expediency of a statute, as well as the necessity for its enactment; and whether it be wise or necessary will not be considered, in determining its constitutionality.

3. STATUTES §81—SPECIAL LEGISLATION.

Act June 17, 1915 (P. L. 1012), regulating the loaning of money in sums of \$300 or less, prescribing penalties for its violation, is not objectionable as special legislation, in violation of Const. art. 3, § 7.

4. STATUTES §114(1)—TITLE OF ACT—SUFFICIENCY.

The title of Act June 17, 1915 (P. L. 1012), regulating the business of loaning money in sums of \$300 or less, gives sufficient notice of the provisions of the act providing for criminal pun-

ishment of one who loans money without procuring a license.

5. CONSTITUTIONAL LAW §62 — BANK COMMISSIONER — GRANT OF LEGISLATIVE DISCRETION.

Act June 17, 1915 (P. L. 1012), regulating the loaning of money in small sums, and giving commissioner of banking discretion to grant license to applicants, is not unconstitutional as a grant of legislative discretion.

6. PAWNBROKERS §2—LICENSES—VALIDITY.

Act June 17, 1915 (P. L. 1012), regulating the loaning of money in small sums, and giving commissioner of banking discretion to grant license to applicant, *held* not invalid.

Appeal from Superior Court.

H. Matthias Puder was convicted of violating the statute relating to the loan of moneys in small sums, and appeals. Affirmed.

Argued before POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Owen J. Roberts and Charles H. Weston, both of Philadelphia, for appellant. Joseph H. Taulane, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., both of Philadelphia, for the Commonwealth.

FRAZER, J. Defendant appeals from the judgment of the Superior Court, affirming the court of quarter sessions of Philadelphia county, entered on a verdict of guilty on an indictment charging defendant with a misdemeanor in violating the act of June 17, 1915 (P. L. 1012), "regulating the business of loaning money in sums of three hundred (\$300) dollars or less," and prescribing penalties for its violation. The principal contention is that the statute is unconstitutional as special legislation, though appellant also questions the sufficiency of the title and whether the act is an improper delegation of legislative power to the banking commissioner.

[1, 2] In view of the decision of this court in *Commonwealth v. Young*, 248 Pa. 458, 94 Atl. 141, relied upon by defendant, in which we held an act, in many respects similar to the one under discussion, approved June 5, 1913 (P. L. 429), to be unconstitutional as class legislation, a comparison of the provisions of that act with the present one is important, for the purpose of ascertaining whether there is in fact such distinction between the two as to warrant a different conclusion in the present case—bearing in mind the rule that every presumption is in favor of the validity of the exercise of legislative power, and that the act must be upheld unless its provisions plainly violate a constitutional mandate. *Sharpless et al. v. Mayor*, etc., 21 Pa. 147, 164, 59 Am. Dec. 759; *Commonwealth v. Butler*, 99 Pa. 535, 540; *Commonwealth v. Grossman*, 248 Pa. 11, 14, 93 Atl. 781.

The act of 1913 referred to provided for the licensing of money lenders under the supervision of the court of quarter sessions; the relevant provisions for the purpose of this discussion being found in section 2, which reads as follows:

"Any person, copartnership, association, or corporation who shall obtain a license, in accordance with the provisions of section one of this act, shall be entitled to loan money at his, their, or its place of business, for which said license is issued, and to charge the borrowers thereof, for its use or loan, interest not to exceed the rate of six per centum per annum, and a brokerage fee of not more than one-tenth of the amount actually loaned. No charge, in addition to the said interest and brokerage fee shall be exacted, charged, or collected, excepting an examination fee of not more than one dollar on all loans not exceeding fifty dollars in amount."

The act of 1915, on the other hand, substitutes the discretion of the banking commissioner for the discretion of the court of quarter sessions, and, after regulating the procedure on application for a license and specifying the necessary qualifications of the applicant, provides further in section 2 that:

"Any person, persons, copartnership, association, or corporation who shall obtain a license, in accordance with the provisions of section one of this act, shall be entitled to loan money in sums of three hundred (\$300) dollars or less, either with or without security, to individuals pressed for lack of funds to meet immediate necessities, at his, their, or its place of business, for which said license is issued, and to charge the borrowers thereof, for its use or loan, interest as follows: Upon loans not exceeding one hundred (\$100) dollars in amount, not more than three (3) per centum per month; upon loans exceeding one hundred (\$100) dollars in amount, and not exceeding three hundred (\$300) dollars, not more than (2) per centum per month; and, in addition, in any case in which the loan is made for a period of not less than four (4) months, on sums not exceeding fifty (\$50) dollars in amount, an examination fee of not more than one (\$1) dollar; on sums exceeding fifty (\$50) dollars, an examination fee of not more than two (\$2) dollars, may be charged, for examining the security offered or the credit and responsibility of the borrower. No charge of any kind, in addition to interest, shall be made on a loan of less than fifteen (\$15) dollars. No charge, in addition to the said interest and examination fee, shall be exacted, charged, or collected."

[3] The distinction between the classifications under the two acts, if any, must rest upon the construction of the provisions above quoted. In the act of 1913 there is no limit to the amount of the loans, nor is there a clearly defined class of borrowers. Under that act a person procuring a license was privileged to charge interest at the rate of 6 per cent. and a brokerage and examination fee not in excess of that provided for in the act, regardless of circumstances or amount of the loan. The statute being general in its scope, and no reason appearing on its face for classifying persons complying with its provisions, this court concluded it violated article 3, § 7, of the Constitution of Pennsylvania, forbidding the passage of any local or special law fixing the rate of interest. That this was the basis of the decision in *Commonwealth v. Young*, supra, appears from the following language in the opinion (248 Pa. 461, 94 Atl. 142):

"The general scheme of the act is to create into a class of persons absolutely undistinguishable from the entire body of citizenship by any-

thing suggesting a differentiation with respect to rights, privileges, immunities, or peculiarities, whether arising out of personal or business relations, and then to invest such class with a privilege denied to all not within the class, namely, the right to collect on money loaned a rate of interest in excess of that to which all others are confined. So much is beyond all question."

On the other hand, the act of 1915 confines the class of loans to those not exceeding \$300 and defines the class of borrowers as "individuals pressed by lack of funds to meet immediate necessities." It thus appears all persons are eliminated from taking the benefit of the act, except those who desire to make loans not exceeding \$300 in amount. *Commonwealth v. Young* did not decide the Legislature might not pass a law regulating the business of loaning money in small sums. On the contrary, the opinion recognizes this right, if a proper basis of classification can be found as appears from the following language (248 Pa. 461, 94 Atl. 142):

"Whether such persons stand in need of further facilities of this character, or whether it is practicable by legislative action to afford the relief needed, are questions wholly aside. This one fact stands out with a distinctiveness that makes it unmistakable and indisputable—the necessary and only effect of this act must be, not to benefit such as are necessitous, but to advantage a class of persons who, however they may have qualified by showing that none in the class have ever been convicted of certain crimes and misdemeanors, are yet willing to pay for the privilege of exacting from those made dependent by their necessities, a rate of interest more than six times the rate borrowers with larger means can be compelled to pay. * * * In what we have said our purpose has been simply to show that the one certain effect of the act is to create a distinct class out of persons having in common, as between themselves, no peculiarities whether of person or business, or anything else, distinguishing them from any other class, and investing the class thus artificially created with special and exclusive privilege with respect to interest charges on money loaned. From our study of the act we see no escape from the conclusions above expressed."

It remains only to consider whether or not the basis of classification adopted in the act of 1915 is a proper one. In *Ayars' App. Cal.*, 122 Pa. 266, 281, 16 Atl. 356, 363 (2 L. R. A. 577), it was held classification to be valid must be based upon "a necessity springing from manifest peculiarities, clearly distinguishing those [members] of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others." Classification is a legislative question, subject to judicial revision only so far as to see it is founded on real, and not merely artificial, distinctions, and if the distinctions are genuine, the court cannot declare the classification void, though they may not consider the basis to be sound. The test is not wisdom, but good faith, in the classification. *Seabolt v. Commissioners*, 187 Pa. 318, 41 Atl. 22; *Commonwealth v. Grossman*, 248 Pa. 11, 93 Atl. 781. In construing a statute, the presumption is that it is

a valid exercise of legislative power, and the burden is upon one who attacks its validity to show a clear violation of the constitutional provision. "The Legislature is the sole judge of the wisdom and expediency of a statute, as well as of the necessity for its enactment, and whether the legislation be wise, expedient, or necessary is without importance to the court in determining its constitutionality. In other words, the assembly has a free hand to legislate on every subject in such manner as it deems proper, unless there is a constitutional prohibition clearly expressed or necessarily implied." *Commonwealth v. Grossman*, supra. Applying the foregoing principles to the present case, the fundamental question is whether a necessity exists demanding legislation for the class of money lenders in sums of \$300 or less to those of limited means who would otherwise be unable to procure needed funds, and whether classification adopted to meet such necessity is based on a real and not merely an artificial distinction. The subject-matter of the act has been before the public and under investigation and discussion for a number of years, not only in this jurisdiction, but in other states as well, and has resulted in the adopting of somewhat similar legislation in probably half the states of the Union. The attempt in recent years to eradicate the evils of the so-called "money loan sharks" by proceedings instituted in Philadelphia and Pittsburgh is a matter of general public knowledge, and those who have given the matter close investigation and thought concede that a prohibition of the business does not accomplish the desired result, and that the only practical method of dealing with the subject is by proper regulation. Our Legislature, in a preamble to the act of 1915, omitted from the *Phamphlet Laws*, but shown in the certified copy of the act from the office of the secretary of the commonwealth, recognizes the situation, and the impracticability of prohibiting the business of loaning money in small amounts, and the need of regulation and supervision by law, and also the fact that such loans are necessarily attended with greater risk than is ordinarily incident to lending money by banks, pawnbrokers, and others who loan only on approved collateral. The fact that loans of this nature rarely exceed the sum of \$300 is admitted, and the adoption of the amount named as a limitation affords a proper criterion for a classification in so far as the peculiar nature and character of the business is concerned. The matter of fixing the maximum amount to be charged for the use of money rests primarily in the discretion of the Legislature and is within the police power of the state. *Griffith v. Connecticut*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151. Statutes passed at various times by our state Legislature recog-

nize certain businesses to be in a separate class, and authorize as to them a departure from the regular rate of interest fixed by the general law. For example, building and loan associations are permitted to charge a premium on loans in excess of the legal rate. There exists in the present case both a necessity and a valid basis for classification of the business of loaning money in small amounts, with or without security, and the distinction between the present law and the act of 1913, which was declared unconstitutional in *Commonwealth v. Young*, supra, furnishes adequate support for the conclusion of the court below that the present act cannot be condemned on the ground of improper classification.

[4] Appellant also contends the title of the act is insufficient to give notice of the provision for criminal punishment of one who loans money without procuring a license. The title is:

"An act regulating the business of loaning money in sums of three hundred (\$300) dollars or less, * * * fixing the rates of interest and charges therefor; requiring the licensing of lenders, and prescribing penalties for the violation of this act."

All the Constitution requires is that the title of an act shall fairly give notice of its subject-matter to reasonably direct the inquirer to the contents. *Allegheny County Home's Case*, 77 Pa. 77; *Bridgewater Borough v. Big Beaver Bridge Co.*, 210 Pa. 105, 59 Atl. 697. Certainly the use of the word "penalties" should put the inquirer upon notice that a violation of the statute's provisions would be followed by either civil or criminal punishment, or both.

[5] Neither is there merit in the argument that the act is an improper delegation of legislative discretion to the banking commissioner, by whom the licenses are to be issued. As was stated by the Superior Court, the appeal is not from an act of the banking commissioner, or from his refusal to act, as it is conceded defendant did not apply for a license, or otherwise attempt to bring himself within the provisions of the statute. The mere fact of the commissioner being given power to grant a license to applicants, in his discretion, if satisfied the character and general fitness of the applicant is such as to warrant the conclusion that the business will be honestly conducted, is not a grant of legislative discretion, as the Legislature has fully described the conditions under which he is to act. There are various statutes on our books in which discretion is given to a public official or board to determine the qualifications of applicants for license to carry on a particular kind of business, among which we may refer to the act of March 19, 1909 (P. L. 46), relating to the qualification of osteopathic physicians the acts of June 19, 1911 (P. L. 1067), and May 15, 1915 (P. L. 534), creating a state board of censors

of moving pictures (the latter were upheld in Buffalo Branch Mutual Film Corporation v. Brettinger, 250 Pa. 225, 95 Atl. 433), and Franklin Film Manufacturing Co., 253 Pa. 422, 98 Atl. 623), and the act of July 22, 1913 (P. L. 928), creating a live stock sanitary board, upheld in Commonwealth v. Falk, 59 Pa. Super. Ct. 217. In Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128, the New York Private Bankers' Act, vesting the granting of licenses in the state controller was sustained.

The case of O'Neil et al. v. American Fire Insurance Co., 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650, relied upon by defendant, is not controlling here; in that case, as we pointed out in Jermyn v. Scranton, 186 Pa. 595, 602, 40 Atl. 972, there was an attempt to delegate to a single individual the power to prescribe a compulsory form of contract between private parties, leaving to the official the full power to prescribe the form and enforce its use.

The judgment is affirmed.

(361 Pa. 139)

WHEELER v. REMEDIAL LOAN CO. OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 22, 1918.)

Appeal from Superior Court.

Action by William C. Wheeler against the Remedial Loan Company of Philadelphia. Judgment for defendant was affirmed in the Superior Court, and plaintiff appeals. Affirmed.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Edward A. Kelly, of Philadelphia, for appellant. Thos. Raeburn White, T. Henry Walnut, and Harry D. Wescott, all of Philadelphia, for appellee.

FRAZER, J. In this case plaintiff appeals from a judgment for defendant in an action to recover the difference between the amount defendant charged plaintiff for a loan and the amount due with interest computed at the rate of 6 per cent. The question raised involves the constitutionality of the act of June 17, 1915 (P. L. 1012), and as that question is fully, discussed and determined in Commonwealth v. Puder, 104 Atl. 505, nothing additional need be added here.

The judgment is affirmed.

(261 Pa. 181)

In re WICKERSHAM'S ESTATE. (No. 1.)

Appeal of GOWEN.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. WILLS §740(4) — AGREEMENT BETWEEN LEGATEES—PERSONS AFFECTED.

Where testator left estate in trust to pay certain sums to his children if alive, and on their death leaving issue to pay the same sum to children appointed by will of their parents, and in default of appointment in equal shares, and children of testator agreed as to distribution of the income during their lives, agreement was valid as to them, but did not affect the grandchildren.

2. WILLS §523—CONSTRUCTION—CLASS—OR—AND.

A bequest to "children or grandchildren" held to be read as one to "children and grandchildren," and hence to a class, and not to individuals.

3. WILLS §524(6) — TIME OF ASCERTAINMENT OF CLASS.

A bequest to a daughter for life, and thereafter to her children or grandchildren her surviving, meant children and grandchildren living at death of life tenant.

4. PERPETUITIES §4(3)—VESTING—VALIDITY.

That life estates given by will might extend to a greater period than the period fixed by the rule against perpetuities does not affect their validity, if they vest within the time required by the rule.

5. WILLS §74—PARTIAL DISPOSITION OF ESTATE.

A testator may bequeath the income of his estate for a certain period without disposing of the principal, which in such event passes to his heirs at law.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Morris S. Wickersham. From a decree dismissing exceptions to adjudication, Morris W. Gowen appeals. Affirmed.

Argued before MESTREZAT, POTTER, STEWART, FRAZER, and WALLING, JJ.

Lester B. Johnson and Lewis H. Van Dusen, both of Philadelphia, for appellant. George J. Edwards, Jr., of Philadelphia, for appellee.

WALLING, J. This appeal involves the construction of certain provisions in the last will of the late Morris S. Wickersham, of Philadelphia, who died in September, 1888. By the will testator's entire estate, aside from some specific bequests, is given to his executors, in trust, for certain declared purposes; among others, it states:

"Fourth. To pay my daughter, Ive, during the term of her natural life the sum of eighty-three dollars and thirty-three cents on the first day of each and every month, and upon her death leaving issue surviving her then I direct that the said eighty-three dollars and thirty-three cents shall be paid monthly and in such amounts to such of her children as she may direct and appoint by her last will and testament or any writing in the nature of a last will and testament. In default of said appointment I direct that the said sum of eighty-three dollars and thirty-three cents shall be paid to her children

share and share alike monthly during the term of their natural life. In case of the death of my daughter Ive without issue her surviving then I give devise and bequeath the said sum of eighty-three dollars and thirty-three cents to my hereinafter mentioned executors in trust for the uses and purposes following.

"Fifth. To pay all the income of my said residuary estate to my daughter Mary during her natural life, and upon her death leaving children or grandchildren her surviving then I direct that the said income from my residuary estate be paid to such of her children or grandchildren and in such proportions as she may direct and appoint by her last will and testament or any writing in the nature of a last will and testament. In default of such appointment I direct that the said income from my residuary estate be paid to her children or grandchildren share and share alike during the term of their natural life. The grandchildren to take but the share that their parent would be entitled to if living. In the event of the decease of my daughter Mary without children or grandchildren her surviving then I give and bequeath the whole of the income from my residuary estate to my executors hereinafter named, in trust for the uses and purposes hereinafter set forth.

"Item Sixth. In the event of my said daughter Mary dying without children or grandchildren her surviving I give and bequeath the income of my residuary estate in equal moieties or half parts to my brother Samuel M. Wickersham and my son-in-law the Marquis Louis Carlo Taffini d'Acceglio their heirs and assigns forever. I make this devise moreover it being my desire that an intestacy should never occur as to any part or portion of my estate."

Besides the two daughters, testator left a son, to whom he gave a life annuity. The son died in 1901, Mary in 1911, and Ive in 1916. In December, 1883, an agreement was made, to which the three children were parties, by which they renounced their respective rights under the will and agreed to share equally in the income from the estate during life, and thereafter for a like division of the estate among their children. This agreement, which left the estate in the hands of the trustees, was faithfully carried out until the death of testator's children. Ive left one child, the appellant, Morris W. Gowen; and Mary left as her only child Kate Nassall-Rocca, and no issue of a deceased child. Ive left a writing in the nature of a last will, which says:

"I do give, devise and bequeath all my property, real, personal or mixed, of whatsoever kind and wherever situated, of which I may die possessed or over which I may have any power of appointment under the will of my father, Morris S. Wickersham, deceased or otherwise, unto my son, Morris W. Gowen."

Mary died intestate, without exercising the power of appointment conferred by her father's will. Ive's son and Mary's daughter were born before the death of their grandfather and are mentioned by name as legatees in his will. They and the three children of testator's son now constitute the heirs at law of said Morris S. Wickersham, deceased.

[1] In the adjudication by the court below, the trust created by testator's will is sustained, and it is held, in effect, that there-

under Morris W. Gowen is entitled for life to the \$83½ per month and Kate Nassali-Rocca to the balance of the income of said residuary estate; and that the time for the distribution of the principal has not arrived. The adjudication seems well-founded; for, while the agreement may have been valid as to testator's children, it does not affect grandchildren, who were not parties thereto, and who take under their grandfather's will, directly or by virtue of a power of appointment therein given. Ive's execution of the power was by testamentary writing and in favor of her son; but, in our opinion, whether valid or invalid, the result would be the same, for Morris W. Gowen as Ive's only child, would take the life annuity under the plain terms of the original will, and that is all he could take under the power of appointment, for, taking together the entire provision for Ive's children, it only extends "during the term of their natural life." And in either event the annuity vested in him on the death of his mother, so as to that the rule against perpetuities has no application.

[2-4] But it is strenuously urged that the bequest to Mary's children or grandchildren violates the rule against perpetuities and is invalid. That depends upon the time of the vesting of the bequest. If that be within the life or lives in being and 21 years thereafter, the gift is good, although its enjoyment be deferred or continued beyond that time. See *Edwards's Estate*, 255 Pa. 358, 90 Atl. 1010; *Lawrence's Estate*, 186 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925; *Rhodes' Estate*, 147 Pa. 227, 23 Atl. 553. We here construe the word "or" in the bequest as "and," so it will read "children and grandchildren," thus forming a class. Then the rule applies that a gift to a class upon the termination of a life estate includes members of the class born after the testator's death. *Edwards's Estate*, supra. This would embrace all of Mary's surviving children and grandchildren, subject to the provision that the grandchildren take but the share their parent would be entitled to if living—that is, if living at Mary's death. It is then that the income of the residuary estate vests in her children and grandchildren, and that is the time to ascertain the members of the class. "If living" means if living at Mary's death, and not at some remote period. Had the bequest to such children and grandchildren been presently payable at testator's death, it would have included only such as were then in existence; but, being payable or vesting at the death of the first taker, it embraces those born meantime. However, only the income for life is given Mary's children and grandchildren, and that having passed to those in existence at her death, there is no reason for construing the will so as to include grandchildren thereafter born or whose parents thereafter die. A life estate vesting in a surviving child under the

will, as a member of the class, becomes extinct at his death, and does not pass on to his children.

Taking the will as a whole, in our opinion it includes only such of Mary's grandchildren as might at her death stand in the place of a deceased child. So construed it does not transgress the rule against perpetuities; for, the life estate having vested in the children and grandchildren within the time, the fact that it might extend beyond is immaterial. The rule is tested by the possible, not actual, events, and, when so considered, if the bequest offends as to any member of a class it is void as to all. *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565. The presumption is that a testator does not intend to violate the rule against perpetuities, and that is a strong reason for a construction that will not. *Rhodes' Estate*, supra. If, in connection with a certain devise, a testator expresses a desire to avoid an intestacy as to any part or portion of his estate that does not enlarge, to a fee, estates given to others for life in former clauses of the will; nor does the expression of such desire indicate an intention of transgressing the rule against perpetuities.

This will was before Judge Ashman in the orphans' court shortly after Mr. Wickersham's death, and the final conclusion then was that it did not violate the rule against perpetuities, but created an intestacy. The decree of distribution there made, however, was based upon the agreement above mentioned. For that reason, and because the parties now before the court were not then represented, nor parties to the agreement, and because there is a different fund now for distribution, the rights of these litigants are not concluded by that adjudication. See *Kellerman's Estate*, 242 Pa. 3, 88 Atl. 865. In our opinion it is not necessary here to invoke the rule established by *Whitman's Estate*, 248 Pa. 285, 93 Atl. 1062, and other cases that life estates will not be disturbed because ultimate limitations may transgress the rule against perpetuities. The gift of the income, unlimited in duration and with no gift over, will carry the principal; but that rule cannot apply here, as the income is given only for the natural life of the beneficiaries, except as to the alternative bequest which can never take effect.

[5] A testator may bequeath the income of his estate for a certain period without disposing of the principal, which in such event passes to his heirs at law; and that is this case. Morris W. Gowen is entitled to his life annuity, and Kate Nassali-Rocca is entitled to the balance of the income of the residuary estate during her life; then in our opinion the estate will pass to the heirs of Morris S. Wickersham, deceased, under the intestate laws.

The assignments of error are overruled, and the decree is affirmed, at the costs of appellant.

(261 Pa. 126)

In re WICKERSHAM'S ESTATE. (No. 2.)

Appeal of NASSALI-ROCCO.

(Supreme Court of Pennsylvania. April 22, 1918.)

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Morris S. Wickersham. From the decree dismissing exceptions to adjudication, Kate Nassali-Rocca appeals. Appeal dismissed.

Argued before MESTREZAT, POTTER, STEWART, FRAZER, and WALLING, JJ.

George J. Edwards, Jr., of Philadelphia, for appellant. Lester B. Johnson and Lewis H. Van Dusen, both of Philadelphia, for appellee.

WALLING, J. In the opinion filed herewith on the appeal of Morris W. Gowen, from the same decree (In re Wickersham's Estate, 104 Atl. 500), we have considered the questions here raised, and, for reasons there given, this appeal is dismissed, at the costs of the appellant.

(261 Pa. 100)

AHRENS et al. v. CITY OF READING.

(Supreme Court of Pennsylvania. April 8, 1918.)

MUNICIPAL CORPORATIONS §874(6) — CONTRACT FOR PUBLIC IMPROVEMENT—DECISION OF ENGINEER—CONCLUSIVENESS—QUESTION FOR JURY.

A provision in a contract with a city for a public improvement that the decision of the city engineer shall be final in all disputes between the parties, and that he shall determine the amount or quantity of the several kinds of work which are to be paid for and the compensation, will not prevent submission of an action to recover for extra work to the jury, where the issue as to whether the engineer acted within the authority conferred on him by the contract was involved.

Appeal from Court of Common Pleas, Berks County.

Action by H. E. Ahrens and W. B. Ahrens, trading as H. E. Ahrens Company, against the City of Reading. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Jefferson Snyder and Wellington M. Ber-tolet, both of Reading, for appellant. Isaac Hiester and John B. Stevens, both of Reading, for appellees.

MOSCHZISKER, J. The plaintiffs sued to recover on a written contract with the city of Reading for the construction of filter beds, claiming \$23,780.00. They obtained a verdict for \$15,831.02, upon which judgment was entered, and defendant has appealed.

About three-fourths of the amount sued for represents the contract price of additional work and material furnished by plaintiffs, which entered into the construction of foundations and flooring of the filter beds; and the remaining one-fourth, the stipulated price of additional concrete used by plaintiffs in erecting the roofs of these beds. We shall

consider the two items of claim separately and in the order named.

As to the first item, the contract in question provides, *inter alia* :

"Wherever excavations are carried on beyond the lines and grades furnished by the engineer, the contractor shall, at his own expense, refill such places with concrete or other material selected by the engineer. Wherever materials are encountered which are not suitable for supporting the structures, the excavation shall be carried to such additional depth as may be specified by the engineer. Excavation and concrete necessary for such additional depth will be paid for [by the city] at the prices bid [by the contractor] for excavation and concrete masonry."

At the trial, plaintiffs claimed and gave evidence to prove that, during the course of preparing the grounds for construction of the beds, defendant's engineer in many instances determined that rock material "encountered" was not suitable "for supporting the structures," and, for that reason, directed the excavations be carried to additional depths specified by him; that, in obedience to and in accordance with these directions, they (the plaintiffs) were obliged to make additional excavations to the extent claimed for in this suit. On the other hand, the defendant contended and presented evidence to prove that, whenever its engineer decided that materials encountered were not suitable for support, and ordered additional excavations, these were allowed and paid for; that as a matter of fact the particular additional excavating here in question was necessitated by the negligence of plaintiffs in blasting out rock, and was not in any sense caused by "encountering" unsuitable "material."

Thus clear issues of fact arose, which were tersely and properly submitted to the jury. The defendant contends, however, that no evidence should have been received on these issues, and that they ought not to have been submitted to the jury, because of two clauses contained in the written contract: (1) A provision to the effect that "the decision of the engineer shall be final and conclusive in all disputes and disagreements which may arise between the parties to this agreement." (2) A stipulation that "the engineer shall in all cases determine the amount or quantity of the several kinds of work which are to be paid for * * * and the * * * compensation to be paid," and certify accordingly.

In receiving testimony and charging the jury, the learned trial judge properly acted upon the theory that the engineer, when rendering his decisions, was "bound to * * * give due effect to the terms of the contract and not * * * to depart from them or substitute something else in their place"; and therefore, wherever additional excavations were made because materials were encountered which were not suitable for supporting the structures, and these excavations

were carried to depths specified by the engineer, the latter, under the terms of the contract, was obliged to make allowances of extra compensation to plaintiffs, at the prices named in the agreement, citing *Drhew & Beel v. Altoona*, 121 Pa. 401, 15 Atl. 636; *Coryell v. Dubois Boro.*, 226 Pa. 103, 75 Atl. 25. Again, in refusing judgment *n. o. v.* the court below properly sustained the theory upon which the case had been tried, and correctly held that the "disputes" involved were really between the contractors and the engineer, as to whether or not the latter had specified the additional depths in question and concerning his stated reasons for so doing, if done; and since there was no denial as to the execution of the work in question or as to the prices to be paid therefor, if any, the court below did not err in applying the principle laid down in *Smith v. Cunningham Piano Co.*, 239 Pa. 496, 501, 86 Atl. 1067, and the authorities there cited, governing cases of this kind.

The syllabus of the *Smith Case* states the rule thus:

"Where * * * the controversy is mainly as to the conduct of the architect himself, there being evidence tending to show that he was capricious and unreasonable in refusing to approve of work that had been done in strict accordance with his directions, the question is for the jury, and the latter is properly instructed that the arbitration clause in the * * * contract referred to questions arising between the contractor and owner, and not to questions that concerned the performance of duties by the architect himself."

Here, if as a matter of fact the excavations claimed for were made on and in accordance with the order of the city engineer, following his decisions that materials had been encountered which were "not suitable for supporting the structures" (and the jury has so found), it follows as a matter of law that plaintiffs would be entitled to payment; and a refusal of the engineer so to certify would not be the exercise of arbitral jurisdiction, but simply a capricious attempt to deprive plaintiffs of their contractual rights. Hence, notwithstanding the arbitration and certificate clauses contained in the written agreement, the case was for the jury, to determine the beforementioned facts regarding the conduct of defendant's engineer.

In view of the conclusion just stated, it becomes unnecessary to consider the other

point discussed in the paper books, as to whether or not, since the contract contains a provision that the engineer's payment certificates shall be subject to review and correction by a board representing the defendant city, the arbitration and other clauses above referred to could, under any circumstances, interfere with the right to trial by jury.

On the second branch of the case, concerning plaintiffs' claim for additional concrete entering into the construction of the filter-bed roofs, the written agreement provides, *inter alia*, that concrete shall be "wetted and mixed to form a stiff paste"; but plaintiffs claim defendant's engineer compelled them to mix it in a loose, liquid state, that the prescribed molds for holding the substance were not adapted to this fluid condition, and hence that the use of a greater quantity of concrete became necessary. The contract stipulates, where quantities shall be increased from any cause which may enhance the expense of construction, "such increase shall be paid for at the rates herein provided."

In disposing of the claim in hand, the court below well says that the charge explicitly limits the jury's allowances on this account to occasions where the necessity for increasing the quantity of concrete arose purely from a change in the consistency thereof ordered by the city's engineer, and forbids allowances where the use of additional material was traceable to any shortcomings or omissions on the part of plaintiffs themselves; and President Judge Endlich adds:

"It is by no means clear, from the size of the verdict rendered, that the jury allowed plaintiffs anything on this item of their demand; but, if they did, the allowance must be presumed to have been made in accordance with these instructions."

As stated by the court below, the verdict strongly indicates that the jury made no allowance to plaintiffs on account of the present item of claim; but, be this as it may, after carefully reading all the testimony, we are not convinced of the inapplicability to this branch of the case of the principles already stated in our consideration of the subject of the additional excavations, or that harmful error was committed in submitting the issues involved to the jury.

The assignments are overruled, and the judgment is affirmed.

(117 Me. 326)

WEBBER et al. v. McAVOY.

(Supreme Judicial Court of Maine. Aug. 21, 1918.)

1. TROVER AND CONVERSION ¶16—CONVERSION OF LOGS—GIST OF ACTION.

In action of trover for conversion of logs cut from plaintiffs' land, plaintiffs, to maintain action, must show that, at time of alleged conversion they had either actual or constructive possession of the premises; the gist of the action being the invasion of plaintiffs' possession.

2. TROVER AND CONVERSION ¶40(8)—TITLE—PRIMA FACIE EVIDENCE.

Where plaintiffs claimed title to land under a mortgage with full covenants of warranty which had been foreclosed and title under which by reason of certain assignments and other mesne conveyance had passed to plaintiffs, the warranty deed and deraignment of title thereunder are prima facie evidence of title and seizure.

3. TROVER AND CONVERSION ¶16—PRIMA FACIE TITLE.

Prima facie evidence of title entitles plaintiff to recover in trover for cutting timber against a mere trespasser or one who cannot prove better title.

4. PROPERTY ¶9—EVIDENCE OF TITLE—QUITCLAIM DEED.

Where plaintiff claims title under foreclosure of mortgage, a quitclaim deed from mortgagee to mortgagor, of the same date as the mortgage and to which reference is made in the mortgage, does not prove that there is no title in plaintiff.

5. MORTGAGES ¶127—QUITCLAIM DEED—REFERENCE TO MORTGAGE.

Reference in a mortgage to quitclaim deed from mortgagee to mortgagor, dated same day as mortgage, was merely assistance to determine the source of title, and not intended to determine the quality or quantity of title.

6. ADVERSE POSSESSION ¶112—BURDEN OF PROOF.

The burden of proof of title by adverse possession is upon him who alleges it.

7. ADVERSE POSSESSION ¶44—CONTINUITY OF POSSESSION—CUTTING TIMBER.

Cutting timber from wild land and selling stumpage therefrom held insufficient to establish title by adverse possession, where there were intervals of a number of years between every act relied upon; such acts, though open and notorious, being more in nature of acts of trespass long separated in time, and failing to show that continuity of possession or occupation which is required by the common law or which comports with ordinary management of a farm.

Report from Supreme Judicial Court, Penobscot County, at Law.

Action by Charles P. Webber and others against Richard McAvoy. Case reported. Judgment for plaintiff.

Argued before SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Ryder & Simpson, of Bangor, for plaintiffs. Bertram L. Smith, of Patten, and E. A. Atherton, of Sherman Station, for defendant.

BIRD, J. On report. An action of trover for the recovery of damages for the conversion of certain logs cut from the locus described below in the years 1909 and 1910.

"It is admitted that the alleged conversion was of lumber cut upon the 66 acres lying next easterly of a 100-acre lot located in the southwestern portion of Benedicta or the west corner of lot No. 1, according to Caleb Leavitt's plan."

[1] As the right to the logs depends upon the possession of the locus from which they were cut, the plaintiffs, to maintain the action, must show that, at the time of the alleged conversion, they had either actual or constructive possession of the premises. If they did not have the title, they must show actual possession; the gist of the action being the invasion of the plaintiff's possession. This is familiar law. *Thurston v. McMillan*, 108 Me. 67, 68, 78 Atl. 1122; *Stevens v. Gordon*, 87 Me. 564, 566, 567, 83 Atl. 27; 3 Wash. Real Prop. § 1945.

[2, 3] The plaintiffs claim title and possession under a mortgage with full covenants of warranty given by Fayette Shaw and others to the Bishop of the Diocese of Portland. This deed of mortgage, in terms, includes the locus or 60-acre lot. The mortgage has been foreclosed, and the title thereunder, by reason of certain assignments and other mesne conveyances, is in the plaintiffs. Such being the case, the warranty deed and deraignment of title thereunder are prima facie evidence of title and seizure and entitle the plaintiffs to recover against a mere trespasser or against one who cannot prove better title or that the mortgagor had no title. *Thurston v. McMillan*, 108 Me. 67, 71, 72, 78 Atl. 1122; *Smith v. Sawyer*, 108 Me. 485, 487, 81 Atl. 868; *May v. Labbe*, 112 Me. 209, 210, 91 Atl. 929; *Smith v. Booth Bros., etc., Co.*, 112 Me. 297, 306, 92 Atl. 103. See, also, *Chandler v. Wilson*, 77 Me. 76, 82.

[4, 5] The defendant in disparagement of the plaintiffs' title offers the quitclaim deed of the Bishop of the Diocese of Portland to Fayette Shaw and others, of the same date as the mortgage given by the latter and already referred to, and to which reference is made in the mortgage, of all the right, title, and interest of the grantor in the same property described in the mortgage given by the grantees to the grantor. This deed falls far short of proving no title in plaintiff or a title inferior to that of defendant, whose claim of title is considered later. The deed conveys, it is true, only the grantor's right, title, and interest; but it by no means follows that the grantor did not possess a complete and impregnable title. If the fact be otherwise, the defendant must proceed further with his proof. See *Jones v. Webster Woolen Co.*, 85 Me. 210, 27 Atl. 105. The situation of the plaintiff is not that of the defendant in *Thurston v. McMillan*, 108 Me. 67, 72, 78 Atl. 1122. Nor do we find the reference, in the deed of mortgage to the deed of Shaw et al. to the Bishop of Portland, aught but assistance to determine the

source of title, not an intention to determine the quality or quantity of title. *Perry v. Buswell*, 113 Me. 402, 94 Atl. 483.

The defendant shows no title by deed, but claims title by adverse possession and that the 60-acre lot or locus was and is a part of a lot originally laid out as a 160-acre lot, the other 100 acres constituting the remainder of the 160-acre lot, lying westerly of the 60-acre lot. The evidence does not satisfy the court that the 160 acres in question were laid out in one lot, but rather that they constituted two lots; one of 100 acres and another of 60, or more, acres.

The evidence tends to show that the grandfather of defendant settled upon the 100-acre lot in the southwest corner of Benedicta, cleared and cultivated about 40 acres of land upon its westerly side, and that at his death in 1853 there had been built upon it a log house, a barn, and other outbuildings, all of which had disappeared at the time the case was reported. The easterly line of the 100-acre lot does not appear to have been indicated or established upon the face of the earth, nor do we find the contention of the defendant that the easterly line of the 60-acre lot was so established sustained by a preponderance of the evidence. Neither the 100-acre lot nor the 60-acre lot were inclosed by fences, and both were wild and uncultivated lands, except the westerly 40 acres of the former which are now partly grown up to trees or bushes. Upon the death of the grandfather, his son, Thomas McAvoy, Second, took possession of and occupied the 100-acre lot until his death in 1886. Since the latter date the defendant, son of Thomas McAvoy, Second, appears to have occupied and used the 100-acre lot as his own, or, quoting his own language, has "worked it off and on all his lifetime," claiming title by gift from his father, and not only to the 100-acre lot, but also to the alleged 60-acre lot adjoining. *Martin v. M. C. R. R. Co.*, 83 Me. 100, 103, 21 Atl. 740. The plaintiffs make no claims to the 100 acres.

Upon the 60-acre lot there is evidence of a witness, then 10 years old, that in 1862 the father of defendant cut "quite a large amount of pine." There is also evidence tending to prove that in 1878 the defendant, then a boy of 14, helped his father to haul cedar therefrom, the operation consuming a week's time; that in 1890 the defendant sold the stumpage for bark from the whole of the 160 acres; that in 1895 the defendant sold the stumpage of juniper knees upon the whole 160 acres (but there is no evidence that any bark or knees were removed from the 60-acre lot, under these permits or licenses); that in 1902 the defendant cut cedar from the southeasterly corner of the 60-acre lot

and thence westerly to the westerly line of the 100-acre lot, cutting along the south line of the town. Defendant testifies that in his occupation of the premises he always worked up to the east line of the 60-acre lot. These are the only acts done by the father and defendant upon the locus, relied upon by defendant in his counsel's brief.

[8, 7] The burden of proof of title by adverse possession is upon him who alleges it. *Batchelder v. Robbins*, 95 Me. 59, 67, 49 Atl. 210; *Brown v. King*, 5 Metc. (Mass.) 173, 180; *Lawrence v. Doe*, etc., 144 Ala. 524, 527, 41 South. 612. Assuming the acts done upon the so-called 60-acre lot to have been adverse (*Alden v. Gilmore*, 13 Me. 178, 182; *Morse v. Williams*, 62 Me. 445, 446), and that all were open and notorious, we think there is a failure to show that continuity of possession or occupation which is required by the common law or which comports with the ordinary management of a farm. In the mind of the court they appear rather to be acts of trespass long separated in time and fugitive in nature. *Rangleley v. Snowman*, 115 Me. 412, 416, 99 Atl. 41. See *Little v. Megquier*, 2 Me. (2 Greenl.) 176, 178; *Tilton v. Hunter*, 24 Me. 29, 33, 34; *Proprietors, etc., v. Laboree*, 2 Me. (2 Greenl.) 275, 283, 11 Am. Dec. 79; *Worcester v. Lord*, 56 Me. 265, 269, 96 Am. Dec. 456; *Fleming v. Paper Co.*, 93 Me. 110, 113, 44 Atl. 378; *Hill v. Coburn*, 105 Me. 437, 446, 447, 75 Atl. 67; *Smith v. Sawyer*, 108 Me. 485, 486, 81 Atl. 868; *Smith v. Booth Brothers*, 112 Me. 297, 306, 92 Atl. 103; *Rollins v. Blackden*, 112 Me. 459, 464, 465, 92 Atl. 521, Ann. Cas. 1917A, 875; *Daly v. Children's Home*, 113 Me. 526, 528, 95 Atl. 219. See, also, *Roberts v. Richards*, 84 Me. 1, 9, 10, 24 Atl. 425; *Adams v. Clapp*, 87 Me. 316, 322, 32 Atl. 911. The law does not undertake to specify the particular acts of occupation by which alone a title by adverse possession can be acquired. *Id.* The following cases indicate what have not been considered such acts: *Frye v. Gragg*, 35 Me. 29, 32; *Chandler v. Wilson*, 77 Me. 76, 83; *Hudson v. Coe*, 79 Me. 83, 93, 8 Atl. 249, 1 Am. St. Rep. 288; *Roberts v. Richards*, 84 Me. 1, 10, 24 Atl. 425; *Smith v. Sawyer*, 108 Me. 485, 486, 81 Atl. 485.

The localities of the various acts of alleged occupation are not shown. Equally barren is the case of evidence that any one or more of such acts were upon the same locality. See *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 416, 418, 3 Am. Dec. 227.

The conclusion is that the defendant has not sustained the burden of proof imposed upon him.

Judgment for plaintiff for the sum of \$125, as agreed by the parties.

(117 Me. 331)

THATCHER et al. v. THATCHER et al.
(Supreme Judicial Court of Maine. Aug. 28, 1918.)

1. WILLS §439—CONSTRUCTION—INTENTION OF TESTATOR.

In the construction of a will, the intention of the testator must govern.

2. WILLS §441—CONSTRUCTION—PRECEDENCE.

Where the terms of the will do not expressly or impliedly indicate the testator's intention, the court must be governed by such rules of law as have been established to meet the circumstances of the case.

3. WILLS §684(3)—LIFE TENANTS AND REMAINDERMEN—RIGHT TO STOCK DIVIDENDS.

Under a will giving a residue in trust, to pay the income equally to a widow and to two children for a certain time, and one-third of the remainder to the widow for life, and two-thirds over to the children, the survivor, or his or her heirs, stock dividends on the trust estate would be a part of the capital or corpus; the income alone being payable to the life tenant.

4. EQUITY §54—RULES—APPLICATION.

All rules of equity must necessarily be sufficiently elastic to do equity in a given case; but equity will not adhere to and apply rules which manifestly and clearly will not result in doing equity.

Report from Supreme Judicial Court, Penobscot County, in Equity.

Bill for instructions by Charlotte W. Thatcher and others, trustees under the will of Benjamin B. Thatcher, against Charlotte W. Thatcher and others. Case reported upon bill and answer. Decree rendered.

Argued before CORNISH, C. J., and BIRD, HANSON, and PHILBROOK, JJ.

Charles H. Bartlett, of Bangor, for plaintiffs. Charlotte W. Thatcher, pro se. George T. Thatcher, pro se. Charlotte M. Thatcher, pro se.

BIRD, J. In equity. The plaintiffs are trustees under the last will and testament of Benjamin B. Thatcher, deceased. The will was executed March 26, 1906. After sundry bequests the residue and remainder are given in trust to the plaintiffs, who, after the payment of certain annuities therefrom, are directed to pay the balance of the income in equal shares to Charlotte W. Thatcher, wife of the testator, George T. Thatcher, his son and Charlotte M. Thatcher, his daughter. The will further provides that the trust for these last-named beneficiaries shall cease on the 1st day of January, 1920, if any of them live so long, and, if not, upon the death of the last survivor, and upon the determination of the trust "as a whole" the remainder is disposed of by giving the widow one-third for life discharged of the trust, and the other two-thirds outright to the said son and said daughter, or to the survivor, or his or her heirs outright, in case either should die without lineal descendants.

Of the three annuitants, one is already dead, and the two surviving are unaffected by the solution of the question presented.

The plaintiff trustees received from the testator as part of the trust estate, and are owners of 150 shares of the capital stock of the Orono Pulp & Paper Company. On the 16th day of November, 1916, the directors of that company declared from earnings a stock dividend of 33½ per cent. and 50 shares of its capital stock, representing that percentage, have been delivered to the trustees. The trustees, expressing doubt as to the disposition of this stock dividend as between life tenants and remaindermen, ask the instructions of this court. Such, briefly, are the allegations and prayer of the bill of complaint. The defendants by their joint and several answer admit the allegations of the bill of complaint and join in its prayer. The case is reported to this court upon bill and answer.

[1, 2] As in other cases, the intention of the testator must govern. *Gibbons v. Mahon*, 136 U. S. 549, 559; 10 Sup. Ct. 1057, 34 L. Ed. 525.

But we find in the will no indication of the intention of the testator, either express or implied from any of its terms.

Under such circumstances, the court must be governed by such rules of law as have been established to meet the circumstances of the case. Unfortunately the courts are not in agreement. But it would be unwise, in the face of such disagreement, for this court to endeavor to declare a new rule or discover a new method of dealing with the situation. We conceive our duty to be to ascertain the rule supported by the most authoritative decisions and best supported by reason.

[3] Three so-called rules have been evolved to meet the situation—the Kentucky rule, the Pennsylvania rule, and the Federal or Massachusetts rule. Roughly, the Kentucky rule gives to the life tenant all dividends accruing from earnings, whenever made and in whatever form declared, while the Pennsylvania rule makes the same disposition of such dividends, except those accruing from earnings made before the death of the testator, when apportionment is made. The third rule, known as the Massachusetts rule, holds that ordinarily cash or money dividends are the property of the life tenant, and that stock dividends belong to the remainderman. *Minot v. Paine*, 99 Mass. (1868) 101, 96 Am. Dec. 705; *Rand v. Hubbell*, 115 Mass. 461, 475, 15 Am. Rep. 121. In this rule, the courts of Connecticut, Rhode Island, Illinois, Ohio, the Supreme Court of the United States, and the English courts concur. *Brinley v. Groun*, 50 Conn. (1882) 66, 76, 47 Am. Rep. 618; *Mills v. Britton*, 64 Conn. (1894) 4, 12, 29 Atl. 231, 24 L. R. A. 536; *Smith v. Dana*, 77 Conn. (1905) 543, 550, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; *Boardman v. Boardman*, 78 Conn. (1905) 451, 455, 62 Atl. 339, 12 L. R. A. (N. S.) 779; *Board-*

man v. Mansfield, 79 Conn. (1907) 634, 639, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 173; Green v. Bissell, 79 Conn. (1907) 547, 551, 65 Atl. 1036, 8 L. R. A. (N. S.) 310, 118 Am. St. Rep. 156, 9 Ann. Cas. 287; Boardman v. Mansfield, 79 Conn. (1907) 634, 639;¹ Brown et al., Pet'rs, 14 R. I. (1884) 371, 372, 51 Am. Rep. 397; Greene v. Smith, 17 R. I. (1890) 28, 30, 19 Atl. 1081; Newport Trust Co. v. Van Rensselaer, 32 R. I. (1911) 281, 237, 78 Atl. 1009, 35 L. R. A. (N. S.) 563; Bouch v. Sproule, L. R. 12 App. Cas. (1887) 385, 379; Jones v. Evans, L. R. 1 Oh. Div. (1918) 25, 32 (see In re Heaton's Estate, 89 Vt. 561, 562, 96 Atl. 21, L. R. A. 1916D, 201); Gibbons v. Mahon, 136 U. S. (1889) 549, 559, 564, 10 Sup. Ct. 1057, 34 L. Ed. 525; Towne v. Eisner, 245 U. S. (1918) 418, 426, 38 Sup. Ct. 158, 62 L. Ed. 372; De Koven v. Alsop, 205 Ill. (1903) 309, 314, 315, 68 N. E. 930, 63 L. R. A. 587; Billings v. Warren, 216 Ill. (1906) 281, 287, 74 N. E. 1050; Wilberding v. Miller, 88 Ohio St. 609, 106 N. E. 665, L. R. A. 1916A, 718 (opinion 90 Ohio St. [1913] 23, 54, 55, 106 N. E. 665, L. R. A. 1916A, 722).

In *Richardson v. Richardson* 75 Me. (1884) 570, 574, 46 Am. Rep. 423, Peters, C. J., states that the decided preponderance of authority probably concedes the point that dividends of stock go to the capital under all ordinary circumstances. If the decided preponderance of authority probably conceded this point in 1884, in the opinion of the learned Chief Justice, we think we are justified in saying now that we believe the Massachusetts rule is supported by the weight of authority, and we need not say of the most respectable and highest character.

These so-called rules have been the subject of many decisions of the courts, and have received treatment at the hands of numerous text-writers and authors of legal literature. To analyze those opposing the Massachusetts rule, and give the reasons upon which they are based, would be of little profit and far exceed the limits of an opinion of the court. To give the reasons for the adoption of the Massachusetts rule would be a work of supererogation. They are found and fully discussed in the cases above cited, and this court feels that it needs to do no more than to call attention to them. It is our conclusion that the Massachusetts rule is sustained by reason as well as by authority.

[4] Attention has been called to the case of *Gilkey v. Paine*, 80 Me. 319, 14 Atl. 205. This was a proceeding in equity by a life tenant under a trust created by will, in which the life tenant claimed certain shares of stock in the hands of the trustee under a pro rata distribution by a corporation of sundry shares of its own stock. The court held that the shares were purchased by the corporation by an issue of its interest-bearing bonds, and that these shares were therefore no

part of the net annual income to which plaintiff was entitled under the will, and dismissed the bill. The court refers to the Massachusetts rule as a very elastic rule in the state of its origin, and cites a departure therefrom in that state. But all rules in equity must necessarily be sufficiently elastic to do equity in the case which may be under consideration. There are few rules that have no exceptions and equity will not adhere to and apply a rule or principle which manifestly and clearly will not result in doing equity (*Daland v. Williams*, 101 Mass. 571, 573), especially when it is necessary to determine the true character of a transaction (*Leland v. Hayden*, 102 Mass. 542). See, also, *Gifford v. Thompson*, 115 Mass. 478, 480. *Gilkey v. Paine*, supra, while citing *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 423, already referred to, does not overrule it, and the expressions in the opinion relied upon as weakening its authority we regard as obiter dicta merely. Neither case decides the point at issue in this case.

The income of a corporation is one thing; that of a trust estate another.

In answer to the request of the plaintiffs for instructions, it is the opinion of the court that the 50 shares of stock issued by the corporation are to be held by the trustees as part of the corpus or capital of the trust estate in their hands, the income thereof alone to be paid to the life tenants.

Decree accordingly.

(117 Me. 335)

LE CLAIR v. WHITE, Sheriff.

(Supreme Judicial Court of Maine. Aug. 23, 1918.)

1. INDICTMENT AND INFORMATION \S 2(2) — APPLICABILITY OF UNITED STATES CONSTITUTION TO STATE COURTS.

Const. U. S. Amend. 5, conferring right to prosecution by indictment in case of infamous crimes, is obligatory only on the federal government, and does not apply to the courts of the several states.

2. INDICTMENT AND INFORMATION \S 3—"INFAMOUS CRIMES."

The liability to punishment upon conviction for the commission of crime, rather than the punishment actually inflicted, is the criterion which, as a general rule, renders the offenders infamous at common law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Infamous Crime.]

3. INDICTMENT AND INFORMATION \S 3—INFAMOUS CRIMES.

Violation of Rev. St. c. 127, § 27, as amended by St. 1917, c. 291, imposing as penalty for its violation a fine of \$100 to \$500, plus costs of prosecution, and imprisonment for not less than two months and not more than six months, with supplementary imprisonment for six months more in the event of omission of payment of fine and costs, measured by standard of liability to Rev. St. c. 137, § 3, providing that all imprisonments for one year or more shall be executed in state prison, is not an infamous crime, within Const. art. 1, § 7.

¹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 173.

1. CONSTITUTIONAL LAW ¶265—"DUE PROCESS OF LAW"—PROSECUTION—INDICTMENT. "Due process of law," as the expression is used in Const. U. S. Amend. 14, does not necessarily require that a state shall prosecute, even for felony, by presentment or indictment by grand jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

5. CONSTITUTIONAL LAW ¶251—DUE PROCESS OF LAW—MODE OF PROCEDURE.

The words "due process of law," as used in Const. U. S. Amend. 14, shield the citizen's rights to life, liberty, and property from the exercise of arbitrary governmental power, but do not restrict the state to any particular mode of procedure.

6. CONSTITUTIONAL LAW ¶258—INTOXICATING LIQUORS ¶17—DUE PROCESS OF LAW—LIBERTY AND JUSTICE.

Rev. St. c. 127, § 27, as amended by St. 1917, c. 291, forbidding any person to deposit intoxicating liquor or to have it in his possession with intent on his part to sell it in the state in violation of law, and prescribing penalty for so doing, held to violate none of the fundamental elements of liberty and justice underlying our civil and political institutions.

7. CONSTITUTIONAL LAW ¶257—DUE PROCESS OF LAW—CRIMINAL PROSECUTIONS.

A person convicted of violation of Rev. St. c. 127, § 27, as amended by St. 1917, c. 291, after having notice in due form of nature and cause of accusation against her, and after being given adequate opportunity for hearing and defense, and after a trial in accordance with recognized procedure and rules of evidence, was afforded the "due process of law" protection provided for by Const. U. S. Amend. 14.

8. CONSTITUTIONAL LAW ¶251—DUE PROCESS OF LAW.

Law, regularly administered through courts of justice, is due process, and satisfies the constitutional requisition, under Const. U. S. Amend. 14.

9. CONSTITUTIONAL LAW ¶250—EQUAL PROTECTION OF LAWS.

Rev. St. c. 127, § 27, as amended by St. 1917, c. 291, forbidding any person to deposit intoxicating liquor or to have it in his possession with intent to sell it in state in violation of law, and prescribing penalty for so doing, fits alike the case of every person violating its inhibitions, and does not deny to any person within its jurisdiction the equal protection of its laws.

Exceptions from Supreme Judicial Court, Penobscot County.

Petition for writ of habeas corpus by Ida Le Clair against T. Herbert White, Sheriff. Petition denied, and petitioner excepts. Exceptions overruled.

Argued before BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Thomas F. Gallagher and O'Connor & Conquest, all of Bangor, for petitioner. Albert L. Blanchard, Co. Atty., of Bangor, for defendant.

DUNN, J. A statute forbids any person to deposit intoxicating liquor, or to have it in his possession, with intent on his part to sell it, in this state in violation of law. The penalty is a fine within the inclusive limitations of \$100 and \$500, plus costs of prosecution, and imprisonment for not less than 2 months and not more than 6 months, with supplementary imprisonment, in the

event of omission of payment of the fine and costs, for 6 months more. R. S. c. 127, § 27, as amended by St. 1917, c. 291. Municipal and other subordinate courts have jurisdiction; original and concurrent with the Supreme Judicial and superior courts, to try and punish offenders. R. S. c. 127, § 40.

On the 31st day of December in the year of 1917, on proceedings instituted against her by written complaint, Ida Le Clair, of Bangor, was convicted in the municipal court in that city of violation of the legislative enactment. She was sentenced to pay a fine of \$200 and costs, to be imprisoned in the county jail for the term of 60 days, and, should she default payment of the fine and costs, to be imprisoned as aforesaid for 6 months additionally. This sentence was vacated by appeal. For noncompliance with an order of the court of first instance to recognize for the prosecution of her appeal before the appellate tribunal, and to abide its judgment thereon, the respondent was committed to jail. In April, 1918, at a Penobscot session of this court, she petitioned for writ of habeas corpus, which petition was denied. In argument of exceptions the petitioner contends that the punishment provided for violation of the statute on which the proceedings against her were founded authorizes the equivalent of sentence to absolute imprisonment for one year; and for as much as the Legislature has commanded, subject to an exception unnecessary to be particularly stated here, that all imprisonments for one year or more shall be executed in the state prison (R. S. c. 137, § 3), therefore the transgression whereof she was accused is a felony (R. S. c. 133, § 11). Expressed somewhat differently, she insists that, within the meaning of the Fifth of the Amendments to the Constitution of the United States, and of a similar provision in the Declaration of Rights in the Constitution of the state of Maine (Const. Me. art. 1, § 7), the crime charged against her is an infamous one, for which she should be held to answer on presentment or indictment of a grand jury, and not otherwise.

[1] The assignment of inconsistency with the provision of the Fifth Amendment to the Constitution of the United States is based on a misapprehension. That amendment is obligatory only on the federal government, and does not apply to the courts of the several states. *Hunter v. City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151; *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; *Ohio v. Dollison*, 194 U. S. 445, 24 Sup. Ct. 708, 48 L. Ed. 1062.

[2, 3] On this branch of the case, the crucial query is whether, in view of the guaranty of the supreme organic law of the state of Maine, the prosecution should have been begun by or before a grand jury, instead of

by complaint to the municipal court. The liability to punishment upon conviction for the commission of crime, rather than the punishment actually inflicted, is the criterion which, as a general rule, renders the offenders infamous at common law. *Butler v. Wentworth*, 84 Me. 25, 33, 24 Atl. 456, 17 L. R. A. 764. Is the crime, measured by the standard of liability to punishment for its commission, an infamous one? Was the petitioner accused of misconduct for which the statute empowers the court to impose a sentence to be fulfilled in no other manner than by the incarceration of the convict in a penal institution for one year? If the answer shall be in the affirmative, then no court had jurisdiction to try and punish her, unless upon presentment or indictment by a grand jury. It is easy to discern that if a criminal were sentenced to the maximum term of imprisonment, and, that punishment endured, he should be detained in jail 6 months beyond, for failure to pay his fine, he would be debarred from personal liberty for one whole year. But no judge in any court prerogative has to say, when he pronounces sentence in such case, that the culprit shall stay one year in jail or prison, unconditionally, positively, and absolutely. There is the test. Detention of a condemned person in jail for failure to pay a fine is only a means provided for the enforcement of the pecuniary penalty imposed by the sentence. Actual payment of the fine itself is the punishment. Imprisonment for default of payment is a mere incident of the fine. It is within the common-law authority of the court to order a sentenced respondent to stand committed pending payment of an imposed fine. The statute fixes the duration of such imprisonment. This "imprisonment" is not a part of the punishment by imprisonment authorized as a penalty for the commission of the crime. Payment of the fine, and imprisonment for not paying it, cannot exist at the same time. Of his own elective preference the convict may remain in jail for nonpayment of the fine. In effect the statute is that, if the malefactor fails or neglects to pay the fine and costs, then, after the expiration of the sentence to unconditional imprisonment, he shall continue imprisoned until payment shall be made, but not longer than 6 months, when he shall go quit. He can sooner discharge himself by paying the fine. At the expiration of the sentence to absolute imprisonment, which at most cannot be prolonged more than 6 months, if the convict should have paid, or if any time within 6 months afterwards he shall pay, the fine and costs, he will find the prison door ready to swing open to his touch. So the answer

is obvious. The crime is not an infamous one. The statute does not presume to authorize unconditional imprisonment for the term of one year.

[4-8] Nor is the statute, as the petitioner further claims, inconsistent with the interdiction of those clauses of the Fourteenth Article of Amendment to the Constitution of the United States which are in these words:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Due process of law," as that expression is used in the Fourteenth Amendment, does not necessarily require that a state shall prosecute even for felony by presentment or indictment of a grand jury. *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 292, 23 L. Ed. 232. Those words shield the citizen's rights to life, liberty, and property from the exercise of arbitrary governmental power, but do not restrict the state to any particular mode of procedure. They afford protection which the proceedings against the present petitioner fully respected. The statute which creates the offense, and provides for the prosecution of offenders and their punishment, derives its authority from the reserved powers of the state, and violates none of the fundamental elements of liberty and justice which underlie our civil and political institutions. With reasonable certainty it defines what shall constitute infraction of the law. The nature and cause of the accusation against the petitioner as a respondent appear to have been effectively set forth in due form; the respondent has notice thereof, and knew for what she was to be tried. Adequate opportunity was afforded for her hearing and defense. Her trial proceeded in accordance with recognized procedure, agreeably to the rules of evidence. She was convicted by the decision of a competent court, and sentenced to a punishment sanctioned by law. Law, regularly administered through courts of justice, is due process, and satisfies the constitutional requisition. 2 Kent, Com. 13; *Hurtado v. California*, *supra*; *Frank v. Mangum*, 237 U. S. 309-326, 35 Sup. Ct. 582, 59 L. Ed. 909.

[9] The statute is not arbitrary. It is not partial. It deals to each his proper share, and fits alike the case of every person within the extent of its authority, who, since the enactment, has violated or may violate its inhibitions. It does not deny to any person within its jurisdiction the equal protection of the laws. *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91.

The petitioner took nothing by her exceptions.

Exceptions overruled.

(117 Me. 339)

GOODWIN v. NEDJIP et al.

(Supreme Judicial Court of Maine. Aug. 30, 1918.)

INTOXICATING LIQUORS ~~§~~86(1) — VICTUALER'S BOND—VIOLATION.

Victualer's bond, provided for by Rev. St. c. 31, § 2, stipulating victualer should not violate any law relating to intoxicating liquors, was violated where victualer had been convicted of single sale of intoxicants, subsequent to bond, though not at his inn.

Exceptions from Supreme Judicial Court, York County, at Law.

Action by Ernest A. Goodwin against Hassan Nedjip and others. On defendants' exceptions from the Supreme Judicial Court. Exceptions overruled, and judgment ordered for plaintiff.

Argued before SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Leroy Haley, of Biddeford, for plaintiff. Clarence Webber and Robert B. Seidel, both of Biddeford, for defendants.

HANSON, J. Action of debt upon a victualer's bond, before the court upon the following bill of exceptions:

"This was an action of debt upon a victualer's bond, for which provision is made in chapter 31, § 2, of the Revised Statutes. The defendants appeared severally, and jointly cravedoyer of the declaration and the conditions of the bond. The conditions of the bond were recited in defendants' plea. Thereupon defendants pleaded performance of such conditions. The plaintiff replied, assigning as a breach of such conditions that the principal in the bond had been convicted of the offense of a single sale of intoxicating liquor subsequent to the date of the bond and prior to the date of the writ. Defendants rejoined as follows:

"The said defendants, as to the said replication to their said plea say that he, the said Hassan Nedjip, has not, at any time since the execution of the writing obligatory declared on in the plaintiff's writ, violated any law of this state relating to intoxicating liquors in, about, or around the premises mentioned in said writing obligatory, or any of the appurtenances thereof, and this they are ready to verify."

"To which rejoinder plaintiff demurred, and the demurrer was joined by defendants. The presiding justice sustained the demurrer, to which ruling the said defendants except, and pray that their exceptions may be allowed."

The condition of the bond is that:

"Whereas, the above-bounden Hassan Nedjip has been duly licensed as a common victualer at No. 1 Main street, within said city [Biddeford], until the day succeeding the first Monday of May next: Now, if in all respects he shall conform to the provisions of law relating to the business for which he is licensed, and to the rules and regulations as provided by the licensing board in reference thereto, and shall not violate any law of the state relating to intoxicating liquors, then this obligation shall be void; otherwise, shall remain in full force."

The contention here is over the following clause in the condition of the bond: "And shall not violate any law of the state relating to intoxicating liquors." And but one question is raised: Does the bond apply to the place licensed, only? The defendants

claim that such clause is to be interpreted as meaning "in, about, or around the premises licensed," and cite and rely upon Clements v. Smith, 128 App. Div. 859, 113 N. Y. Supp. 55, where action was brought against the principal and the Federal Surety Company under a bond issued by the latter under the provisions of the Liquor Tax Law. The bond was in the usual form, and, after reciting the purpose and location of the business, provides:

"That if the said liquor tax certificate applied for is given unto the said principal, and the said principal will not, while the business for which such liquor tax certificate is given shall be carried on, suffer or permit any gambling to be done *in the place* designated by the liquor tax certificate in which the *traffic in liquors is to be carried on*, or in any yard, booth, garden, or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly, and will not violate any of the provisions of the liquor tax law, then the above obligation to be void; otherwise, to remain in full force and virtue."

The trial court directed a verdict for the defendant, and the decision of the appellate court sustained the action of the lower court, upon the ground that:

"Any other ruling would tend to defeat the very purpose of the Liquor Tax Law as a revenue measure, by making it practically impossible for any man to get sureties. The bond clearly related and was confined in its operations to the premises for which the liquor tax certificate was issued. This was the fair contract of the surety company. It undertook to guarantee that, as to the premises which were to be licensed for the traffic, there should be no gambling and no disorderly conduct, and generally that there should be no *violations of the conditions of the license*."

We have stated enough of that opinion to demonstrate that the cases are not similar in fact or principle. The difference in the wording of the bond, and the decided difference in public policy, in the two jurisdictions, touching sources of state revenue, makes clear the distinction drawn by us that, while that ruling has the support of the case quoted, we cannot so hold it to be the law governing the case at bar. We are in agreement with the finding that the clause in the bond in that case, which reads, "and will not violate any of the provisions of the liquor tax law," was one of the conditions of the license, and a *condition* of the bond. So we must hold here. The like clause in the bond in suit was one of the conditions of the bond, and was violated by the defendant by the sale of intoxicating liquors at another place within the state. The permission to conduct an inn is not granted to all who may apply for a license; it is not a right to be exercised by one at will, but a privilege to be exercised when granted by municipal officers. The last-named officers may not at will grant such license; their duty is defined by statute, and they may issue licenses to such persons only as are of good moral character. The licensee must possess such character to

be entitled to a license. To maintain such license, he must continue to be of good moral character. If during the term of the license he engaged in the sale of intoxicating liquor in this state, then he violated his license; there was a breach of the bond for which both principal and sureties are liable. Our conclusion proceeds from different premises; not revenue, but the safety and security of the public. Good moral character is a prerequisite; the defendant could receive no license without it. He must be presumed to have been of good moral character at the date of the bond. In any event, the condition of the bond relating to intoxicating liquors was known to the sureties, as it was to the principal. It was in the bond, and related to the contract he was making with the public, that during the period of his license he would conform to the law relating to the business of an innholder, and to the rules and regulations as provided by the licensing board in reference thereto, and "shall not violate any law of the state relating to intoxicating liquors."

If the Legislature did not intend to include territory beyond the confines of the inn, and the only purpose was to guard the integrity of the license, then the language used was wholly unnecessary, for other provisions of the statute would serve that purpose as effectually. We cannot read into the bond in suit the words written in *Clements v. Smith*, supra, and say that the bond related to the inn alone. The words are of broader scope, and can mean only that the defendant will sell no liquor anywhere in Maine during the term of his license. The bondsmen agreed to this, and all the parties are bound by the rule that, when persons under no disability enter into a contract on a sufficient consideration, an action will lie for its breach. This doctrine is applicable to bonds equally with other contracts. 4 R. C. L. 55; *Carey v. McKay*, 82 Me. 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500. See *Dexter v. Blackden*, 93 Me. 473, 45 Atl. 525.

The entry will be: Exceptions overruled. In accordance with the stipulation in the exceptions:

Judgment for the plaintiff for \$50.

(117 Me. 344)

STATE v. BUCKWALD.

(Supreme Judicial Court of Maine. Aug. 30, 1918.)

1. PROSTITUTION. §4 — ACCEPTING MONEY FROM PROSTITUTE—REPUTATION—STATUTE.

In a trial on an indictment under Rev. St. c. 128, § 16, for accepting money from a prostitute, evidence that the reputation of the house where the woman stayed during a period of about six months was that of a disorderly house was admissible under section 20.

2. CRIMINAL LAW. §371(9) — ACCEPTING MONEY FROM PROSTITUTE—EVIDENCE—SIMILAR ACTS.

In a trial on an indictment under Rev. St. c. 128, § 16, for accepting money from a prostitute, her testimony that within six months from the day alleged in the indictment she had paid over other money to defendant was admissible in proof of the intent.

3. INDICTMENT AND INFORMATION. §110(51) — STATUTORY LANGUAGE—ACCEPTING MONEY FROM PROSTITUTE—"THEN AND THERE."

An indictment for accepting money from a prostitute, in exact words of Rev. St. c. 128, § 16, not expressly stating that money was from earnings as a prostitute, but which began and concluded with the words "then and there," meant that the money was from earnings as a prostitute while engaged in prostitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Then and There.]

Exceptions from Superior Court, Cumberland County, at Law.

Benjamin Buckwald was convicted of accepting money from a prostitute, and he excepts. Exceptions overruled.

Argued before CORNISH, C. J., and SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Carroll L. Beedy, Co. Atty., and Jasper H. Hone, Asst. Co. Atty., both of Portland, for the State. Wm. C. Eaton, W. C. Whelden, and Henry N. Taylor, all of Portland, for respondent.

HANSON, J. This was an indictment for accepting money from a prostitute, contrary to the provisions of R. S. c. 128, § 16. The case was tried before a jury at the May term, 1917, of the superior court for the county of Cumberland, a verdict of guilty was returned, and the case is before the court on exceptions.

The indictment follows:

"The grand jurors for said state upon their oath present that Benjamin Buckwald of said Portland, on the 15th day of June, A. D. 1915, at said Portland, feloniously did accept, receive, levy, and appropriate, without consideration, from the proceeds of the earnings of Sadie Cohen, of said Portland, a woman then and there engaged in prostitution, money, to wit, certain gold, silver, nickel, and copper coins and divers national bank bills, United States treasury notes and certificates, current as money in the United States of America, a more particular description and the value and amount of which is to your grand jurors unknown, the said Buckwald then and there knowing that said money was from the earnings of the said Sadie Cohen, and that she was a woman then and there engaged in prostitution, against the peace of said state and contrary to the form of the statute in such case made and provided."

The first exception was to the admission of the following question and answer:

"Q. What was the reputation of 63 Commercial street with reference to purposes of prostitution during the summer of 1915, between the 1st of May and last day of November? Answer. It is a disorderly house."

Second. Sadie Cohen, named in the indictment, was allowed to testify against objection that on the day of her arrival, May 1 or

2, 1915, she engaged in prostitution (before the day alleged in the indictment), and that after May 15th, on various occasions she engaged in prostitution at the place above named, which place was occupied by the defendant and herself, and that she paid over one-half the proceeds thereof to the defendant. Other witnesses testified to similar acts on the part of Sadie Cohen subsequent to the day alleged in the indictment, and the payment by her of money to the defendant. Third: After verdict of guilty and before judgment the defendant filed a motion in arrest of judgment upon the ground that:

"Said indictment is bad, in that it does not set out any offense against the common law or any statute of this state."

[1] As to the first exception: Section 20 of the act provides:

"In any prosecution under the six preceding sections evidence of the general reputation or common fame of a house or place shall be admissible for the purpose of proving that the house or place is one of ill fame, prostitution or assignation."

The language used needs no construction by us to show the intention of the Legislature. Various offenses are mentioned in the "six preceding sections," in any one and all of which section 20 applies; its clear purpose being to make use of, and make admissible, such reputation of ill repute, in the highest interest of society, to the end that such practices as are here in question, and kindred offenses, shall be stamped out. The testimony was properly admitted, and the respondent takes nothing from this exception.

[2] As to the second exception: The respondent claimed as matter of law that the offense charged in the indictment was a single and not a continuing offense, and that while the state was not bound by the date laid in the indictment, but could introduce evidence tending to prove the commission of the offense on any date within six years prior to the finding of the indictment, having introduced evidence tending to prove the commission of the alleged offense on a particular occasion, further testimony relative to separate and subsequent alleged commissions of the offense was not admissible. The cases do not so hold, and such has not been the practice in similar cases. Here the presiding justice ruled, if he ruled at all, as follows:

"My ruling would be that the state may show any similar acts at or about the time alleged in proof of the intent."

Following this, counsel for the respondent asked:

"Within a period of six months; that is the question here, from May 1st to November 1st."

And the court replied:

"Within that period, yes."

The rule is universal that such testimony is admissible for the purpose offered. Moreover, it appears that the presiding justice was very careful to so limit the testimony, which, with all the other testimony and cir-

cumstances in the case, were submitted to the jury, and properly so. We find nothing in the case to show error prejudicial to the respondent, and he can take nothing by this exception. *State v. Acheson*, 91 Me. 240, 39 Atl. 570; *State v. Bennett*, 117 Me. 113, 102 Atl. 974.

[3] The third exception calls in question the validity of the law itself, and counsel says that it "does not set out any offense against the common law or any statute of the state." His reasoning is that the indictment, which is in the exact words of the statute, does not state definitely that the money claimed to have been paid was, within the meaning of the law, money actually received from the proceeds of the earnings of Sadie Cohen as a prostitute; that, while she may have earned money as a prostitute, she might possess other money from legitimate sources from which she could have paid the respondent, and, if so, the construction of the statute justifies his claim under this exception, because the indictment nowhere states that such money was earned by prostitution. The indictment follows the statute, and at the beginning, and again at the conclusion, uses the words "then and there," which can have but one meaning, and in our criminal proceedings have had but one meaning for a century. As used in the indictment, no doubt can arise in the mind of any person as to the exact meaning of the words being that the money in question was from the earnings of a prostitute while engaged in prostitution.

It is held in *State of Washington, Respondent, v. Felix Orane, Appellant* (1915) 88 Wash. 210, 152 Pac. 989, the only case before us dealing with a like question under a similar statute, that:

"An information charging, in the language of the statute, the accused with accepting the earnings of one G. B., she then and there being a common prostitute, sufficiently charges the offense of accepting the earnings of a prostitute; it not being necessary to specify that the earnings so given were unlawful earnings accepted for an unlawful purpose, or to state specifically what was received."

The motion was properly overruled. The entry will be:

Exceptions overruled.

(117 Me. 348)

PREST v. INHABITANTS OF TOWN OF FARMINGTON.

(Supreme Judicial Court of Maine. Sept. 11, 1918.)

1. TOWNS ~~§~~79—SEWER CONTRACT—ACTION FOR EXTRAS—EVIDENCE.

In action for extras for labor and materials furnished under a contract with a town for the construction of a sewer, evidence held to show that the contractor agreed to construct the sewers for the amount of the town's appropriation.

2. FRAUD ~~§~~11(1)—MATTERS OF OPINION.

Where the whole subject in fact rests in the opinion of the parties, and cannot reason-

ably be understood otherwise, false expressions on either hand do not generally constitute fraud in law.

3. WORK AND LABOR \Leftrightarrow 29(2)—**FRAUD—RECOVERY—ASSUMPSIT.**

Where a party agrees to do work at a specified sum under a fraudulent representation, he can recover, in an action of indebitatus assumpsit only according to the terms of the contract.

4. FRAUD \Leftrightarrow 31—**FRAUDULENT REPRESENTATIONS—ACTION FOR DECEIT.**

A party, agreeing to do work at a specified sum under a fraudulent representation, on discovery of the fraud, may repudiate the contract and sue for deceit.

5. CONTRACTS \Leftrightarrow 168—**IMPLIED PROMISE.**

Where the parties have made a contract for themselves covering the whole subject-matter, no promise is implied by law.

6. ASSUMPSIT, ACTION OF \Leftrightarrow 8—**DAMAGES FOR TORT.**

The duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained.

7. WORK AND LABOR \Leftrightarrow 14(1)—**EXCAVATION CONTRACT—FRAUD—RECOVERY FOR WORK AND MATERIAL.**

A contractor for excavation work, who early discovered the false representations as to the character of the work, might then have repudiated his contract and have recovered the fair value of the work done and material furnished.

8. MUNICIPAL CORPORATIONS \Leftrightarrow 747—**MISREPRESENTATION BY AGENT—LIABILITY.**

A municipality may be made responsible for misrepresentations made by its agent to induce one to enter into a contract with it.

9. ACCOUNT, ACTION ON \Leftrightarrow 2—**CONTRACT—DAMAGES ARISING FROM FALSE REPRESENTATIONS.**

An action in indebitatus assumpsit upon an account annexed, to recover damages arising from false representations as to the subject-matter of a contract which has not been repudiated, cannot be maintained.

10. TOWNS \Leftrightarrow 79—**CONTRACT—LIABILITY FOR ADDITIONAL WORK—EVIDENCE.**

In an action by a contractor for the construction of town sewers for an item of extra work, evidence held not to sustain the inclusion of the extra work in the verdict.

11. TOWNS \Leftrightarrow 79—**CONTRACT FOR SEWER CONSTRUCTION—EXTRA WORK.**

In an action by contractor for sewer construction, evidence held to sustain the allowance of an extra charge for constructing a sewer within and along a street for 200 feet to make a connection.

12. TOWNS \Leftrightarrow 79—**CONTRACT—EXTRA WORK AND MATERIAL—EVIDENCE.**

In an action by one contracting with a town to construct a pier point, evidence held to require a finding in the contractor's favor for \$143.60 for extra work and material.

13. APPEAL AND ERROR \Leftrightarrow 932(1)—**PRESUMPTIONS—ITEMS ALLOWED BY JURY.**

Where, in a suit for balance due on contract for repairs, a contractor's claim for an extra charge of \$25 for keeping a bridge open to travelers during repairs appeared reasonable, it might be assumed, the evidence being conflicting, that the general verdict for \$1,347.88 included such item.

On motion from Supreme Judicial Court, Sagadahoc County, at Law.

Action by Charles A. Prest against the Inhabitants of the Town of Farmington. Gen-

eral verdict for plaintiff, and defendants move to set aside the verdict. Motion sustained, unless plaintiff, within 30 days, remit a part of the verdict; in which case, motion overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

McGillcuddy & Morey, of Lewiston, for plaintiff. S. P. Mills and F. W. Butler, both of Farmington, for defendants.

MORRILL, J. This action is brought to recover a balance of \$2,241.61 alleged to be due the plaintiff under three independent contracts between plaintiff and defendants, and for extra labor and materials on each piece of work. The aggregate of the contract prices was \$4,425; this is agreed to by both parties. The plaintiff gives credit for items aggregating \$4,383.70; the defendant claims credit for items aggregating \$4,457.20, and it is admitted that the latter amount is correct. In the account annexed to the writ the amounts claimed for extra work and materials on each job are stated in lump sums. It appears, however, from reading the record, that a bill of particulars was prepared and used at the trial before the jury; but it was not made part of the record, and no copy has come to the possession of the court. The jury found a general verdict for \$1,347.88, which the defendants now move to set aside, insisting, as stated in their brief statement filed under the general issue, "that no further liability was incurred by them in regard to either piece of work than the contract price." The contracts were not reduced to writing. It is therefore necessary, in passing upon the contentions of the parties, to ascertain from the evidence what were the actual terms of the contracts for each piece of work.

[1] 1. *The Sewer Contract.*—At the annual town meeting in March, 1913, the inhabitants of the town of Farmington appropriated \$3,500 for the construction of certain lines of sewers. In July of that year the plaintiff came to Farmington "to look up the job—to learn what they wanted done." At that interview the selectmen told him "something about what they had to do, just about the same knowledge that I had before I went there," as the plaintiff says in his testimony. At that time the selectmen and the road commissioner showed him over the proposed line. At that visit of the plaintiff to Farmington, or a short time later (the exact date does not appear), the plaintiff made a contract with the defendants to construct an 8-inch, 10-inch, and 12-inch sewer in Front street and Broadway, and from a point at Main street and Broadway southerly to the Exchange Hotel; also to construct a 6-inch sewer from an existing 8-inch sewer in High street extension, along the north and west

side of the Old Tannery brook to Perham street. The contract price was to be \$3,500, the amount appropriated by the town for that work. Both parties agree that such a contract was made. The part relating to the extension southerly in Main street was modified by mutual agreement. No claim for extra work and materials is made on account thereof, and that charged does not enter into this case. When the first interview was had, the lines of the sewers had not been surveyed and Mr. Prest agreed to obtain an engineer and to throw in his time in assisting the engineer. He accordingly engaged Mr. Pierce, of the Sanders Engineering Company, to run out the lines. At some time a contract for the work was drafted, but never signed. In offering this paper in evidence plaintiff's counsel said:

"This paper I offer, not for the purpose of a contract, because they never agreed. There are some things left out, but as far as establishing the course, it is in here, and there is an admission that the parties were together. That makes the courses admissible. Upon that point there is no disagreement. I offer it for that purpose and no other."

It is to be noticed that counsel said "they never agreed," yet he brings his action to recover an amount due upon a contract price of \$3,500. What, then, were the terms of the contract upon which plaintiff now sues? What were the specifications of that contract, which determine the line between work under the contract and alleged extra work?

If the unsigned contract is evidence only of the courses of the proposed sewers, for which purpose only it was offered, there is no evidence whatever of any details or specifications of the contract as made, save only in the particular that the contractor was to connect up existing sewers with the new lines. It does not appear what agreement, if any, the parties arrived at as to the grades, depth, depth of covering, location of manholes, or exact location of intercepted sewers—no specification of location of the sewer as to the water pipes which were known to be in the ground. The conclusion is irresistible that after looking over the ground, with the knowledge which he had when he first came to Farmington, Mr. Prest agreed to construct the proposed sewers for the amount of the appropriation. In fact, he substantially says as much. On page 55 of the record he testifies:

"Q. When did you make your trade with them? A. I don't remember the date. Q. Now, what was your trade? What trade did you finally make with the selectmen? A. Well, I agreed to lay those two sewer lines for \$3,500."

This is likewise the version of the selectmen. Mr. Prest's actions are consistent therewith; he offered to procure for the town an engineer to run the lines, and to give his own time as an assistant; he thus had the opportunity to make all tests and to ob-

tain all knowledge of the location which would enable him to do the work properly and profitably to himself. He now brings suit to recover under the account annexed the contract price. In addition to the item for the contract price, he claims in the account annexed the following items:

To extra on 8-inch, 10-inch and 12-inch line, Front and Broadway street to High street.....\$336.95
Plus 15 per cent. profit on \$336.95.... 50.50

[2] An examination of this claim as tabulated in the brief of plaintiff's counsel shows that it is all for labor of men and teams along and within the limits of lines of sewers covered by the special contract. Recovery is claimed upon the ground that certain representations as to the character of the excavation were made to him by the selectmen, that these representations were material and were false, and that in this form of action he is entitled to recover for the extra cost occasioned thereby. It may well be doubted whether the alleged misrepresentations, if made, were anything more than honest expressions of opinion, or honest statements of fact not purporting to be of knowledge. *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Gordon v. Parmelee*, 2 Allen (Mass.) 212. "Where the whole subject, in fact, rests in the opinion of the parties, and cannot reasonably be understood otherwise, false expressions on either hand do not generally constitute fraud in law." *Thompson v. Insurance Co.*, 75 Me. 55, 61, 46 Am. Rep. 357. It may well be claimed that the plaintiff did not rely, and had no right to rely, upon the alleged misrepresentations, because they related to facts of which he had equal or better means of knowledge than the selectmen had under the circumstances of this case. *Patton v. Field*, 108 Me. 299, 81 Atl. 77; *Savage v. Stevens*, 128 Mass. 207. See cases cited in *Long v. Athol*, 196 Mass. 503, 504, 82 N. E. 665, 17 L. R. A. (N. S.) 96.

However that may be, and we express no opinion in relation thereto, upon the plaintiff's claim he cannot recover in this form of action.

[3, 4] Where a party agrees to do work at a specified sum under a fraudulent representation, he can only recover, in an action of *indebitatus assumpsit*, according to the terms of the contract, although, when he discovered the fraud, he might have repudiated the contract and sued for deceit. *Selway v. Fogg*, 5 M. & W. 83.

So, when a party purchases goods on credit, fraudulently intending at the time of the contract not to pay for them, and the vendor brings *assumpsit* for the goods sold before the time of credit has expired, the action cannot be maintained, although the vendor might have treated the contract as void and have sued the vendee immediately in *trover* to re-

cover the value of the goods. By bringing the action in assumpsit, the plaintiff affirmed the contract. *Ferguson v. Carrington*, 9 B. & Cr. 59.

[5] Where the parties have made a contract for themselves, covering the whole subject-matter, no promise is implied by law. *Phelps v. Sheldon*, 13 Pick. (Mass.) 52, 23 Am. Dec. 659; *Whiting v. Sullivan*, 7 Mass. 107; *Steam Mill Co. v. Westervelt*, 67 Me. 446, 449.

[6] The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721.

The evidence fails to show any attitude or action on the part of the selectmen recognizing, or undertaking to pay, the charges for so-called extra work on the sewers, except in relation to an old well and an extension in Perham street, of which we shall speak later. The items appear to have been kept by the plaintiff as showing his loss on account of the alleged misrepresentation. The right of action arises, not on a failure to keep and perform a promise, but upon a false representation. Why, then, should an action of assumpsit be brought? See *Noyes v. Loring*, 55 Me. 408, 411.

[7, 8] Mr. Prest discovered the true character of the excavation at an early stage of the work, and, if his present contention is true, he might then have repudiated the contract and recovered the fair value of the work done and materials furnished. *Selway v. Fogg*, supra; *Long v. Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96. And it has been held that a municipality may be charged with responsibility for misrepresentations which have been made by its agent to induce a person to enter into a contract with it. *Sharp v. Mayor*, etc., of New York, 40 Barb. (N. Y.) 256.

[9] But an action in indebitatus assumpsit upon an account annexed, to recover damages arising from false representations as to the subject-matter of a contract, which has not been repudiated, is beyond the "furthest venture" noted in *Tukey v. Gerry*, 63 Me. 151, 153. See *Brown v. Starbird*, 98 Me. 292, 56 Atl. 902; *Gilmore v. Bradford*, 82 Me. 547, 20 Atl. 92.

Included in this charge of \$336.95 are certain items amounting to \$28.59 for labor and materials in filling up an old well or reservoir which was found in the line of the sewer on Broadway. There is some evidence that the selectmen directed the plaintiff to fill this well, and in the absence of any testimony on the point from the selectmen, we think that the jury would have been warranted in finding a promise to pay for that work.

Also, in addition to the item for the contract price, the plaintiff claims in the account annexed, the following items:

To extra work on sewer through the hill from station 4 to station 9, B line, and extra around the hill, station 9, C line, to station 9, B line, and to Perham street, 200 feet of 6-inch pipe.....	\$1,062.63
To 15 per cent. profit on the \$1,062.63	159.30

[10, 11] Reference to the tabulation in the brief of plaintiff's counsel shows that this item of \$1,062.63 is made up of three parts:

(a) Charges for labor of men and for material on 6-inch sewer line through clay hill, August 5 to August 15, 1913, \$568.75.

This work was unquestionably a part of the work which was to be done under the contract for \$3,500. The line of sewer through the clay hill from station 4 to station 9, B line, was on the course first laid out by Mr. Pierce. The plaintiff bases his claim for this item upon the alleged misrepresentations before considered. It must be rejected.

(b) Charges for labor of men and for material on 6-inch sewer line around the hill, station 9, C line, to station 9, B line, August 18 to August 26, 1913, \$272.80.

The plaintiff claims that the original line through the hill, called line B, was changed by order of the selectmen to the line around the hill, called line C, and he gives this item of \$272.80 as the cost of laying the sewer for the additional distance. Mr. Prest says that the course of the sewer was changed by the selectmen on account of the depth, and the consequent difficulty and expense of repair, if the sewer should become obstructed. This contention rests on his testimony alone; it is contradicted by three selectmen, and is not supported by the foreman, Mr. Lowery, or the engineer on the work, Mr. Fish. The claim is highly improbable, in that the depth of the sewer on the original B line was known to the selectmen when the work was first laid out. Without discussing it in detail, we may say that the evidence falls far short of sustaining the reason given by plaintiff for the change, and overwhelmingly preponderates against any liability on the part of the town for the additional expense. The difficulty of the digging furnishes the far more probable reason for the change of course. We think that the jury were not justified in including this amount of \$272.80 in their verdict, if they did include it.

(c) Charges for constructing the 6-inch sewer within and along Perham street, a distance of 200 feet, \$221.08.

The jury was warranted in allowing this item. The northerly end of the 6-inch sewer was given to Mr. Prest as at Perham street. It is true that he was to connect up all the sewers in the Tannery Brook section; but it appears by the testimony of Mr. Titcomb that none of the selectmen knew the exact location of the sewers. To connect with the sewer on Perham street it was necessary to lay the 6-inch pipe for a distance of 200 feet

in the street. We think that Mr. Prest should have compensation for that work; the witnesses agree that \$1 per lineal foot was a fair price, and the charge does not greatly exceed that estimate.

[12] 2. *The Pier Point on Center Bridge.*—There was a sharp conflict of testimony as to this piece of work. Mr. Prest claims that the selectmen agreed to pay him \$500 to put in a concrete pier point after his own design, and that later Mr. Marble, the selectman who had the oversight of this particular piece of work, directed him to enlarge the structure, substantially increasing the amount of labor and material. Mr. Marble claims that the pier point was to be constructed of specified dimensions; that Mr. Prest began to build a smaller pier than he had agreed to build and, upon complaint being made, voluntarily extended the point upstream. Upon this controverted issue the jury would have been warranted in finding for Mr. Prest; but, while they might so find, there seems to be no reliable basis for estimating the amount of extra work and material, because neither the jury nor the court has any definite knowledge of the size of the pier point which Mr. Prest proposed to build. The only method of arriving at the amount of extra work with approximate accuracy is to take Mr. Prest's estimate of 80 cubic yards for the entire work, and his estimate of the cost at \$8.045 per cubic yard. The total cost would then be \$643.60, of which \$143.60 would be for extra work and material in excess of the contract. This, we believe, would be a liberal finding. Mr. Prest's estimate of cost per cubic yard includes his own time at \$10 per day; and his estimate of cubic contents is substantially the same as given by Mr. Mallett, a witness for the defendants, and 20 cubic yards in excess of the estimate given by Mr. Fish, who was in the plaintiff's employment.

[13] 3. *Fairbanks Bridge Job.*—Here again it is only necessary to say that there was a sharp conflict of testimony, and the jury would be warranted in sustaining the plaintiff's contention. The item includes a charge of \$25 for keeping the bridge open to travelers during the repairs, which appears reasonable. We may assume, therefore, that the jury allowed this entire item.

Thus stating the account, it stands:

Sewer job—contract.....	\$3,500.00
Extra, Perham street.....	221.08
Filling old well.....	28.59
Pier point job—contract.....	500.00
Extra	143.60
Fairbanks bridge—contract.....	425.00
Extra	220.85
	<hr/>
	\$5,039.12
Admitted credits.....	4,457.20
	<hr/>
	\$ 581.92

To this amount should be added interest from the date when the work was completed,

in the winter of 1913-14, to the date of the verdict, substantially 4 years and 2 months, \$145.48, making a total of \$727.40. Giving the verdict of the jury the full consideration to which it is entitled, the verdict should not have exceeded above amount. The entry will therefore be:

Motion sustained unless, within 30 days after notice of this decision is received by the clerk of courts for Sagadahoc county, the plaintiff remits all of said verdict in excess of \$727.40; in which case, motion overruled.

(117 Me. 363)

STATE v. CROUSE.

(Supreme Judicial Court of Maine. Sept. 18, 1918.)

1. INDICTMENT AND INFORMATION \S 71—DESCRIPTION OF OFFENSE—CERTAINTY.

Under Const. art. 1, \S 6, declaring accused shall have right to demand nature and cause of accusation, defendant can insist that facts alleged to constitute crime be stated with certainty and precision requisite to enable him to meet exact charge, and to plead judgment in bar of later prosecution.

2. INDICTMENT AND INFORMATION \S 110(3)—STATUTORY OFFENSE.

Generally, indictment for statutory crime is sufficient where it charges in words of statute, but only where statute itself sufficiently describes offense.

3. INDICTMENT AND INFORMATION \S 110(4)—STATUTORY OFFENSE.

Indictment for statutory offense in addition to statutory words of general description must, in some cases, set forth such further statement of facts and circumstances as may be essential to identify the particular doing.

4. INDICTMENT AND INFORMATION \S 110(7)—ARSON—STATUTE AND CONSTITUTION—"BUILDING."

Indictment for violation of Rev. St. c. 121, \S 1-3, punishing willful and malicious burning of a "building" of another, reading that defendant feloniously, willfully, and maliciously did burn a "building," the property of another, etc., was insufficient to inform defendant of accusation against her, as required by Const. art. 1, \S 6; "building" comprising any edifice erected by man of natural materials.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Building.]

Exceptions from Supreme Judicial Court, Knox County, at Law.

Alice Crouse was convicted of arson, and moves in arrest of judgment, alleging exceptions. Exceptions sustained, and judgment arrested.

Argued before CORNISH, C. J., and SPEAR, HANSON, DUNN, and MORRILL, JJ.

Henry L. Withee, Co. Atty., of Rockland, for the State. Philip Howard, of Rockland, for respondent.

DUNN, J. "Arson" and kindred crimes are defined by sections 1, 2, and 3 of chapter 121 of the Revised Statutes, the section last mentioned reading:

"Whoever willfully and maliciously burns any building of another not mentioned in the preced-

ing section, * * * shall be punished by imprisonment for not less than one, nor more than ten years."

Having been convicted upon an indictment, containing a single count, wherein it is charged "that Alice Crouse, of Rockland, in the county of Knox, aforesaid, on the first day of April, A. D. 1918, at Rockland, feloniously, willfully, and maliciously did burn a certain building the property of Lucy Farnsworth, said building being then and there situate on Pleasant street, in said Rockland," with conclusion in usual form, the defendant moves in arrest of judgment, for the assigned reasons that the indictment does not name or describe the kind or nature of the building alleged to have been burned, and because no judgment can be lawfully rendered on said record.

[1] The memorable and time-honored declaration that, in all criminal proceedings, the accused shall have a right to demand the nature and cause of the accusation (Con. of Maine, art. 1, § 6) entitles him to insist that the facts alleged to constitute a crime shall be stated in the indictment with that certainty and precision of designation requisite to enable him to meet the exact charge, and to plead the judgment, either of acquittal or conviction, which may be rendered upon it, in bar of a later prosecution for the same offense. *State v. Moran*, 40 Me. 129; *State v. Learned*, 47 Me. 426; *State v. Mace*, 76 Me. 64; *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278. He is of right entitled in the beginning to know, and in after time to point out, if he shall so desire, without going beyond the written record, the distinct crimination. The description of the offense must be certain, positive, and complete.

[2, 3] Speaking broadly, an indictment for a statutory crime is sufficient where it charges in the words of the statute. But this applies only in cases where in the statute itself there is a sufficient description of the offense intended to be created by the Legislature. With admirable accuracy it is stated in *Commonwealth v. Welsh*, 7 Gray (Mass.) 324:

"A charge in an indictment may be made in the words of the statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offense consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity."

Mr. Bishop, in his work on Criminal Procedure (volume 1, § 98), says:

"Under every sort of Constitution known among us an indictment which does not substantially set down, at least in general terms, all the elements of the offense—everything which the law has made essential to the punishment it imposes—is void; and, besides this, under most of our Constitutions the allegation must descend far enough into the particulars and be sufficiently certain in its form of words to give the defendant reasonable notice of what is meant."

"Where," as this court said in *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278, "a mere general or generic term is used, or the

statute does not sufficiently set forth the crime, the use of the statutory language is not sufficient."

The rule is that, in some instances, in addition to the statutory words of general description, it is necessary to set forth such further statement of facts and circumstances as may be essential to identify the particular doing. There must be such a description of the crime that the defendant may know just what it is he is called upon to answer; that the jury may be warranted in its finding, and the court, looking at the record after conviction, may impose the punishment which the law prescribed.

[4] Does the indictment in this case meet the requirements that it must, either in the language of the statute or other apt words, so identify the offense as to comply with the Declaration of Rights in the Constitution? It is our opinion that the indictment does not sufficiently inform the accused of the nature and cause of the accusation against her, and that there is legal ground for an arrest of judgment. "The word 'building' is not the distinctive name of a particular structure. It is a comprehensive term. It comprises any edifice erected by the hand of man of natural materials, as wood or stone, brick or marble. As commonly understood, a building is a house for residence, business, or public use, or for shelter of animals or storage of goods. A structure of considerable size intended to be permanent, or at least to endure for a considerable time." 9 *Corpus Juris*, 683; *Bouvier, Law Dict.* Any permanent building or edifice, usually occupied by any person by lodging therein at night, is a dwelling house. R. S. c. 121, § 8. A building may constitute an entire block, consisting of separate and independent tenements, one of which may be occupied for a dwelling house and another for a store. *State v. Spencer*, 38 Me. 32. The gravamen of the indictment is that the respondent feloniously, willfully, and maliciously did burn a building, situate on Pleasant street in Rockland, and owned by Lucy Farnsworth. The accused well may be in doubt, from a reading of the indictment, as to the precise act against which she is called to defend herself; whether, ineffectively, for arson as that crime is defined in section 1; or for having set fire, feloniously, willfully, and maliciously, to any of the buildings told off one after another in the next succeeding section of the chapter, or for likewise burning "any building of another not mentioned in the preceding section." If, as the case is argued, it was the intention to indict the respondent for a violation of the third section of the chapter, then, having reference to the manner in which the crime is defined in and by the statute, a more particular statement of facts than there is contained becomes necessary to bring the defendant precisely within the inhibition of the law. All substantive allegations should be specifically and defini-

tively set out. A description of what was burned is essential to fix the identity of the offense. *Com. v. Smith*, 151 Mass. 491, 24 N. E. 677.

Exceptions sustained. Judgment arrested.

(133 Md. 101)

BOYNTON et al. v. REMSON et al.
(No. 21.)

(Court of Appeals of Maryland. June 19, 1918.)

1. USURY §80—EFFECT—MORTGAGE.

Usury does not invalidate a mortgage or affect the power of sale contained therein.

2. MORTGAGES §25(5)—CONSIDERATION.

Mortgagee cannot be deprived of mortgage lien merely because mortgagor did not use the money deposited to his account and stated to a subsequent mortgagee that the prior mortgage would be released because he had not then received the fund to which it referred.

3. MORTGAGES §526(6)—SALES—INADEQUACY OF PRICE.

On exceptions to mortgage sale, evidence held to show that land was sold at an inadequate price.

4. MORTGAGES §528—SALES—INADEQUACY OF PRICE—WAIVER.

A mortgagor, who consented to the advertisement of his property under a first mortgage, after he found that a third mortgage was being foreclosed, did not thereby waive any valid objection as to inadequacy of the purchase price by reason of conflict and confusion resulting.

Three Appeals in One Record, Consolidated, from the Circuit Court for Anne Arundel County, in Equity; Wm. H. Thomas, Judge.

"To be officially reported."

Foreclosure proceedings by Etta L. Boynton and others against Charles E. Remson and others. There were two sales by different mortgagees, and various parties excepted. From a decree ratifying the sales, three appeals are taken. Affirmed in part and reversed in part, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Daniel R. Randall, of Baltimore, and Arthur Peter and Fred. B. Rhodes, both of Washington, D. C., for appellants. Charles Clagett, of Baltimore, and Ridgely P. Melvin, of Annapolis, for appellees.

URNER, J. The farm of Charles E. Remson, containing about 300 acres of land and situated near Annapolis was subject, in 1915, to a mortgage for \$25,000. Interest on the mortgage debt and taxes on the property being in arrears to the amount of about \$1,500, Mr. Remson borrowed the money to meet those charges from Mr. G. Clifton Sunderland, of Annapolis. In order to obtain the sum required Mr. Remson gave his promissory note to Mr. Sunderland for \$2,500, secured by a second mortgage on the farm, and the note and mortgage were used by Mr. Sunderland as collateral security for a loan to himself of the same amount from the An-

napolis Banking & Trust Company, the proceeds of which he deposited to Mr. Remson's credit in that institution. As previously agreed, Mr. Remson at once paid \$1,000 out of the fund to Mr. Sunderland for providing the sum of \$1,500 thus left available for the use to which it was intended to be applied. Mr. Sunderland paid one-half of the \$1,000 bonus to Mr. George T. Melvin, who as president of the Annapolis Banking & Trust Company had received and submitted to the board of directors the application for the loan, and had individually agreed, for an equal share of the bonus, to bear an equal part in financing the purchase of the property in case a foreclosure became necessary. These transactions were completed on December 1, 1915. On the same day a check for \$1,500, signed by Mr. Remson, was mailed from the bank to the representative of the first mortgagee, to be used for the payment of interest and taxes, but it was returned to the bank, with the statement that it would not be accepted. The check thereafter remained at the bank subject to Mr. Remson's disposal. It was not until March 2, 1917, however, that he had the check canceled and made other use of the fund against which it was drawn.

After declining to receive the check referred to, the first mortgagee made an effort to exercise the power of sale in his mortgage, but this was restrained by preliminary injunction, and the mortgage was shortly afterwards paid out of the proceeds of a new mortgage loan of \$30,000, which Mr. Remson obtained from Mr. J. Henry Strohmeyer, of Baltimore, by paying therefor a commission or bonus of \$3,000 in addition to \$895 interest in advance for six months. A further mortgage loan of \$8,559.40, for which Mr. Remson appears to have paid a bonus of \$1,000 to the lender, was then procured from Mrs. Etta L. Boynton, of the city of Washington. The proceeds of this loan were applied to the payment of judgments and taxes amounting to over \$5,300, unsecured debts of about \$200, an attorney's fee of \$750, and other expenses incident to the two mortgage transactions just mentioned, both of which were conducted for Mr. Remson by his counsel, Mr. Frederick B. Rhodes. As a result of the payment of the \$25,000 mortgage, and the existing judgment indebtedness, out of the funds realized from the Strohmeyer and Boynton loans, the Sunderland mortgage became the first lien on the Remson farm. The two subsequent mortgage loans were effected by Mr. Rhodes in the belief that a release of the Sunderland mortgage could be obtained on the ground that the object for which it was given had failed and the fund it produced for Mr. Remson had not as yet been utilized for any purpose. Efforts were accordingly made by Mr. Rhodes, as counsel for Mr. Remson, to accomplish that result; but, while an understanding was reached with Mr. Ridgely

P. Melvin, as attorney for Mr. Sunderland and the bank, that the mortgage would be released upon terms which appear to have been quite moderate, yet the sum agreed upon was not paid, and eventually, as already stated, the \$1,500 fund derived from the mortgage loan was appropriated by Mr. Remson to his own use. All of the mortgages had then matured and were in default. An extension of time on the Strohmyer mortgage was secured, but proceedings were begun for the exercise of the power of sale in the Boynton mortgage by Mr. Rhodes, as attorney, therein named for that purpose; his professional relations with Mr. Remson having previously terminated. In the advertisement of the sale thus undertaken no reference was made to the Sunderland mortgage, but it was stated that the property would be sold subject to a prior mortgage of \$30,000. The sale was advertised to be held at the courthouse door in Annapolis at 12 o'clock m. on April 3, 1917. When Mr. Sunderland learned of this proceeding he consulted his counsel, Mr. Ridgely P. Melvin, who represented also the bank, which held the Sunderland mortgage by assignment as collateral security for the \$2,500 loan, and, with the consent of Mr. Remson, it was determined to exercise the power of sale in that mortgage so as to anticipate the Boynton sale by which the first mortgage was apparently to be ignored. The Sunderland mortgage was thereupon assigned by the bank to Mr. Melvin as its attorney, who, after filing his bond as required by law, advertised the mortgaged property for sale at the courthouse door in Annapolis on April 3, 1917, at 10:30 o'clock a. m. A suit was brought by Mrs. Boynton to restrain the sale under the first mortgage on the ground that it was invalid, but at a hearing on bill and answer, shortly before the day of the sale, a preliminary injunction was refused. At the Sunderland sale the property was sold for \$40,000, and at the Boynton sale, an hour and a half later, it was bought by the same purchaser for \$11,000, subject, in terms, to the \$30,000 mortgage held by Mr. Strohmyer. Announcement was made at the Sunderland sale, by an attorney for Mrs. Boynton, that a purchaser at that sale would not obtain a good title, while at the Boynton sale it was publicly stated by Mr. Melvin, representing the first mortgagee, that the property had already been sold.

Exceptions to both sales were filed by Mr. Remson on the ground that, because of the confusion arising from the conflicting sales and announcements to which we have referred, his property was sold in both instances at a substantial sacrifice of its real value. Mrs. Boynton excepted to the ratification of the first mortgage sale upon grounds which will be presently stated and considered. Mr. Melvin, as assignee of the Sunderland mortgage, excepted to the Boynton sale, but the

question raised by his exceptions need not be determined. The purchaser also filed exceptions seeking a decision upon the validity of the first mortgage and the ratification of the sale under which it might be found that he would obtain a good title. Testimony was taken in support of the various exceptions, and by agreement the same evidence was treated as being available in the injunction suit relating to the Sunderland mortgage; that case and the exceptions to the sales being brought to final hearing at the same time.

[1] The grounds of objection urged against the sale under the Sunderland mortgage, apart from the question as to the adequacy of the price, are that the consideration mentioned in the mortgage is usurious and fictitious, and that the third mortgage loan was made upon the assurance by the mortgagor that he had received no part of the loan secured by the first mortgage, and that it would be released. In disposing of these objections in the court below, Judge Thomas held that the Sunderland mortgage was not rendered invalid by the fact that the mortgagor was charged \$1,000 for the loan, or by the circumstance that the \$1,500 fund which the mortgage produced was not used for the purpose for which it was borrowed, and was not actually drawn upon by the mortgagor until long after the second and third mortgages were executed. In this conclusion we fully concur. As Judge Thomas said in his opinion:

"The law is well settled in this state that usury does not invalidate a mortgage or affect the power of sale contained therein. In the case of Md. Perm. Land & Bldg. Soc. v. Smith, 41 Md. 518, the court said that the question of usury 'can only arise upon the statement of the final account by the auditor, and cannot be urged, as an objection to the sale,' and in the case of Powell v. Hopkins, 38 Md. 1, we find the same rule stated in the following language: 'The exaction of usurious or illegal interest (if proved by the evidence) does not invalidate the mortgage or affect the power to sell.' * * * The court of equity in which the sale is to be ratified, and the proceeds distributed, has full authority and jurisdiction to adjust the question of interest between the parties.' See, also, Miller's Eq. Proc. p. 563, and cases cited in the note, and Chipman v. Farmers' & Merchants' Nat. Bank, 121 Md. 343 [88 Atl. 151]."

[2] There was no evidence in the case that the Boynton loan was induced by any statement by Mr. Sunderland or the Annapolis Banking & Trust Company that the first mortgage would be released or that the consideration it recites had not been paid. It clearly appears from the testimony that the bank had in fact loaned to Mr. Sunderland, and the latter had paid to Mr. Remson, the amount of the loan which the mortgage was intended to secure. The fact that the money could not be applied to the objects first proposed, but remained in bank subject to Mr. Remson's order, could not affect the rights of the original holder, or of the assignee of the mortgage, whose money had been actually and unconditionally appropriated to the loan.

They could certainly not be deprived of the security of the mortgage lien merely because of Mr. Remson's statement to the third mortgagee that the Sunderland mortgage would be released because he had not then received the fund to which it referred.

[3] The court below concluded also that the objection to the first mortgage sale on the ground of inadequacy of price could not properly be sustained. With this view we have been unable to agree.

In our opinion the evidence is sufficient to support the contention that the conditions surrounding the sale not only tended to prevent the disposition of the property for an adequate price, but in fact produced that injurious result. It was almost inevitable that the efforts of two mortgagees to sell the same property at rival auctions held on the same day would cause a state of conflict and confusion by which both sales would be seriously prejudiced. In addition to being hampered by the mere fact of such competition, each of the sales was further embarrassed by a public warning against its validity by a representative of the opposing interest. It would be really remarkable if the fair market value of the farm had been realized under such adverse conditions.

The price of \$40,000 for which the property was sold under the first mortgage was said by several witnesses to represent, in their judgment, its full value. There was testimony, however, that some years ago the owner had received from separate sources offers of \$55,000 and \$65,000 for the farm, which he declined. A county assessor testified that the property is worth \$50,000 for farming purposes alone, and two other witnesses estimated its value, respectively, at \$55,000 and \$75,000. It was proven that a prospective bidder, who had visited the property, and had come from the city of Washington to attend the first mortgage sale, even though he had been told by his counsel that the United States government had offered \$75,000 for the farm, remained away from the sale after he learned that a second sale was to be made under another mortgage, because he did not wish to become involved in the litigation which would be expected to result from such a conflict of interests. By the advertisements for both of the sales, as well as by the evidence, emphasis was laid upon the fact that this 300-acre farm is exceptionally valuable, not only because of its fertility and improvements, and its availability and actual use for the purposes of an extensive dairy enterprise, but also because of its large water frontage, its adaptability to profitable subdivision, its proximity to Annapolis and the Naval Academy, and its adjacency to the Government Experimental Station and other public property in process of extensive development.

[4] Our review of the case has brought us to the conclusion that the mortgagor's

interests have suffered material injury as a result of the concurrent exercise of the powers of sale contained in the first and third mortgages, and of the effort of each of the vendors to discourage bidding at the sale conducted by his competitor. While Mr. Remson consented to the advertisement of his property under the first mortgage, after he found that the third mortgage was being foreclosed, we do not think he should be held to have thereby waived in advance any valid objection he might otherwise be entitled to raise as to the inadequacy of the purchase price reported. In consenting to such a proceeding he probably did not anticipate that the validity of the sale would be publicly contested at the time it was attempted to be made, and he certainly did not agree that his property should be sold for less than it was really worth. According to our conception of the case, a serious loss may result to the mortgagor from the ratification of either of the reported sales, but we are confident that no injustice would be done to any interest in the case if a resale is ordered. The third mortgagee, whose claim will be partly lost if the first sale is confirmed, might be very materially benefited if the farm is resold, and the first mortgagee is amply protected by priority of lien and cannot be injured by a resale of the property under conditions which will admit of its fair market value being realized. The second mortgagee appears to be well secured, and is taking no part in the litigation. The purchaser would apparently lose the benefit of an attractive bargain if neither sale is sustained, but it is not unjust to him to hold that he is not entitled to retain the accidental benefit resulting from the extraordinary and adverse conditions under which both sales occurred.

The conclusion we have reached upon the exceptional facts of this case does not disregard, and is not inconsistent with, the general rule relating to objections to sales on the ground of inadequacy of price as applied in previous decisions of this court. *McCarthy v. Hamburger*, 112 Md. 40, 75 Atl. 964; *Edgecombe Park Co. v. Finney*, 121 Md. 328, 88 Atl. 143; *Hunter v. Highland Co.*, 123 Md. 647, 91 Atl. 697; *Vollum v. Beall*, 117 Md. 620, 83 Atl. 1095, Ann. Cas. 1914D, 16; *Carroll v. Hutton*, 91 Md. 380, 46 Atl. 967; *Shaw v. Smith*, 107 Md. 526, 69 Atl. 116.

If Mr. Remson should be unable to refund his existing mortgage indebtedness, and a resale cannot be thus avoided, it should be made alone under the power of sale in the first mortgage, so that the title may be sold clear of all liens and under conditions favorable to a sale that will be advantageous to all parties concerned.

The decree of the court below will be affirmed in so far as it dismissed the bill for an injunction against a sale under the first mortgage and sustained the exceptions to the

sale reported under the third mortgage, but, with respect to the ratification of the sale under the first mortgage, it will be reversed.

Decree affirmed in part and reversed in part, and cause remanded, the costs to be equally paid by the first and third mortgagees.

(132 Md. 577)

KERNAN v. CARTER et al. (No. 57.)

(Court of Appeals of Maryland. April 4, 1918.)

1. HUSBAND AND WIFE §15(1) — INSANITY OF WIFE—SEPARATE CONVEYANCE BY HUSBAND—VALIDITY.

Where wife was adjudged insane in 1887, an absolute conveyance in 1911 by husband of realty, acquired after inquisition, to a corporation for shares of its stock, although husband was a director or president, could not be set aside in suit by wife's next friend, in view of Code Pub. Civ. Laws, art. 45, § 13, as to conveyance of property acquired after inquisition.

2. CORPORATIONS §104—PURCHASE OF PROPERTY.

The next friend of wife, whose husband conveyed realty alleged to be worth \$1,400,000 to a corporation for 5,997 shares of stock, each a par value of \$100, is in no position to complain, there being no fraud, that transfer was not in compliance with Code Pub. Civ. Laws, art. 23, § 35, as to issuing stock for property, in view of section 36, providing that acceptance by stockholders of property shall be conclusive, in absence of fraud.

3. PLEADING §8(15)—CONCLUSIONS—FRAUD.

While it is unnecessary to set out in the bill all the evidence a plaintiff may have knowledge of, there must be something more than plaintiff's conclusion that a transaction is fraudulent.

4. WILLS §790—RENUNCIATION FOR INSANE WIFE.

Under Code Pub. Civ. Laws, art. 93, §§ 301, 302, as to renunciation by wife of provisions of will within six months after first grant of administration, where husband, who was appointed committee of insane wife, died having made a bequest to her, and will was admitted to probate, a court of equity cannot, three years and nine months thereafter at instance of next friend of wife, make a renunciation for wife, where every one of near relatives were beneficiaries under will, and knew everything necessary to enable proceedings to be taken, in view of section 342 as to will not being subject to objection three years after probate.

5. EQUITY §267—AMENDMENT.

Refusal to grant leave to amend amended bill was in discretion of court.

6. APPEAL AND ERROR §959(1)—REFUSAL TO ALLOW AMENDMENT—DISCRETION.

Refusal to grant leave to amend amended bill being discretionary, there is no appeal from it.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Duffy, Judge.

Suit by Eugenia L. Kernan, by her next friend, against Shirley Carter and others. From an order sustaining a demurrer to and dismissing an amended bill, and from an order refusing to grant leave to amend said amended bill, plaintiff appeals. Appeal from order refusing leave to amend dismissed, and order sustaining demurrer and dismissing bill affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Walter D. Elseman and Isaac Lobe Straus, both of Baltimore, for appellant. Shirley Carter and Thos. Foley Hisky, both of Baltimore (Bernard Carter & Sons, of Baltimore, on the brief), for appellees.

BOYD, C. J. This case is before us on an appeal from an order sustaining a demurrer to and dismissing an amended bill filed by the appellant, and on another appeal from an order refusing to grant the appellant leave to amend that amended bill. The plaintiff, Eugenia L. Kernan, is the widow of James L. Kernan, who died on the 14th of December, 1912, leaving surviving him his widow and two sons and a daughter. In 1887 the plaintiff was upon an inquisition adjudicated a lunatic upon the petition of her husband, who was appointed by the circuit court of Baltimore city the committee of her person and estate. The finding still remains in force and she is confined in Mt. Hope Retreat, where she has been for many years. The bill alleges that for many years prior to and ever since the death of her husband she "has been and is non compos mentis and incapable of acting for and in her own behalf with respect to any business matters, property rights, or interests whatsoever, and incapable and disabled at all times, both at and since the death of her said husband, from making any election with respect to accepting or renouncing the provisions made for her in his last will and testament," and that "she was and had been and is still disabled and incapacitated from taking any steps whatsoever, from instituting any proceedings, or causing any steps to be taken or proceedings to be instituted, to question or deny the validity of" a deed of trust, a deed of assignment, or a deed of conveyance, which will be later referred to in this opinion. That paragraph of the bill concludes, "and that her disability and incapacity in all the respects aforesaid have been caused by the fact that she has been at all times bereft of her reason and of all understanding of her rights, interests, and matters aforesaid."

On the 20th of April, 1911, James L. Kernan executed a "deed of conveyance" to the James L. Kernan Company of Baltimore City, Incorporated, for a property which is therein described. The lot fronts partly on Howard street and partly on Franklin street, and is improved by a hotel and theater. The property is described as being in fee simple, except a portion of it which is subject to an annual rent of \$64. That deed also included personal property, the businesses, franchises, good will, etc. The consideration is stated to be 5,000 shares of preferred stock of the James L. Kernan Company of the par value of \$100 each, and 997 shares of the common stock of that company of the same par value,

all of which stock is said in the deed to have been issued and certificates thereof delivered to said Kernan, in accordance with a resolution of the stockholders duly passed at a meeting held in Baltimore on the 15th of April, 1911, in compliance with the provisions of section 35 of article 23 of the Code. The deed also refers to a decree of the circuit court of Baltimore city, dated January 28, 1887, being the proceeding in which the plaintiff was adjudicated a lunatic, and to section 13 of article 45 of the Code, for the right of the grantor to sell and convey the real estate.

On the 20th of April, 1911, being the same day the deed of conveyance was made, a "deed of trust" was made by said Kernan, as party of the first part, to Frederick C. Schanberger and Shirley Carter, parties of the second part, in which it is recited that whereas the party of the first part had granted and assigned to the parties of, the second part, upon the trusts therein set out, the 5,000 shares of preferred stock, and he was about to cause the same to be transferred to them on the books of the company, and desired to have the trust upon which they were granted and assigned fully set out in that instrument of writing, so that the same might be recorded, therefore, in consideration of the premises and of the sum of \$10, he granted, bargained and sold, assigned, transferred, and confirmed unto the parties of the second part, and the survivor of them, and the successors of the survivor of them, as therein provided for, the 5,000 shares of preferred stock in trust for the purposes therein set forth. They were to hold the said shares of stock, collect the dividends and income, and pay over the net dividends and income therefrom to the said Kernan during his life, and after his death to hold said shares for the following purposes: To collect and pay over the net dividends and income from 3,400 shares of that stock to the James Lawrence Kernan Hospital and Industrial School of Maryland for Crippled Children, during the joint lives of the trustees, and upon the death of either of them the survivor to transfer and assign the said 3,400 shares to said Hospital and Industrial School. It was then provided that of the remaining 1,600 shares of preferred stock they were to hold 534 shares for each of his two sons and 532 shares for his daughter. The provisions of the trusts for each of them are set out at length, and under certain contingencies the share left to a son or daughter was to go to St. Agnes Hospital.

On the 22d of April, 1911, he made what is spoken of as a "deed of assignment," in which he stated that he had assigned to Frederick C. Schanberger 385 shares of the common stock of the James L. Kernan Company, absolutely, and to Shirley Carter 165 shares of said stock, absolutely, and to himself 447 shares for life, with remainder as to 315 of them to said Schanberger, and as to 132

shares to said Carter, and he desired to have said transactions evidenced by that deed so that it could be duly recorded. The deed then, in consideration of \$5; assigned and transferred said stock according to what was stated in the preamble. All of the deeds were promptly put on record.

On the 24th of June, 1911, James L. Kernan executed his last will and testament, by which he gave to Bernard Carter and Shirley Carter, and to the survivor of them, \$20,000 in trust to invest and reinvest the same from time to time, to collect the income therefrom, and apply the net income, or so much thereof as shall be necessary, to the proper maintenance and support of his wife for and during the term of her natural life, and from and after the death of his wife, and after the payment of her funeral expenses, to divide the corpus of said \$20,000 and any accrued income therefrom into two equal shares, and to pay one share absolutely to St. Agnes Hospital and the other to the Institute of Mission Helpers of Baltimore City, to be applied by it to the education and care of the deaf and dumb or otherwise afflicted children under its care. He then left \$3,000 to each of his two sons, and said he did not make a bequest to his daughter because he had his life insured and held the policy for her benefit. He made the James L. Kernan Company of Baltimore city his residuary legatee and devisee. He appointed Messrs. Bernard Carter and Shirley Carter, and the survivor of them, executors of his will, which was probated on December 18, 1912, and letters testamentary were granted to Shirley Carter, the survivor.

[1] The bill asks the court: (1) To renounce the provision made for the plaintiff in the will, and elect to take and receive, in lieu thereof, the share allowed her by law in the personal property of the estate, belonging to her husband at the time of his death; (2) to decree and declare that said Kernan died seized of all the real estate mentioned in the deed of conveyance of April 20, 1911, and that she is entitled to dower therein; (3) that the three deeds be declared null and void, and that the plaintiff be declared and decreed to be entitled to one-third of the personal estate and her dower rights in all real property of which her husband died seized; (4) that the bequests and gifts in the residuary clause of the will be declared null and void; (5) that the executor be required to pay over to a trustee to be appointed her legal share, interest, and portion of all the personal estate of which her husband died possessed; (6) that the court direct such further proceedings as may be proper and necessary to assign the plaintiff her dower; (7) that there be an accounting with the defendants who have received profits, revenues, income, or interest to which she was entitled; and (8) for general relief.

Section 13 of article 45 provides that:

"Where any married man or married woman is a lunatic or insane, and has been so found upon inquisition and the said finding remains

in force, or where any married man or married woman has been absent or unheard of for seven years, the husband or wife of such lunatic or insane or absent person may grant and convey by his or her separate deed, whether the same be absolute or by way of lease or mortgage, as fully as if he or she were unmarried, any real estate which he or she may have acquired since the finding of such inquisition or since the beginning of such absence."

Mr. Kernan unquestionably had the power to convey the real estate included in the deed of conveyance of April 20, 1911, by virtue of that provision of the Code—having acquired it after the finding of the inquisition. There is no reservation whatever in the deed in his favor, but it was an absolute deed for a valuable consideration. Under the decisions in this state a husband can dispose of his personal property during his life, even if it be done with an intent to defraud his wife of any interest in it, provided he reserves no right to himself. *Hays v. Henry*, 1 Md. Ch. 337; *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Rabbitt v. Gaither*, 67 Md. 94, 8 Atl. 744; *Brown v. Fidelity Trust Co.*, 126 Md. 175, 94 Atl. 523; *Poole v. Poole*, 129 Md. 387, 99 Atl. 551. There would seem to be no doubt that a husband has equal, if not more, power as to real estate, by virtue of that statute. It is said, however, on the part of the appellant, that by this transaction Mr. Kernan simply attempted to convert his real estate into stock of the corporation for the purpose of more readily depriving his wife of her interest by putting it in the shape of stock which could be easily transferred. That allegation seems to us to be contradicted by the exhibits filed with the bill, and nothing is alleged to overcome them but the mere allegations of fraud without stating or suggesting that there is any evidence of it outside of the instruments themselves. The same day he received the certificates of stock he made the deed of trust, by which he transferred all of the preferred stock to the trustees for the trusts referred to above, and he assigned 550 shares of the common stock to Messrs. Schanberger and Carter, absolutely, in the proportions mentioned above, and 447 shares to himself for life, with remainder to those parties, absolutely, and did not reserve the right to assign or sell the interests of the remaindermen in the 447 shares. We will speak later of the transfer of the stock, but the deed of the real estate was in our judgment beyond the attack of the plaintiff, as it was an absolute sale without any reservation or control over that property. The controlling interest in the company was in the hands of others, and if he was a director, or even president, such a position would not give him the control of the property for his own benefit. His duty was to the company, and we find nothing in this bill and exhibits which would justify us in holding that he was not authorized to make the deed under the statute quoted.

[2] We have not overlooked the point made

by the appellant that section 35 of article 23 of the Code was not complied with, but we think that has no merit. In the first place, the appellant could not object to that, if there is any irregularity about it. The object of the statute is to prevent a corporation from paying in stock an exorbitant price for the property, in short, from issuing watered stock. It would be impossible in many, perhaps most, cases, to pay for stock in property if no one in any way interested in the person proposing to sell property for stock could take part as a stockholder. The statute says that "no stock shall be counted whose owner or holder is interested in such services or property." Section 36 of article 23 provides:

"That the valuation placed by the stockholders upon such services or property at the meeting duly warned, as aforesaid, and the propriety of their action accepting the same and issuing the agreed number of shares therefor, shall in the absence of actual fraud be conclusive against and binding upon any and all creditors of the corporation."

Surely the appellant is in no better position than creditors would be to raise any question about it. The "actual fraud" spoken of in the statute means of course the fraud in issuing the stock for services or property. If the bill is anything like correct in stating the value of the property conveyed for the stock to be worth about \$1,400,000, no one interested in the corporation can complain of the stockholders who took part in that transaction giving 5,000 shares of preferred stock and 997 shares of common stock, each of the par value of \$100, in all a par value of \$596,700.

[3] The bill is replete with charges of fraud, based on the theory that all of these transactions were with the deliberate intent to defraud the unfortunate plaintiff of what the bill asserts were her marital rights. While it is not necessary to set out in the bill all the evidence a plaintiff may have knowledge of, there must be something more than the plaintiff's conclusion as to the purpose and intent of a party in making written instruments brought before the court, and the plaintiff calling them fraudulent or characterizing the plan as a scheme to perpetrate a fraud on a helpless lunatic does not make it so.

It would be difficult to find a record in which there are a bill in equity and exhibits where the exhibits themselves, when given fair and unprejudiced consideration, meet so many of the allegations of fraud in the bill more clearly than those in this case do. There is no concealment; on the contrary, there was an open book from beginning to end. Those exhibits do not in our opinion furnish ground for the charge of fraud that is made. In the first place, what possible motive could Mr. Kernan have had in defrauding his unfortunate wife of her rights in his property after his death? He must have been a very unusual and very peculiar

man if, in order to give one-half of his property to such a worthy charity as a hospital and industrial school for crippled children, he would purposely and intentionally go to work to defraud his insane wife. If any one wanted to make provision for such charities and other objects, and had such an estate as he had—theater and hotel properties—the reasonable and natural thing for him to do was just what Mr. Kernan did do. If the statement in the bill as to the value of the property is correct, then the shares of stock he left to each of his children were worth considerably over \$100,000, and he certainly had the right to say how much of his estate should go to each of them. He could not well have made suitable provisions for the crippled children without organizing a corporation, and probably could not have arranged for as much income out of the portion of his estate he wanted to give to that institution in any way other than the one he adopted. If he had simply made a will—directed a sale of his property and left such portion to the different persons and objects he had in view—it would have been next to impossible to have realized as much out of his properties as he could by the plan he adopted. Or if he had devised this property to trustees for the benefit of the hospital for crippled children and others, it could not have been done as well as by the plan he adopted. So far as the realty is concerned, we are not prepared to hold that even if a husband conveyed his real property and put it in the shape of stock or other personal property, partly because of the mental condition of his wife, and his knowledge of the fact that in case of his death before her his real estate would be incumbered by her dower in it, he could not do so under section 13 of article 45 of the Code, and convey a good title, free and clear of her interest in the property, or in the language of the statute, “as fully as if he were unmarried.” These papers were executed and Mr. Kernan died prior to the act of 1916, chapter 325, and hence there is no question as to its effect on his property. She could not have had more than a third interest for life in the real estate, while in his personalty she would be entitled to the third absolutely. The consequences might be very serious in some case where a husband or wife is a hopeless lunatic, if the other spouse could not sell the real estate and invest the proceeds in personal property, so as to avoid complications in regard to the real property. So, although there is nothing in any of the deeds, or in the will to suggest that the plan worked out was adopted for the purpose of depriving the widow of any of her rights, even if Mr. Kernan was in any way influenced to pursue the course he did in order that the real estate should be free from his wife's dower, it was not, under the circumstances, fraudulent or prohibited, especially as the stock was

placed in such shape that he could not dispose of it, and it could be readily reached by any one interested in the wife's welfare.

We will therefore determine what rights she had, if any, in the personal property left by the testator. It is only fair to say that we cannot in considering this case merely compare the provision made by the testator (the income on \$20,000) with the large estate the bill alleges he left, as to simply state the figures is misleading. When these papers were executed Mrs. Kernan had been an adjudicated lunatic for 24 years. There is nothing in the bill to indicate that there was the least probability of her recovery, or decided improvement, although we are not told whether she is violent, or what her precise condition is, beyond what we have stated above. While there is a suggestion in the bill that more might be used for her comfort and benefit than the income on \$20,000, it is stated that the trustee only spends \$10 a week for her maintenance and care. It is only fair to assume that the testator carefully considered what it had cost in the past and would likely cost in the future to provide for her. Mt. Hope Retreat is an old and well-known institution for such persons. Cases before us in this court and in the circuits have given us information as to how it is conducted, the standing of physicians connected with it, and the care given the patients by those in charge. The condition of this unfortunate lady may be such that the income from the sum placed in trust for her benefit may be more than ample, and apparently the trustee is of that opinion, as he pays, according to the bill, less than 3 per cent. on the amount in trust. If more is necessary, and the trustee has it, we know of no reason why it could not be required to be paid.

[4] Coming, then, to the question whether it is now too late to renounce the will, and whether the court can renounce for her, an insane widow. By section 301 of article 93 it is provided that:

“Every devise of land or any estate therein, or bequest of personal estate to the wife of the testator shall be construed to be intended in bar of her dower in lands or share of the personal estate, respectively, unless it be otherwise expressed in the will.”

Section 302 is:

“A widow shall be barred of her right of dower in land or share in the personal estate by any such devise or bequest, unless within six months after the first grant of administration upon her husband's estate she shall deliver or transmit to the court or register of wills where administration has been granted a written renunciation in the following form, or to the following effect.”

The form provided then follows. This will was admitted to probate and letters issued December 18, 1912, and the original bill was filed October 5, 1916. It is clear that it was too late to file a renunciation of the bequest, unless there be some principle which enables a court of equity to act for one un-

able to act for herself at any time, regardless of the statute. It will be well to say here that we can see no force in the argument, much relied on by the appellant, that Mr. Kernan was the committee of his wife. There was no occasion to renounce until after the grant of administration upon his estate, and, of course, he was then dead, and was no longer a committee. What ought to have been done, if it was desired to file a renunciation, or test the right to file one, was to have a new committee appointed; or a bill could have been filed by the next friend within the 6 months, just as well as within 3 years and 9 months after the letters testamentary were issued. The deeds had been on record for over 19 months before the testator died. This is not like a case in which a proceeding had not been commenced earlier because of the insanity of the widow, and she afterwards recovers and then seeks relief. She is still insane, and probably will be until her death. There is no valid excuse offered in the bill for not proceeding sooner. Section 342 of article 93 provides that "no will, testament, codicil or other testamentary paper shall be subject to caveat or other objection to its validity, after the expiration of three years from its probate;" but notwithstanding that, this will is attacked in the name of Mrs. Kernan, but by her son as next friend, who could have done so as well within 6 months as now. We cannot be unmindful of the fact that if the proceeding is successful the next friend, his brother, and the children of his deceased sister are the real parties who would profit by it, for unless the widow should recover, from which it is not suggested there is any hope, whatever is recovered in her name will eventually go to them. There is therefore not only a delay for which no excuse is offered, but an attack in the name of one who, so far as we can gather from the bill, is not in such a mental condition as to be conscious that her dead husband—the father of her next friend—is accused of perpetrating a fraud on her.

Whatever other courts may have said, the case of *Collins v. Carman*, 5 Md. 503, decided by our predecessors, is conclusive of the question, unless we overrule it. There an insane widow, to whom devises and bequests had been left by her husband's will, not to renounce as required by the statute. After her death her administrator filed in the orphans' court a renunciation of the will, and then filed a bill in equity for the purpose of obtaining a decree declaring the renunciation effective and sufficient, or if for any cause it should be deemed informal or imperfect the complainant prayed that he might be considered as revoking, by his bill, the renunciation. There, as here, the widow had received the benefits of the will for several years. The case was argued by some of the most distinguished attorneys who were ever at the Maryland bar—Thomas S. Alexander and William Schley for the appellant, and T.

P. Scott and John V. L. McMahon for the appellee. The court held that the administrator could not make the renunciation, or claim anything beyond what was given by the will. It said that it intimated no opinion on the question whether a court or equity could make an election or renunciation for an insane widow, during her life and in proper time. After quoting from the Act of 1798, chapter 101, first and second sections of subchapter 13, which are now sections 301 and 302 of article 93, excepting there is a change in the time from 90 days to 6 months, the court said:

"Every valid devise or bequest is therefore made an effectual bar, unless it be removed by renunciation. And until that is made the bar remains. The law admits of no excuse for a failure to renounce. If she make no election within the time prescribed, the law makes it, without stopping to inquire why or for what reason she made none."

Judge Eccleston then went on to show that the act of 1798 had changed the common law, and that:

"When a man dies leaving a will, making valid gifts of real and personal estate to his wife, she has not, as she had at common law, a vested right to dower in his land, or to a legal share of his personality, but her vested rights are under the will by virtue of the statute law."

He said:

"And to effect the husband's object the wife need not declare her assent; if, however, she desires to defeat it, she must manifest her intention to do so by an express dissent. And such dissent is an act, which by the very terms of the law must precede her becoming entitled to or vested with those rights which she might have claimed but for the will. * * * Whether from design, neglect, or from other cause, the widow fails to make such renunciation, the result is the same."

Again it is said:

"The language of the statute is quite comprehensive enough to include every widow, whatever may be her age, or mental condition, there being no exception in favor of infants or insane persons. * * * When the law directs an act to be done, or a condition to be performed for the purpose of conferring a right, that right cannot be acquired if the act is left undone, or the condition is not performed. And if no exception is made in favor of insane persons, courts of justice have no more power to decree to them the allowance of such rights, because of their mental incapacity to comply with the requisites of the law, than they have to decree in favor of sane persons failing to comply. If the law makes no exception the courts can make none, whether they be courts of law or equity; for where the construction of a statute is before them the rules of construction are the same in both courts."

The court referred to many cases, amongst others *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 142, 8 Am. Dec. 487, where Chancellor Kent considered at length the doctrine in regard to any inherent equity creating an exception as to any disability where the statute of limitations creates none, and said the doctrine had been long and uniformly exploded. That case was approved in *Hertle et al. v. Schwartze et al.*, 3 Md. 383, and *Du-*

gan v. Gittings, 3 Gill, 161, 43 Am. Dec. 306. Judge Eccleston added:

"If these are the rules which apply to the statute of limitations, it is difficult to perceive why they should not be equally applicable to other statutes."

The conclusion of the court, as to whether the statute applied to an insane widow was:

"With these principles before us, sanctioned by such authority, we cannot but believe the present case is embraced within the broad and explicit language of the act of 1798, and that without a renunciation the widow had no right to dower, or to her common-law share of the personality."

The court then considered the question whether the renunciation of the administrator availed anything, and held that it did not for several reasons. A number of cases were cited to show that the administrator could not renounce, amongst others *Boone v. Boone*, 3 Har. & McH. 95, where Stephen Boone died leaving a widow to whom he bequeathed a part of his personal estate. The widow died before the expiration of 40 days (the time then fixed by the statute), and did not file a renunciation. It was held that her representatives did not have the privilege of renouncing the bequest "being intended entirely for her benefit and personal privilege."

Although it was urged by the learned attorneys for the appellant that that case does not apply, we are unable to concur with them. The principles there announced have never before been questioned in this state, and while in individual cases some hardships may result, it would be vastly more disastrous if settlements of estates are to be kept in uncertainty for years, probably throughout the lives of insane widows and husbands, under the present law, by the contrary views. As that case expressly left open the question whether a court of equity can make the election, or renunciation, "during her life and in proper time," which manifestly means within the time fixed by the statute, it does not preclude an application to a court of equity within that time and as this bill was filed over 3 years beyond that time, it would be useless to discuss that, further than to say that if it can be done at all by a court of equity it must be within the time fixed by the statute certainly where, as here, every one of the near relatives was a beneficiary under the will, and knew, or must under the circumstances be treated as knowing, everything which was necessary to enable proceedings to be taken. That was the view taken in the dissenting opinion filed in *Wright v. West*, 2 Lea (70 Tenn.) 78, 31 Am. Rep. 586, a case relied on by appellant, which seems to us to be the safest and proper rule, if a court of equity can elect or renounce for an insane widow. We have the right to assume that the next friend and other relations took under this very will, as we are not told in the bill that they did not, and this next friend not only accepted the

will himself, but permitted the trustee to provide for his mother under it, and made no move in court until nearly 4 years after his father's death. He would be effectually barred if he attempted to attack the will, and would not be heard in a court of equity, by reason of his laches, to attack the other instruments, unless there was some ground other than what is in this bill; yet it is contended that he can in the name of his insane mother accomplish indirectly what he could not do in his own name. It is far better that there be some risk of an occasional injustice to an insane widow, as much as that is to be regretted, than that a court of equity be in the position of being required to grant relief indirectly to one who would have no standing in court, if he asked relief in his own name. We are not told how many, if any, crippled children have been receiving help from the 3,400 shares of preferred stock, although probably some were during the years between the death of Mr. Kernan and the filing of the original bill, but if there are any, and the prayers of the bill must be granted, it may well be that if this unfortunate plaintiff could have her reason restored sufficiently to take in the situation, she might deeply regret this proceeding.

In the case of *Garrison v. Hill*, 81 Md. 551, 62 Atl. 191, what is now section 342 of article 93, above quoted, was involved. One of the reasons for contending that the statute was invalid was that there was no saving clause to those under disability to sue. We said in reference to that:

"So far as the omission to insert a saving clause in favor of those under disability to sue is concerned, it might be said the appellant is not in a position to complain. She is now in this court by her next friend, and could have so proceeded at any time since the will of Mrs. Johnson was probated. But the law cannot be said to be unconstitutional merely because it fails to extend the time in favor of those under disability, such as coverture, infancy, etc. It is discretionary with the Legislature whether or not they shall be exempted from the operation of the statute of limitations, and unless that statute does so exempt them they are governed by the same law that others are."

As this opinion is already of unusual length, we will not cite other cases on the subject except to refer to *Collier v. Smaltz*, 149 Iowa, 230, 128 N. W. 396, which is also reported in Ann. Cas. 1912C, 1007, where there is a note citing a great many cases. That note begins with the statement that:

"There is no dissent from the proposition announced in the reported case that where a statement of limitations contains no exception in favor of persons non compos mentis, the statute runs against an insane person."

As we are of the opinion that *Collins v. Carman*, supra, is applicable, and we are not willing to overrule it, but, on the contrary, believe that it announced the correct rule under such statutes as we have, it would be useless to discuss the authorities to the contrary cited by the appellant.

[5, 6] It is only necessary to say in ref-

erence to the refusal of the lower court to allow the plaintiff to again amend the bill that it was in the discretion of that court and there is no appeal from it. Miller's Eq. Proc. 231, § 182. The court doubtless thought that amendment could make no difference in its conclusion. The appeal from the order refusing to give leave to amend will be dismissed, and the order sustaining the demurrer and dismissing the bill will be affirmed.

Appeal from the order refusing leave to amend dismissed. Order sustaining the demurrer and dismissing the bill affirmed, the next friend to pay the costs.

(123 Md. 150)

MAYOR AND CITY COUNCIL OF BALTIMORE v. GORDON et al. (No. 25.)

(Court of Appeals of Maryland. June 20, 1918.)

1. DEDICATION §=1—ESSENTIALS.

To sustain a city's claim that an alley had been dedicated, it must be found that there was a clearly manifest intent to dedicate to public use on the part of the owner, and that the same was accepted by the city.

2. DEDICATION §=15—INTENT—PLAT.

Intent requisite to constitute a dedication cannot be inferred from a plat by placing on it names which import a private use as readily as a public use.

3. DEDICATION §=16(1)—OFFICIAL PLAT.

The laying out of a street, without consent of owners, upon a plat by commissioners, authorized by statute to prepare a plan of a city, did not operate as a dedication.

4. DEDICATION §=16(1)—PARTITION PROCEEDING.

The leaving of a strip behind lots in a partition proceeding for the mutual accommodation of the lots as an alley did not constitute a dedication, especially where the alley had only one outlet.

5. DEDICATION §=37—ACCEPTANCE.

That public may for many years have used a way over private property is not alone sufficient to authorize presumption that same has been accepted by public authorities as a public way.

6. DEDICATION §=35(1)—ACCEPTANCE.

A notice from health department of a city to remove manure on a certain way did not show an acceptance by the city of such way as a public alley, where it did not appear whether or not health department acted in performance of its duty to cause the removal of nuisances, an act which might be performed in regard to private as well as public property.

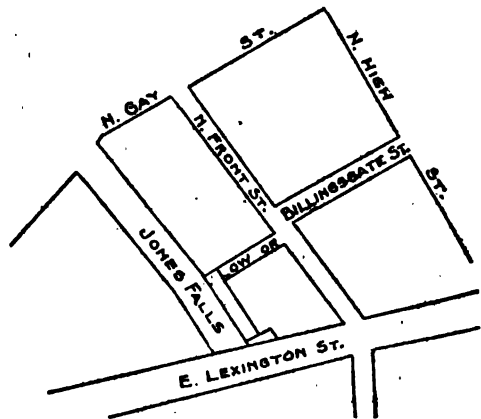
Appeal from Circuit Court of Baltimore City; H. Arthur Stump, Judge.

Bill by Louis Gordon and John C. Toland, to enjoin the Mayor and City Council of Baltimore, a municipal corporation, from closing an alleged alley. Decree for plaintiffs, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Alexander Preston, Deputy City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellant. Jacob J. H. Mitnick and Hiram J. Weiskopf, both of Baltimore (Simon E. Sobeloff, of Baltimore, on the brief), for appellees.

STOCKBRIDGE, J. When Harry Dorsey Gough died in 1808 he was seised in fee, among other property, of a lot on the west side of Front street in Baltimore city, having a front of 140 feet, and extending back westerly an approximate depth of 150 feet to Jones Falls. This lot lay just to the south of Billingsgate street, as it was then called, now known as Low street. Proceedings for a partition of Mr. Gough's real estate were begun in the High Court of Chancery in 1817, and the return of the commissioners was filed about 18 months later. By it there was allotted to James Carroll, Jr., a portion of the Front street property, fronting 46 feet 1 inch on Front street, "by a depth of 125 feet to an alley 25 feet wide left on Jones Falls for the mutual accommodation of this and adjoining lots." By the same return there was allotted to Charles R. Carroll a house and lot on Front street, immediately adjoining that allotted to James Carroll, Jr., and which had a front on Front street of 98 feet 11 inches, with a depth of 125 feet "to a 25 foot alley left on Jones Falls for the mutual accommodation of this and the adjoining lot." These two lots taken together thus exhausted the entire amount of real estate of Mr. Gough's on Front street. The space referred to as an alley in the allotment remained an open space along the side of the Falls, which could be entered from Low street, but was closed at the other end by property adjoining to the south, which ran through from Front street to the Falls.



The present litigation grows out of an attempt by the mayor and city council of Baltimore, through the passage of an ordinance, to close this space as being a public alley, which is resisted by the abutting owners, who claim title in themselves by virtue of various mesne conveyances from James Carroll, Jr., and Charles R. Carroll. A bill was filed by the plaintiffs as owners, asking an injunction, which by the decree of the circuit court of Baltimore city was granted, enjoining the mayor and city council from proceeding un-

der the ordinance. The question thus is one of dedication to the public, and the acceptance by the municipal authorities of such dedication of this strip of ground, referred to as an alley, as a public highway.

[1] To sustain the city's claim and contention it must be found that there was an intent to dedicate to public use on the part of the owner of the property, and that such intent was clearly manifested, and that the same was accepted by the city. "There is no such thing as a dedication between the owner and individuals, the public must be a party to every dedication. It is the essence of a dedication to public uses that it shall be for the use of the public at large. There may be a dedication of land for special uses, but it shall be for the benefit of the public and not for any particular part of it. * * * The grant by the owner of a private right of way over his land to buyers of different parcels of the same to furnish them with convenient access to the street is no dedication to public use." 8 R. C. L. 888, 889; *Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 518.

[2] The intent requisite to constitute a dedication cannot be inferred from a plat, by placing on it names which import a private use, as readily as a public use. *Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729. And what the character of the evidence of the intent must be was clearly stated by Judge Miller, in *Pitts v. Baltimore*, 78 Md. 326, 21 Atl. 52, when he said:

"It has been decided by this court in a number of cases that in order to make out a dedication, an intent on the part of the owner to dedicate his land to the particular use alleged is absolutely essential, and unless such intention is clearly proved by the facts and circumstances of the particular case, no dedication exists."

And for this he cites the cases of *White v. Flannigan*, 1 Md. 539, 54 Am. Dec. 668; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *McCormick v. Baltimore*, 45 Md. 512; *Tinges v. Baltimore*, 51 Md. 600; *Hall v. Baltimore*, 56 Md. 187; *Baltimore v. White*, 62 Md. 362; and *Glenn v. Baltimore*, 67 Md. 390, 10 Atl. 70.

To support the contention of the city reliance is placed upon two facts, which will be considered in the light of the rules of law applicable to such cases. These are: First. The description in the return of the commissioners, which called for a depth of 125 feet to an alley 25 feet wide; and second, "Poppleton's Plat."

[3] Taking these up in inverse order, the effect to be given to Poppleton's plat has been passed upon by this court in *Baltimore v. Bouldin*, 23 Md. 628, and *Baltimore v. Hook*, 62 Md. 371, under which it was distinctly held that the laying down of a street upon that plat was not sufficient to avoid condemnation proceedings, in cases where there had been no dedication. But apart from these positive adjudications the situation is this: The appointment of a commission to make

the partition of Mr. Gough's estate, and the act of the Legislature giving authority to John E. Howard and others as commissioners to have a plan of the city prepared, both took place in the same year. The return of the commissioners for the partition was some years earlier than the filing of Poppleton's plat. There do not appear from the record to have been any legislative acts with reference to the plat subsequent to the time of its being filed; nor could the laying out of a street upon that plat operate as a dedication, without the consent of the owner or owners, where there had been no prior dedication of the land.

[4] With regard to a dedication resulting from the description in the partition proceedings, that can stand in no better position. It is perfectly true that the call is for a depth of 125 feet to a 25-foot alley, but it is equally true that by the very terms of that call the alley was one left, not for the use of the public generally, but was specially restricted to the use of the lot or lots carved out of the land of Mr. Gough which should bound thereon. Thus instead of a clearly proved intent to dedicate this alley to public use, it is limited to the use of the owners of the abutting land of which Mr. Gough died seised.

There is another circumstance which in many of the adjudicated cases has been regarded as negating the purpose to dedicate. The alley called for in the partition proceedings had no outlet to the south, and thus formed a cul-de-sac, as it is commonly called. As early as 1813 Lord Chief Justice Mansfield, in the case of *Woodyear v. Hadden*, 5 Taunt. 126, had a similar situation presented. It differed from the present case, in that 19 houses were erected on the land having an outlet on the cul-de-sac, which was watched, paved, cleaned, and lighted at the public expense, and yet in that case it was said that there had been no such dedication as was requisite to constitute a public highway. This was followed some years later by the case of *Barraclough v. Johnson*, 8 Ad. & El. 99, in which the court followed the same rule, and clearly distinguishes a use, which is properly to be designated as a license, from a dedication. This rule of the English courts has been adopted in a number of cases in this country. *Gillilan v. Shattuck*, 142 Cal. 27, 75 Pac. 646; *People v. Johnson*, 237 Ill. 237, 86 N. E. 676. These cases all differ radically from the case of *Beale v. Takoma Park*, 130 Md. 306, 100 Atl. 379, in which there was an express dedication.

[5, 6] Nor is there any sufficient evidence in this case to show any acceptance whatever upon the part of the municipal authorities. The mere fact that the public may for many years have used a way over private property is not sufficient to authorize the presumption that the same has been accepted by the public authorities as a public way. *James v. Kent*, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291.

The evidence in this case with regard to acceptance is all one way. This alley space has never, up to the present time, been paved at all, what grading has been done was done by and at the expense of the owners of abutting property. The sole act testified to of any interference on the part of the municipal authorities is that upon one occasion during the administration of Mayor Hooper, notice was sent to the owners of the property to remove or clean certain manure pits located on this alleyway. No copy of this notice was offered in evidence, but from the statements of the witnesses this seems to have emanated from the health department of the city government, in the performance of its duty to cause the removal of or remove nuisances, an act which might just as well be performed with regard to private as with regard to public property, and this falls far short of any positive action which can by inference be regarded as an acceptance.

Reference is made in support of the city's case to Ordinance No. 2, approved June 14, 1906. But that ordinance by its very terms is without application in this case, since it attempts to deal, and only to deal, with "streets, avenues, lanes and alleys which have been heretofore unconditionally dedicated as highways"; and, since in the present case that dedication did not exist by virtue of any deed or plat made with the sanction of the owner, there are no acts disclosed by the evidence from which an "unconditional dedication" can be properly deduced.

The decree appealed from will accordingly be affirmed.

Decree affirmed, with costs.

(123 Md. 192)

EMERSON et al. v. TAYLOR. (No. 33.)

(Court of Appeals of Maryland. June 20, 1918.)

1. HUSBAND AND WIFE ⇨209(4)—INJURY TO HUSBAND—WIFE'S RIGHT OF ACTION—COMMON LAW.

For a personal injury to a husband no right of action arose in favor of the wife at common law.

2. HUSBAND AND WIFE ⇨209(4)—INJURY TO HUSBAND—WIFE'S RIGHT OF ACTION—LOSS OF CONSORTIUM.

A wife cannot recover damages for personal injury to her husband, whereby she sustains loss of support and of consortium, and is compelled to care for him while sick.

Appeal from Baltimore City Court; Carroll T. Bond, Judge.

"To be officially reported."

Action by Rachel Taylor against Isaac E. Emerson, trading as the Emersonian Apartments, and Charles F. W. Berndt. Demurrer to declaration overruled, and judgment against defendants by default, and they appeal. Reversed, without a new trial.

See, also, 103 Atl. 423.

Argued before BOYD, O. J., and BRISCOE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Aubrey Pearre, Jr., of Baltimore, for appellants. Augustus O. Binswanger, of Baltimore (Louis Samuels, of Baltimore, on the brief), for appellee.

STOCKBRIDGE, J. This suit is an action by a married woman to recover damages for the loss of consortium, resulting from an injury to the husband occasioned by the negligence, as alleged, of the defendants. No other element of damage to the plaintiff is claimed. She suffered no physical injury.

The husband, a hod carrier by occupation, was employed as one of the hands in the building of an apartment house under construction by the appellants. An elevator which ran from the sixth to the first floor became beyond control, as the result of which the plaintiff's husband was thrown down, suffered severe contusions, the breaking of his right leg, and was confined to a hospital for a period of four months. For the injury suffered, if due to the negligence of the defendants, he had a right of action. Whether he did as matter of fact present any claim for these injuries, and, if so, what was the ultimate disposition of it, does not appear from the record, but any claim of this character for the injury suffered was a claim of his, and not of his wife. The sole basis for her claim rests in the loss of consortium consequent upon the injury.

A demurrer was filed to the declaration, which was overruled. The defendants declined to plead, a judgment by default for lack of a plea was entered against them, and an inquisition found in favor of the wife, upon which a judgment for \$50 was entered. Such is the case presented in this court by the record. The appeal, therefore, calls in question only the ruling of the Baltimore city court upon the demurrer to the declaration, and this presents but a single question of law.

[1, 2] It was well settled at common law that for personal injuries to a husband no right of action arose in favor of the wife; but with the advance of the law in the direction of according greater rights to married women, and more nearly placing her upon a footing of equality with her husband, and especially since the adoption in many of the states of this country of the so-called "Married Women's Act," the claim is made that a change has taken place in the right of a married woman to sue and recover separately from her husband for damages which she may suffer. The case has been presented with much fullness of research into the adjudications, and large numbers of the cases were referred to in the argument and cited upon the briefs. The present accepted rule of law will be found accurately and concisely stated in 13 R. C. L. 1443, where many of the cases are referred to. It is sometimes said that there is great

conflict of opinion in the conclusions reached in the various cases.

A close examination of the adjudications discloses that these group themselves under several distinct heads; the differences of opinion arising, as was held in the case of *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102, from the source from which the married woman acquires the right, rather than whether the right existed at all. In the case just mentioned the suit was brought by a married woman to recover damages for the alienation of the affections of her husband, and this court held that the law cannot make redress in such cases otherwise than to the married woman solely, apart from all others, and especially her husband. In such cases the injury to the woman is direct, and hence of legal necessity the damages must be to her solely, and therefore the suit can be maintained in her own name.

In some of the cases of this description, the basis upon which the recovery is allowed is that an injury of this character involves the legal idea of malice, even if there be no actual malice; that the husband cannot be said to have been damaged, or have recovery therefor, and that, therefore, a suit by a married woman alone, in cases of alienation of affections, enticement, or seduction of the husband, are held to give the wife the right of action. This right of action, sustained in *Wolf v. Frank*, supra, is said in some of the cases to have been a right existing at common law, as well as under married women's statutes; but, however this may be, in this class of cases it is a rule which has been adopted quite generally, of which the following cases are examples: *Bassett v. Bassett*, 20 Ill. App. 543; *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Jaynes v. Jaynes*, 39 Hun, 40; *Logan v. Logan*, 77 Ind. 558, contra; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961; *Jacobson v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. St. Rep. 360, Crim. Conv.; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412, 46 Am. St. Rep. 468; *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 606, 6 Ann. Cas. 658; *Work v. Campbell*, 164 Cal. 581, 128 Pac. 943, 43 L. R. A. (N. S.) 581; *Rott v. Goehring*, 33 N. D. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 643; *Wolf v. Frank*, 92 Md.

138, 48 Atl. 132, 52 L. R. A. 102. Analogy to this class of cases was attempted to be drawn from certain cases of slander or libel; but these cases are all cases where the suit was by the husband for loss of the consortium of the wife, and of these the case of *Garrison v. Sun Printing & Publishing Co.*, 207 N. Y. 1, 100 N. E. 430, 45 L. R. A. (N. S.) 766, Ann. Cas. 1914C, 238, is a good example. A right may exist in the husband, which, notwithstanding the statute, is without a correlative right in the wife.

There is another class of cases upon which reliance has been placed by the appellee, namely, where in the suit of a married woman against a third party for loss of the consortium of her husband the cause of the damage was the sale to the husband of liquor or noxious drugs. In some of these cases, the sales, as testified to, were in direct violation of state statutes; in others, the right to maintain such an action has been based upon special laws, generally described as civil damage acts; and in still a third class of cases, it has been held that sale of such liquors or drugs, particularly when made after due notice and caution to the dealer, involves an element of malice, for which no right of action subsists in the husband; that the damage to the wife is direct, not indirect, and as such a recovery by her in an independent suit can be maintained. See *Flandermeyer v. Cooper*, 85 Ohio St. 327, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983; *Moberg v. Scott*, 38 S. D. 422, 161 N. W. 998, L. R. A. 1917D, 732. In many of the cases cited in the argument the suits were actions brought by the husband for the loss of the consortium of the wife, and from these it has been argued that since the adoption of the Married Women's Act there was the establishment of a complete parity of right upon the part of both husband and wife. The suits in which the Married Women's Act has been considered, as affecting the right of action, are, in part, *So. Railway v. Crowder*, 135 Ala. 417, 33 South. 335; *Clark v. Hill*, 69 Mo. App. 541; *Blair v. Seitzer*, 181 Mich. 304, 151 N. W. 724, L. R. A. 1915D, 524, Ann. Cas. 1916C, 882; *Marri v. Stamford Ry.*, 84 Conn. 9, 78 Atl. 582, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912B, 1120; *Guevin v. Manchester Ry.*, 78 N. H. 289, 99 Atl. 298, L. R. A. 1917C, 410.

The most satisfactory discussion of this phase of the case will be found in *Kosciulek v. Portland R., L. & P. Co.*, 81 Or. 517, 160 Pac. 132. The line of demarcation is there clearly drawn between cases such as find their origin in alienation of affection and those which result from an act of negligence of a third party. The rule with regard to these latter is clearly stated in the section in 13 R. C. L. already referred to, and is expressed by Mr. Cooley in the first volume of his work on Torts (3d Ed., p. 474), as follows:

* 98 N. E. 102.

"A wife cannot recover damages on account of personal injury to her husband, whereby she sustains loss of support and of consortium, and is compelled to care for him while sick."

See, also, Stewart on Husband and Wife, § 429.

The statements of these authors are fully borne out by the following adjudicated cases: *Goldman v. Cohen*, 30 Misc. Rep. 336, 63 N. Y. Supp. 459; *Feneff v. N. Y. Cent. Ry.*, 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291; *Bolger v. Boston Elev. Ry.*, 205 Mass. 420, 91 N. E. 389; *Whitcomb v. N. Y., N. H. & H. R. Ry. Co.*, 215 Mass. 440, 102 N. E. 663; *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916D, 1006; *Blaechinska v. Howard Mission*, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215, reversing 58 Hun, 322, 9 N. Y. Supp. 679; *Stout v. Kansas City F. R. R.*, 172 Mo. App. 113, 157 S. W. 1019; *Gambino v. Coal Co.*, 175 Mo. App. 653, 158 S. W. 77; *Patelski v. Snyder*, 179 Ill. App. 24; *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N. E. 204, L. R. A. 1916E, 700; *Brown v. Kistelman*, 177 Ind. 692, 98 N. E. 631, 40 L. R. A. (N. S.) 236. To quote at length from the opinions in the various adjudicated cases would protract this opinion to an unreasonable length, nor has it seemed worth while even to refer to the class of cases where actions have been brought in the joint names of husband and wife, or to suits for damages in cases where an assault has been committed upon the woman, and she has brought an independent suit for the injury sustained. Cases of these several characters are without bearing or influence upon the question now under consideration.

It will be apparent from what has been said that the court below was in error in its ruling upon the demurrer, and the judgment appealed from must therefore be reversed, without a new trial.

Judgment reversed, with costs to the appellants.

(133 Md. 347)

MCGRAW v. MERRYMAN, County Treasurer.
(No. 36.)

(Court of Appeals of Maryland. July 30, 1918.)

1. CONSTITUTIONAL LAW §70(3)—POWER OF COURT—WISDOM OF LEGISLATION.

If the Legislature had power to pass an act extending the limits of Baltimore city without a referendum, and in the form it was passed, the Court of Appeals has no right to question the wisdom or even the justice of the act.

2. MUNICIPAL CORPORATIONS §65—EXTENSION OF LIMITS—REFERENDUM—DECISION OF LEGISLATURE.

In absence of constitutional prohibition, it is for Legislature to say whether or not there shall be a referendum in reference to the extension of the limits of a city or town.

3. COURTS §92—DECISION OF COURT OF APPEALS.

All that is necessary to render a decision of the Court of Appeals authoritative on any point is to show there was an application of the judicial mind to the precise question.

4. MUNICIPAL CORPORATIONS §108 — ANNEXATION OF TERRITORY—REFERENDUM—STATUTE.

Acts 1918, c. 82, extending limits of Baltimore city by including parts of Baltimore and Anne Arundel counties, though not providing for referendum, is not violative of Const. art. 13, § 1.

5. MUNICIPAL CORPORATIONS §29(4) — EXTENSION OF TERRITORY.

There is no statute or constitutional provision in Maryland limiting an extension of the boundaries of a city to contiguous territory, though some part of the new territory should be contiguous.

6. MUNICIPAL CORPORATIONS §108 — ANNEXATION OF TERRITORY—STATUTE—CONSTITUTIONALITY.

Acts 1918, c. 82, extending limits of Baltimore city by including parts of Baltimore and Anne Arundel counties, is not violative of Const. art. 16, on the referendum, as undertaking to affect taxes levied prior to June 1st, when act, under such article, took effect, as it attempts only to affect the proportion of taxes from January 1, 1919, to end of pending fiscal year.

7. MUNICIPAL CORPORATIONS §86(4) — EXTENSION OF TERRITORY—STATUTE—CONSTITUTIONALITY.

Acts 1918, c. 82, extending limits of Baltimore city by including parts of Baltimore and Anne Arundel counties, is not violative of Declaration of Rights, art. 15, on account of its provisions in reference to taxation.

8. STATUTES §64(4)—PARTIAL INVALIDITY.

If taxation provisions of Acts 1918, c. 82, extending Baltimore city by including parts of Baltimore and Anne Arundel counties, were violative of Declaration of Rights, art. 15, whole act would not be invalidated thereby.

9. STATUTES §64(4)—PARTIAL INVALIDITY.

Any invalidity of saving clause of Acts 1918, c. 82, extending Baltimore city by including parts of Baltimore and Anne Arundel counties, as to certain officers resident within annexed territory, cannot affect rest of act.

10. CONSTITUTIONAL LAW §278(2)—MUNICIPAL CORPORATIONS §29(1)—DUE PROCESS—ACT EXTENDING BALTIMORE CITY.

Acts 1918, c. 82, extending Baltimore city by including parts of Baltimore and Anne Arundel counties, is not unconstitutional as taking property without due process of law, though Baltimore county owns a number of properties, within the annexed district, purchased by it under tax sales.

11. EMINENT DOMAIN §70—ACT EXTENDING BALTIMORE CITY—VALIDITY.

Acts 1918, c. 82, extending Baltimore city by including parts of Baltimore and Anne Arundel counties, is not unconstitutional as taking property without just compensation, though Baltimore county owns a number of properties within the annexed district purchased by it under tax sales.

12. STATUTES §64(4)—PARTIAL INVALIDITY.

If Acts 1918, c. 82, extending Baltimore city by including parts of Baltimore and Anne Arundel counties, makes no proper provision for property owned by either of the counties in addition to that held and used for governmental purposes, fact does not require portion of act providing for annexation to be set aside.

Appeal from Circuit Court, Baltimore County; Allan McLane, Judge.

Suit for mandamus by John F. McGraw against N. Bosley Merryman, Treasurer of Baltimore County, heard with certain other cases involving the validity of Acts 1918, c.

82. From an order denying relief, plaintiff appeals. Order reversed, and cause remanded in order that mandamus may issue as prayed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Henry H. Dinneen, of Baltimore (W. Stuart Symington, Jr., of Baltimore, and John F. Thomas, of Rochester, N. Y., on the brief), for appellant. Shirley Carter and W. Irvine Cross, both of Baltimore, and T. Scott Offutt, of Towson (Edward H. Burke, of Towson, and Carville D. Benson, of Baltimore, on the brief), for appellee. Ridgely P. Melvin, of Annapolis, Stevenson A. Williams, of Bel Air, and Isaac Lobe Straus, of Baltimore (Venable, Baetjer & Howard, of Baltimore, on the brief), for Anne Arundel county commissioners. Benjamin A. Richmond, of Cumberland, and S. S. Field, of Baltimore (Henry D. Harlan, W. Calvin Chesnut, and Daniel R. Randall, all of Baltimore, on the briefs), for mayor and city council of Baltimore.

BOYD, C. J. At the last session of the General Assembly of Maryland there was passed "An act to extend the limits of Baltimore city by including therein parts of Baltimore county and Anne Arundel county," it being chapter 82 of the Acts of 1918. The validity of the act has been attacked on several grounds; the principal one being that there is no referendum in it, as the appellees contend section 1 of article 13 of our state Constitution requires. Although there are five appeals from orders and decrees passed by the circuit court for Baltimore county and one from a decree of the circuit court for Anne Arundel county, the main questions are involved in all of them. The cases were at the request of the attorneys for the respective parties advanced by us, and were heard together. As no question was raised in any of them as to the procedure adopted, it will be unnecessary to make further reference to that.

[1] Much stress was laid by the attorneys for the appellees upon the alleged injustice of this act, but no one will challenge the rule by which we must be guided in our consideration of these appeals, that if the Legislature had the power to pass the act before us without a referendum, and in the form it was passed, this court has no right to call in question the wisdom or even justice of it. As said by Judge Grason in *Groff v. Mayor, etc.*, of Frederick, 44 Md. 67, in a case involving the validity of an act extending the limits of Frederick city, after referring to the power of the Legislature to create municipal corporations, to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, etc.:

"The Legislature having this constitutional power, the exercise of it is wholly within its discretion, and it can in no wise be controlled by the courts."

He concluded that opinion by saying:

"Whether the power was wisely or unwisely bestowed, or the mode in which it has been exercised is just or unjust, and burdensome upon the citizen, are questions with which the courts have no right to deal, but are within the exclusive control of the Legislature."

But the rule is too universally adopted by this and other courts to require other citations of authorities, and we will proceed at once to the consideration of such questions as should be passed on by us.

The one that first presents itself, and is of the gravest importance, is the scope and effect of the decision in *Daly v. Morgan*, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757. In that case the constitutionality of chapter 98 of the Acts of 1888, which was entitled "An act to extend the limits of Baltimore city by including therein parts of Baltimore county," was before the court. There was a referendum in that act, and the question of annexation was submitted to the respective voters of the three parts of Baltimore county proposed to be annexed to Baltimore city. In two of them a majority was declared to be in favor of annexation, and in the other it was against it. In article 13 of our state Constitution, entitled "New Counties," section 1, which was then in force and still is, authorizes the Legislature to provide by law for organizing new counties, locating and removing county seats, and changing county lines, and contains this provision:

"Nor shall the lines of any county be changed without the consent of a majority of the legal voters residing within the district, which, under said proposed change, would form a part of a county different from that to which it belonged prior to said change."

It is contended by the appellees that that provision applies here, as it is proposed to change the lines of the two counties, although the district affected is to form a part of Baltimore city, while the appellants contend that it only applies to a change of lines of a county which would transfer the district to another "county," and that it does not apply when the district, under the proposed change, would form a part of "Baltimore city." But we must first determine whether this court decided that question in *Daly v. Morgan*, and, if so, are we bound by it as a controlling authority? The bill of complaint in that case, in speaking of the act of 1888, alleged that:

"The act aforesaid is null and void, because the Constitution of Maryland gives no power to the Legislature of Maryland to annex any of the territory of a county to the city of Baltimore, nor does it empower said Legislature to make the annexation of said territory depend upon the majority of the votes cast at an election provided for by legislative enactment," etc.

The answer of the mayor and city council of Baltimore alleged that the act was a constitutional and valid exercise of the legislative authority of the state, and that of the treasurer of Baltimore county averred that the act was wholly and utterly void,

etc. The argument of Col. McIntosh and of Mr. Mitchell, solicitors for appellant in that case, as shown by their briefs, was that section 1 of article 13 was the only provision in the Constitution which authorized a change of the lines of a county, and that only authorized such change when the district proposed to be changed would "form part of a county different from that to which it belonged prior to said change," and that that was not synonymous with and in ordinary parlance did not mean "form part of a 'city or Baltimore city' different from," etc. They argued that there was therefore no power in the Legislature to change the lines of the county to annex it to Baltimore city. They also contended that the act of 1888 did not conform to the requirements of section 1 of article 13, if held to be applicable, because the latter required the consent of the majority of the legal voters "residing" within the district, while they claimed that the act only required a majority of the votes "cast." We find in the records of this court that there are bound with the briefs for the appellant (Daly) opinions of Col. Marshall, Judge Fisher, and Mr. S. Teackle Wallis, presumably with the consent of the court, which are mostly on the validity of section 19 of act of 1888 providing for taxation. There are, however, some expressions of views on the necessity of a referendum. Judge Fisher's opinion, which was addressed to the attorney for the county commissioners of Baltimore county, shows that one of the questions submitted to him was:

"Can the limits of the city be extended by legislative enactment without submission to the voters in the territory to be annexed?"

And apparently the same question was asked Mr. Wallis. Both of them answered in the negative, but the latter said it was "extremely doubtful" whether it was competent for the Legislature to annex the territory of Baltimore county, constitutionally, to Baltimore city in any way. The brief of the city was for the most part confined to a discussion of section 19 of the act. It concluded by saying that there was appended to it the legal opinions given before the election by Messrs. Steele, Gwynn, and Findlay, "which furnish additional arguments to those we have presented in favor of the constitutionality of the City Extension Act, and which we respectfully commend to the consideration of the court." Those of Messrs. Steele, and Gwynn were confined to the validity of section 19, which seems to have been understood by the city to be the principal ground of objection to the act, but that of Mr. Findlay very clearly and emphatically took the position that article 13 did not apply to the city, and that the Belt could have been annexed by a legislative act without a popular vote. He dwelt on that at some length, and made the prediction that, if annexation was voted down, it would be the

last time that it would be submitted to the voters, as such an act could be passed without a referendum.

We have thus referred to the briefs, and opinions of prominent attorneys, filed with them by the respective parties, to show how far the attention of the court was directed by them to the question whether it was necessary to have a referendum. As we have seen, another of the grounds relied on by the appellant for the act being invalid was that it did not comply with the requirements of section 1 of article 13 in reference to the submission of the question of annexation. It may be that a sufficient answer to that might have been the decision in *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711, although Col. McIntosh sought to distinguish the two cases; but if the constitutional provision did not apply, and it was not necessary to submit the question to the people, there could not well have been a more complete answer to the contention and to the allegation in the bill that it was not submitted as required by that provision than to hold that an act for annexation to the city could be passed with or without the consent of the people, for if that be so, and the Legislature chose to submit it, it could determine the terms, etc., of the submission, and hence it was immaterial whether the act of 1888 complied with section 1 of article 13.

But let us see just what the court did decide, and what the judges thought they were called upon to decide. Seven judges sat in that case. Judge Robinson delivered the opinion of the court, and Judges Stone, Miller, Irving, and McSherry concurred in it. Judges Alvey and Bryan concurred in the affirmance of the order appealed from, but differed in some of the conclusions reached by the majority, of which we will speak later. The court, through Judge Robinson, said:

"The power of the Legislature to extend the limits of a city, by including therein parts of the county adjoining, when the city itself is a part of the county, is not and cannot be questioned. It is contended, however, that Baltimore city being a separate and independent territorial division of the state, and not a part of Baltimore county, the Legislature has no power to change the lines of the county by annexing part of its territory to the city. And in support of this contention, the appellant relies entirely upon section 1 of article 13 of the Constitution."

The part of that section which we have quoted above was then set out in the opinion, which calls attention to the fact that:

"It does not say, as has been argued, that the lines of a county shall not be changed except it be for the purpose of annexing parts of one county to another county. It merely provides that, when the lines of a county are to be changed for this purpose, it must be done with the consent of a majority of the voters residing within the district to be annexed."

The court then uses this emphatic language, which can leave no doubt as to its construction of section 1 of article 13:

"The object, and sole object, of this provision of section 1, was to provide for the annexation of parts of one county to another. The entire section in fact, and the article in which it is to be found, deals exclusively with the organization of 'new counties,' 'the location of county seats,' and the mode by which parts of one county may be annexed to another county, and the limitation imposed upon the legislative power is in respect to these matters and these only." (Last italics ours.)

The opinion then pointed out some of the distinctions between counties and towns and cities, and in speaking of the latter said:

"They are chartered by the Legislature, and their boundaries are fixed by it, and the power to extend them, whenever in its judgment the public interests require it, has been exercised by the legislature from the earliest days of the colony."

It then concludes the discussion of that question by saying:

"No one knew better than the framers of the Constitution of 1867 that the time must come, and that not far distant, when the extension of the limits of a great city like Baltimore would be absolutely necessary to its proper growth and development. And if they meant to deny the exercise of this power by the Legislature, and to say that its limits as then defined by its charter should for all time remain the same, it is but reasonable to presume that this intention would have been declared in plain and explicit terms. So far from being expressly declared, there is nothing either in the language or terms of this section from which such an intention can be inferred. The Legislature has therefore, in our opinion, the same power now which it has always exercised, to extend the limits of Baltimore city by including therein parts of Baltimore county, and this, too, with or without the consent of the majority of the voters residing within the districts annexed."

[2] The appellees make special objection to the latter expression, but that was manifestly the necessary result of what had already been clearly and definitely settled in the opinion, as shown above. In the absence of a constitutional prohibition, there can be no doubt under the authorities that it is for the Legislature to say whether or not there shall be a referendum in reference to the extension of the limits of a city or town.

"Not only may the Legislature originally fix the limits of the corporation, but it may, unless specially restrained in the Constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. * * * The power to enlarge the boundaries of a municipality by the annexation of contiguous territory is an incident to the legislative power to create and abolish municipalities at pleasure." 1 Dillon on Mun. Corp. (5th Ed.) § 355.

See, also, 1 McQuillin on Mun. Corp. § 265, where many authorities are cited; Johnson v. Luers, 129 Md. 521, 530, 99 Atl. 710; In re Pittsburgh, 217 Pa. 227, 66 Atl. 348, 120 Am. St. Rep. 845, affirmed in Hunter v. Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151.

The court having held that section 1 of article 13 did not apply, and there being no

other restriction in the Constitution, that conclusion would necessarily have meant that the Legislature could act "with or without the consent" of the majority of the voters, even if that expression had been omitted from the opinion, unless the court had placed itself in conflict with the practically unanimous decisions of other courts and our own. How then can it be said that the expression objected to was an obiter dictum, or that the question is not *res adjudicata*? Judge Bryan filed an opinion in which he concurred in the conclusion reached by the five judges, but differed with them as to whether it was necessary to have the consent of the voters. He did not suggest that it was an obiter dictum, but based his opinion on what he deemed to be the proper construction of section 1 of article 13. The reason he thought that the act of 1888 would have been unconstitutional, had it not required the consent of a majority of the legal voters, was that under his construction of that section it was applicable to Baltimore city, which, in construing the section, was to be considered and treated as a county. That is precisely contrary to what the majority of the court held. He did not intimate that he thought the use of the expression referred to was unwarranted or even unnecessary, if the construction of section 1 of article 13 by the majority was correct. So in Judge Alvey's opinion on that subject. The most of his opinion was devoted to a discussion of section 19 of the act, but he also concluded that section 1 of article 13 was applicable, and of course under his construction of that section he thought "the popular election was an indispensable condition."

It will be noticed that the two dissenting opinions were filed the same day the case was decided (November 23, 1888), which indicates that the majority not only had the views of the dissenting judges but their written opinions before them, in which the attention of the majority was expressly directed to the question of the necessity for the consent of the voters. If it had been simply a passing remark by the learned judge who wrote the opinion, without due consideration having been previously given to it by all the members of the court, and it was not thought proper that it should be mentioned in the opinion, it is impossible to conceive that such men as then constituted this court would not have avoided any question about it, by striking out that sentence; but all of them must have known that, whether the expression criticized was in or out of the opinion, it was unquestionably the necessary result of the construction placed on section 1 of article 13 by the majority.

[3, 4] In view of what we have said, we do not deem it necessary to quote at length from the decisions of this court as to what should be deemed binding in later cases; but in *Alexander v. Worthington*, 5 Md. 471, 489,

the question was discussed at length in an opinion delivered by Chief Judge Le Grand, and he concisely stated the rule to be that:

"All that is necessary, in Maryland, to render the decision of the Court of Appeals authoritative on any point decided, is to show that there was an application of the judicial mind to the precise question adjudged; and this we apprehend is the rule elsewhere."

That was approved in *C. O. & L. Co. v. Sherman*, 20 Md. 117, 131; *Michael v. Morey*, 26 Md. 239, 261, 90 Am. Dec. 106; *State v. Cowen*, 94 Md. 487, 495, 51 Atl. 171; *Carsstairs v. Cochran*, 95 Md. 488, 52 Atl. 601; and other cases. That rule is not only applicable here, but in our judgment the decision of the question as to a referendum was directly involved in what was necessarily decided. We are therefore of opinion that *Daly v. Morgan* is a binding authority upon us, and we cannot properly decline to follow it.

We do not deem it necessary or proper to again construe section 1 of article 18 of the Constitution. If we did so, there would be as much, if not more, ground for the contention that our decision was obiter dictum, than there is for what was said in *Daly v. Morgan*. We certainly would not be justified in overruling that decision, as much of the argument for the appellees was directed to having us do, even if we differed with the majority, which, we will only add, must not be inferred by reason of our declining to construe section 1 of article 18.

But it was argued that the decision in *Daly v. Morgan* was limited to Baltimore county, and hence is not applicable to this case. We find nothing in that opinion to sustain the position that parts of Baltimore county could be annexed to Baltimore city, but no part of any other county could be. In that case the extensions were into Baltimore county, and that county alone was the one then being considered. The statement in the opinion referred to by the appellees that "the Legislature has therefore, in our opinion, the same power now which it has always exercised, to extend the limits of Baltimore city by including therein parts of Baltimore county," cannot properly be said to have been intended to limit the right to extend the boundaries of Baltimore city into that county. It is said in the brief of the city that its limits had been extended into that county by ten different acts, all of them being while the city was still in Baltimore county. We have not thought it necessary to examine all of the acts referred to, but we know from the records of this court that the limits had been extended, more than once, into Baltimore county, the last time prior to the act of 1888 having been in 1816, and no inference can be drawn, from the statement in the opinion quoted above, that they could not be extended so as to include part of some other county; but it meant, what it in effect said, that the Legislature had the same power to extend the limits "now"—that is to say, in 1888, when

the present Constitution was in force—as it had when the city was a part of the county.

[8] It was also argued that, as Anne Arundel county is separated from the city by a part of Baltimore county and is not contiguous to the city, this act for that reason cannot be sustained, even if full effect be given to *Daly v. Morgan*. Baltimore city is, for a considerable distance, on the opposite shore of the Patapsco river from the lands of Anne Arundel county, and it was decided in *Raab v. State*, 7 Md. 483, that the Act of 1816, c. 209, extending the boundaries of that city, limited its lines to the north side of the river, thus leaving the portion of the river between the north shore line and the current (to which the Anne Arundel county line extended) in Baltimore county. Although it was intimated in *West. Md. T. R. Co. v. Baltimore City*, 106 Md. 561, 68 Atl. 8, that but for that decision we might have held the contrary, we expressly declined to overrule it. But treating the boundaries of Baltimore county as inclusive of the space in the river between the Anne Arundel county line, in the current of the river, and that of the city, this act cannot be held to be invalid for that reason. The lines of the proposed extension include all of that part of Baltimore county between the Anne Arundel lines and those of the city, and there is no intervening space. There is no statute or constitutional provision in this state limiting an extension of the boundaries of a city to contiguous territory, as there is in some states, although it may be conceded that some part of the newly acquired territory should be contiguous. As will be seen from the cases collected in the notes to *Morgan Park v. Chicago* (255 Ill. 190, 90 N. E. 388), in *Ann. Cas.* 1913D, 399:

"The annexation of outlying territory to a municipality is commonly conditioned, by the statute authorizing the proceeding, on the situation of the territory to be annexed; it being required to be adjacent or contiguous to the municipality."

But proper limitations of the rule are given in that note, where it is said that:

"While the general rule is that land cannot be annexed to a city or town unless it is contiguous thereto, it is not necessary that each and every tract of land sought to be annexed shall be contiguous to the municipality. If all of the tracts are contiguous to each other, and one of them is contiguous to or adjoins a city, that is sufficient."

For that statement a number of cases are cited, and the same rule is stated in 19 R. C. L. 734, § 40, and other authorities; but, if we had found none on the subject, we could have no doubt that such should be the rule.

Having reached the conclusion, as all of us have, after attentively listening to the able and thorough arguments of the attorneys, and after having given to them and the questions involved such consideration, thought, and study as their importance demands, that *Daly v. Morgan* is a binding and authoritative decision, and that it was there determined by this court, as then constituted, that sec-

tion 1 of article 13 of the Constitution did not apply to an extension of the limits of the city of Baltimore, and there being no other constitutional or statutory provision affecting it, there can be no valid ground for holding that an extension which affects the lines of the two counties cannot be permitted. As it was there held that the provision as to the change of lines of the county did not apply to a change for the purpose of extending the limits of Baltimore city, it can make no possible difference that parts of two counties are affected, instead of only one. It was even suggested at the argument that such a conclusion would authorize an annexation to Baltimore of some part of a remote county; but we cannot think that such a suggestion would be made on more serious reflection, and, if it should ever be attempted, nothing that we have said can be relied on to sustain it. In this act there are well-defined lines which include additional territory on each side of and immediately adjoining the former boundaries of the city—the most of which was in Baltimore county, and the rest in Anne Arundel county, which adjoins Baltimore county—and the whole, together with the territory included in the city prior to the passage of this act, constitute one body.

It was also urged upon us that we should not feel bound to follow *Daly v. Morgan* because of the great injustice that will be done the two counties and the people within the annexed territory. But as we have already stated, for whatever injury the two counties or the people in the annexed territory may sustain, the responsibility rests upon the Legislature, and not upon this court. If this court should reverse one of its prior decisions which was so deliberately rendered, on a question of such vast importance as to demand of every judge who sat his fullest consideration and best judgment, as we have endeavored to show was done in *Daly v. Morgan*, because we felt that it worked a great hardship and possible injustice, not only would the principle of stare decisis have to be ignored, but it would have a tendency to cause decisions of courts to be regarded as unstable and vacillating—depending upon the individual views of the judges who happened to constitute the court when such questions arose.

[8] It is also suggested that the act is in conflict with article 16 of the Constitution (the article on referendum), because it undertakes to affect taxes levied prior to June 1st, when the act under that provision of the Constitution took effect, but it only attempts to affect the proportion of taxes from January 1, 1919, to the end of the pending fiscal year, and does not seem to require further comment.

[7, 8] We will not discuss at length the objections made to the act on account of the provisions in reference to taxation. Most of the argument on that subject is met by the

decision in *Daly v. Morgan*. That case has been cited over and over again in cases involving taxation under chapter 98 of the Act of 1888, and subsequent acts in reference to taxation of property within the Belt. It is there held that the principle of equality in taxation was fully gratified by making local taxation equal and uniform as to all property within the limits of the taxing district, and hence the fifteenth article of our Declaration of Rights was not violated by the Act of 1888. Judge Alvey dissented, but the other six judges who sat were of the opinion that the act was valid. Chief Judge McSherry said in *Sindall v. Baltimore City*, 98 Md. 526, 49 Atl. 645:

"It must be borne in mind that at the date of the adoption of the Annexation Act a large part of the added territory was unimproved, outlying, rural land. It would have been manifestly unjust to have subjected such property to the same valuation and to the same rate of taxation as then obtained in the city with respect to distinctively urban property."

In *Baltimore City v. Gail*, 106 Md. 684, 68 Atl. 282, Judge Burke quoted from Judge Robinson's opinion in *Daly v. Morgan* and from Chief Judge McSherry's in the above case to the same effect. In *Miller v. Wicomico County*, 107 Md. 438, 69 Atl. 118, Judge Briscoe referred to *Daly v. Morgan*, and said:

"The same power which authorizes the Legislature to make one taxing district of an entire city equally authorizes it to make two or more taxing districts, if in its judgment the public interest require it."

But as it would seem clear that, even if the position taken by the appellees on the question of taxation be conceded to be correct, it would not invalidate the whole act, it is unnecessary to continue the discussion of the subject. Not only did Judge Alvey take that position in his dissenting opinion in *Daly v. Morgan*, but Judge Robinson in speaking for the majority also in effect did. The case of *Steenken v. State*, 88 Md. 708, 42 Atl. 212, cited that case, amongst others, on that question. If that be correct in a case where the question had been submitted to the people, there is all the more reason why it should be so in this case where it was not submitted.

[9-11] The question in reference to the part of the act, which has a saving clause as to certain officers who reside within the annexed territory, certainly cannot affect the rest of the act. Nor do we find anything in the act to justify the contention that it is taking property without just compensation or without due process of law. It is said that Baltimore county owns a number of properties within the annexed district which it had purchased under tax sales. But the provisions for Baltimore city taking over the public property cannot be construed to mean such property as that. It only means such as is held for public purposes, and not any property that either county may own that does not come in that class.

The rule is thus stated in 1 Dillon on Mun. Cor. (5th Ed.) § 360:

"Upon the annexation of part to another corporation, the Legislature may provide for an equitable apportionment or division of the property, and impose upon the new corporation, or upon the people and territory, thus disannexed, the obligation to pay an equitable proportion of the corporate debts. But there is usually no constitutional requirement that the Legislature shall make such provision, and in the absence of such requirement it may provide for the annexation of territory to a municipality and the transfer to it of such public property as may be within the territory annexed, without imposing upon the municipality any obligation either to pay for the property so transferred or to assume and pay for any portion of the unpaid debts contracted in the acquisition or erection of buildings and other property transferred."

As will be seen from sections 358, 359, and the rest of 360 of that volume, it is generally held that, in the absence of a constitutional provision, the Legislature makes the disposition of public property.

[12] In *Hunter v. Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151, which affirmed in re *Pittsburgh*, 217 Pa. 227, 66 Atl. 348, 120 Am. St. Rep. 845, the question is considered at some length in reference to property held and used for governmental purposes. But if there be any property owned by either of the counties, in addition to that held and used for governmental purposes, for which it can be said proper provision has not been made, that would not require the portion of the act providing for the annexation to be set aside. Without attempting to refer to other points which have been raised, we are of the opinion that all of the cases before us must be reversed.

Order reversed and cause remanded, in order that a mandamus issue as prayed; the costs to be paid by the county commissioners of Baltimore county.

(261 Pa. 295)

ELK NATURAL GAS CO. v. RIDGWAY LIGHT & HEAT CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

MINES AND MINERALS §—55(3)—SALE OF GAS—CONSTRUCTION OF CONTRACT.

Where contract for sale of gas provided that vendor should sell all surplus natural gas in a named district, excepting such as desired for customers or used in drilling wells, it was not material that vendor had gas from other sources with which it could have supplied such customers, whereby there would have been a surplus for the vendee.

Appeal from Court of Common Pleas, Elk County.

Bill by the Elk Natural Gas Company against the Ridgway Light & Heat Company. From a decree refusing an injunction, plaintiff appeals. Affirmed.

The facts appear in the following opinion of Bouton, P. J., in the common pleas, sur

defendant's eighth request for conclusions of law:

"Eighth. That the complainant's bill in this case must be dismissed. Answer: We affirm this request."

Notwithstanding the numerous requests filed on the part of the plaintiff for findings of fact, the material question upon which this case hinges is the construction of the contract between the parties; and it seems to us that the gas which the first party contracted to sell to the second party is so clearly defined in the contract that no controversy whatever ought to have arisen over it. It appears that the party of the first part to the contract, having developed a considerable quantity of gas in what is known as the Beaver Meadow district and already having large quantities of gas from other sources, was willing to sell to the second party such gas from the Beaver Meadow district as they did not desire for use to supply their customers or for the drillings of wells, and the second party was anxious to purchase the gas.

The contract was made solely for such gas from the Beaver Meadow district that the party of the first part did not desire to supply to its customers, and it appears in the contract "that the words 'surplus natural gas' are construed and shall be taken to mean all the natural gas which is not desired by the first party for supply to its customers, and except gas used in the drilling of wells in said district either by the party of the first part or other persons." The contract provides further: "It is expressly declared and understood that the purpose of this contract is the sale by the first party and the purchase by the second party of all surplus natural gas which is produced by the first party in the so-called Beaver Meadow district above mentioned, which it desires to sell as above provided."

Under this contract, there was nothing to prevent the Ridgway Light & Heat Company from using all of the gas produced from the Beaver Meadow district for supplying its customers, if it so desired; and it had the right to do with the gas from its other fields whatever it saw fit. It could have sold its wells in these other districts absolutely, or it could have sold every foot of gas from these other fields to whomever it saw fit, and supply its retail customers from the Beaver Meadow district. There was no intent in the contract in any way to restrict the Ridgway Light & Heat Company from doing as it pleased with all gas produced from its fields other than the Beaver Meadow district. It does not occur to us that further discussion is necessary.

It further appeared that defendant was using all the gas from the Beaver Meadow district for its own customers.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WAL-LING, JJ.

Geo. F. Whitmer, of Clarion, Reed, Smith, Shaw & Beal and H. O. Evans, all of Pittsburgh, and D. J. Driscoll, of St. Mary's, for appellant. E. H. Baird and John G. Whitmore, both of Ridgway, and W. E. Rice, of Warren, for appellee.

PER CURIAM. This appeal is dismissed, at appellant's costs, on so much of the opinion of the learned court below as follows the answer to defendant's eighth request for a conclusion of law.

(261 Pa. 297)

CHRIST et al. v. DUBOSKY.

(Supreme Court of Pennsylvania. May 6, 1913.)

1. COURTS \S 116(1)—AMENDMENT OF RECORD—POWER.

Every court of record has power to direct the amendment of its records, to conform to what the court finds to be a true state of facts.

2. MECHANICS' LIENS \S 180—MOTION TO STRIKE.

Where, in proceeding to strike off mechanic's lien for matter of record, the docket showed the lien filed July 7, 1913, and notice filed August 18th, but the trial court found that the return of service had actually been filed July 18th, it was error to discharge the rule without correcting the record.

Appeal from Court of Common Pleas, Schuylkill County.

Bill by C. E. Christ and others, trading as the Tamaqua Construction Company against Anthony Dubosky. From decree refusing to strike off a mechanic's lien, defendant appealed. Record remitted for amendment.

Bechtel, P. J., filed the following opinion in the common pleas:

This case comes before us on a rule upon the plaintiff to show cause why the mechanic's lien should not be stricken from the record for matters appearing of record, to wit: Said mechanic's lien was filed on the 7th day of July, 1913, and entered in Mechanic's Lien Docket No. 15, page 70. Notice to the owner defendant and affidavit of service thereof upon him was not filed of record within one month of the time within which said lien was filed, namely, July 7, 1913; said notice and affidavit of service having been filed, as appears of record, on August 18, 1913. To this rule an answer was filed alleging, *inter alia*, that the notice of filing was served on the defendant on July 16, 1913, and sworn return of said notice was filed in the office of the prothonotary on July 18, 1913, and that the date of filing of said return of service appearing thereon, namely, August 18, 1913, was mistakenly or erroneously placed thereon by the prothonotary. Upon this rule and answer depositions were taken during which the testimony of the prothonotary, R. J. Graeff (the attorney who filed the return of service of the notice), and two experts, were taken. The filing indorsed on the return of service was made by rubber stamp with movable date, and it is claimed that in the use of this stamp the word "August" slipped around and was imprinted on the paper, where it should have been "July," making the date of filing read August 18th, instead of July 18th. The prothonotary testified that it is his belief that this occurred, and that the date of filing is erroneous. The attorney testifies that he placed the return of service in an envelope addressed to the prothonotary, which was mailed by himself, or under his direction, on the 17th of July. The return was not accompanied by any letter.

It is manifestly impossible that any one could testify absolutely that the date was an error, because, had the error been discovered, it would have, in all probability, been corrected. The expert called in behalf of the plaintiff testifies that the person using the stamp exerted the greatest pressure on the top thereof, and that he is of the opinion that this pressure resulted in the gradual drawing of the word "August" into the face of the stamp and testifies to some measurements that he made relevant thereto. An investigation of this matter disclosed that there were three writs filed in the prothonotary's office Nos. 10, 11, and 12, September term, 1913,

which were marked filed with the same stamp, August 18, 1913, and that this filing is a mistake. It is admitted that the date should have been July 18, 1913. An inspection of the stamps on these three writs, together with the impression upon the writ involved in the case at bar, discloses the fact that the word "August" and the figure "1" is not in alignment with the rest of the stamp, being considerably below the line. It seems to us very persuasive evidence that these impressions were made at the same time, as it would be almost impossible that this month and figure should be out of alignment in almost exactly the same way one month later as it was on the date the impression was made on the first three writs.

[1, 2] It is contended that the evidence in the case should be at least clear, precise, and indubitable, as its purpose is to reform a written instrument. We cannot agree with this contention. This is not a case in which a written instrument is sought to be reformed, but a case in which the court is asked to reform the date of filing of a record to conform to the truth, and it seems to us the measure of proof is quite different. In *City v. Gault*, 8 Wkly. Notes Cas. 14, it is said: "The question is only as to the power of the court to amend its records. Of this there can be no doubt, and as it is quite clear from the record that a judgment was rendered which the clerk neglected to enter upon the appearance docket, it is a proper case for the exercise of the power of amendment." In *Sheip & Co. v. Price, Page & Co.*, 3 Pa. Super. Ct. 1, it is said: "Every court of record is the guardian and judge of its own records. It is clothed with full power to control and inquire into them, and to set them right if incorrect." * * * It is much to be deplored that an interlineation, an alteration, or an erasure should ever appear upon a judicial record; but it would be intolerable to hold that a party in no way responsible for the keeping of the records must explain it or be deprived of the rights which the record was intended to give him." In *Rice v. Constein*, 89 Pa. 477, it is held: The error of a prothonotary of the common pleas, who was also the prothonotary of the district court, in filing in the latter a report of viewers and an appeal therefrom, required to be filed in the common pleas, will not deprive a party of his right of trial by jury upon complying with the requirements of the law on his part.

There can be no question of the right of the court to direct the amendment of this record to conform to what the court finds to be the true state of facts relative to the filing of this notice. A careful review of the testimony and the exhibits in the case has led us to the conclusion that the date of filing, as indorsed upon this notice, is an error, and that the true date should have been July 18, 1913. This being so, we feel constrained to dismiss the rule granted in this issue.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

John B. McGurl, of Minersville, for appellant. Arthur L. Shay and R. J. Graeff, both of Pottsville, for appellees.

PER CURIAM. The learned court did not err in finding that the true date of the filing of the notice of service that the mechanic's lien had been filed was July 18, 1913, but, before discharging the rule to show cause, the record ought to have been properly amended. If it had been so amended, this appeal would be dismissed.

And now, May 6, 1918, it is ordered that the entire record be remitted to the court below, that it may amend its record as indicated, and, when so amended, the rule to show cause will be properly discharged.

(261 Pa. 241)

SCOUTON v. STONY BROOK LUMBER CO.
(Supreme Court of Pennsylvania. April 22, 1918.)

1. CORPORATIONS §—426(10)—NOTE IRREGULARLY ISSUED—ACCEPTANCE OF BENEFITS.

A corporation, which has received the benefit of a note irregularly issued, cannot escape liability by showing that it was not executed by the proper officer.

2. CORPORATIONS §—510(2)—MONEY ADVANCED—EVIDENCE—NOTE IRREGULARLY EXECUTED.

Where, in an action against a corporation to recover on a note, defendant's obligation arose from the receipt of the money for which the note was issued, the note, though not executed by the proper officers, was properly admitted in evidence.

Appeal from Court of Common Pleas, Sullivan County.

Action by John G. Scouton against the Stony Brook Lumber Company. Judgment for plaintiff and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

C. D. Coughlin and G. J. Clark, both of Wilkes-Barre, for appellant. E. J. Mullen, of La Porte, for appellee.

WALLING, J. This is an action of assumpsit for money loaned. The defendant company was incorporated in 1910, with an authorized capital stock of \$200,000, divided into shares of \$100 each. It owned a tract of 2,200 acres of timber land in Sullivan county, where it was engaged in the manufacture and sale of lumber. Prior to August, 1915, 1,500 shares of its capital stock had been issued, of which 1,100 share were owned or controlled by John Hughes Blackman and the remaining 400 shares by C. F. Carter. The latter manufactured the lumber for the corporation, and the former looked after its business affairs. In the spring of 1915 Carter secured from Blackman an option for the purchase of his stock. Blackman was president of the corporation, and insisted that, in connection with the sale of his stock, all the company's direct and collateral liabilities, amounting to about \$41,000, must be paid. The agreed price for his stock was in round numbers \$50,000, making the amount necessary to consummate the transaction \$91,000. Carter employed plaintiff, who was an attorney, to assist him in securing this money, which was obtained largely by loans from banks and individuals. The option as drawn expired July 15th of that year, but was extended. The parties in interest met at a bank in Pittston on July 31st, also on Au-

gust 2d, and again on August 4th, when the matter was finally consummated, and Carter became the owner of practically all the stock of the corporation. At the same time the company was reorganized, and the number of directors increased from three to five, which included Carter, his two sons, plaintiff, and H. W. Ruggles. A share of stock was transferred to each of the two latter to qualify them to act as such. Mr. Carter became president, his son, Bruce A. Carter, secretary, and Mr. Ruggles, treasurer.

Some of the notes given by Carter to raise the money were indorsed by plaintiff, who also furnished \$5,000 of his own, which amount, with the balance of the \$91,000, was turned over to Blackman at the meeting on August 4th. So far as appears, Mr. Blackman paid all the debts and liabilities of the old company and retained the balance as the price of his stock. The only question involved in this suit is whether the \$5,000 was a loan to Carter or to the corporation; plaintiff says to the corporation. The \$41,000 indebtedness included \$6,500 owing to Blackman for salary. On the day last mentioned there was a meeting of the new board of directors, at which four were present; and the evidence for plaintiff tends to show that it was then agreed and understood that his \$5,000 was a loan to the corporation and to be used in payment of Blackman's salary. In corroboration of this a three-months note for that amount, drawn payable to plaintiff and executed by the new president and secretary in the corporate name, was put in evidence. The note was not signed by the treasurer as the by-laws provide; but plaintiff's evidence is to the effect that the treasurer was present, consented to the transaction, and said he would sign the note, if necessary. This is denied by the treasurer, who testifies, in effect, that it was a loan to Carter, and not to the company, and that the question of treating it as a loan from plaintiff to the company was broached at the meeting on August 2d, when he (the treasurer) refused to so consider it, or to sign the note, and that later, after a private conversation between Carter and plaintiff, they stated that other arrangements had been made as to the \$5,000, and further that he had no knowledge of said note until long afterwards, and never consented thereto.

As we understand the facts none of the funds turned over to Blackman, passed through the hands of the treasurer. The minutes of the corporate meeting held that day contain no reference to this loan. Ruggles seems to have been interested in this suit as the holder of a large block of the company's stock as collateral for a loan to Carter, who died in November, 1915, apparently insolvent. The note was admitted in evidence in support of plaintiff's contention. As the court below says, there was a sharp conflict in the evidence. Each side

was supported to some extent by more than one witness, and the case became largely one of fact; as such it was submitted to the jury with adequate instructions. The verdict was in favor of the plaintiff, and the lower court, after careful consideration, directed judgment to be entered thereon, from which defendant appealed.

[1] We find no error in the record. Some of the funds turned over to Blackman were for his stock, and the balance for corporate indebtedness. The jury found this \$5,000 was a part of the latter; that being so, the corporation received the benefit of the loan. Conceding that the president and secretary were not authorized to execute the note, yet the company got the money, which it cannot retain and repudiate the agency by which it was secured. Upon this question we adopt the following from the opinion of the court below:

"If plaintiff's money was loaned and used for such purpose, it is of no consequence that the election of officers was irregular, or that one of them was absent at the time of such loan, or that the treasurer did not execute the note. Such irregularities give way to the principle that a party cannot avail himself of the benefit of his agent's act and repudiate his authority, in the application of which it is held that a corporation which has received the benefit of a note irregularly issued cannot escape liability thereon by showing it was not executed by the proper officers. *Hartzell v. Ebbvale Mining Co.*, 239 Pa. 602, 86 Atl. 1093; *Pannebaker v. Tuscarora Valley R. R. Co.*, 219 Pa. 60, 67 Atl. 923; *Presbyterian Board v. Gilbee*, 212 Pa. 310, 61 Atl. 925; *Penn Natural Gas Co. v. Cook*, 123 Pa. 170, 16 Atl. 762; *MacGeorge v. Chemical Mfg. Co.*, 141 Pa. 575, 21 Atl. 671. And a director of a company, suing, is not denied the application of such rule. *Kendall v. Klapperthal Co.*, 202 Pa. 596, 52 Atl. 92."

[2] The defendant's obligation arises from the receipt of the money by it, and the note, although defectively executed, is evidence as tending to establish the loan. See *Wojciechowski v. Johnkowski*, 16 Pa. Super. Ct. 444. A corporation may lawfully borrow money to pay its indebtedness, and when used for that purpose the obligation to repay is undoubted. The fact that the loan in question did not pass through the hands of the treasurer is not controlling, nor is the absence of any reference thereto in the corporate minutes.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 276)

KERK v. PETERS.

(Supreme Court of Pennsylvania. May 6, 1918.)

HIGHWAYS — 184(3) — INJURY TO PEDESTRIAN — QUESTION FOR JURY.

In an action for death of plaintiff's husband, struck by defendant's automobile on a highway, the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.

Appeal from Court of Common Pleas, Northampton County.

Action by Katherine B. Kerk, administratrix of Samuel H. Kerk, deceased, against Arthur E. Peters. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

W. H. Kirkpatrick, of Easton, for appellant. Calvin F. Smith, of Easton, for appellee.

PER CURIAM. The husband of the appellee, when crossing a public highway, was struck by an automobile driven by the appellant, and death resulted from the injuries he sustained. On this appeal from the judgment on a verdict against the appellant his contention is that there was no evidence of negligence on his part in driving the automobile, while the contributory negligence of the deceased was clear, and the court below should have so held by directing a verdict for the defendant or entering judgment in his favor non obstante verdicto.

To have taken the case from the jury on either ground would have been error. The appellant admitted in his testimony that he saw appellee's husband on the road about 60 feet ahead of him; that he blew his horn and could have stopped his machine before he struck the deceased. Edwin H. Kelper, who was in the automobile with the appellant at the time of the collision, called as a witness for him, testified that when the horn was blown the deceased seemed bewildered, and in a minute the automobile struck him. He was struck with such force that, according to an eyewitness, he "went through the air." The defendant undertook to pass on the right-hand side of the road, where there was considerably less room to pass than on the other side, to the left of the deceased. It seems from the testimony that on that side there was a clear width of more than 20 feet. With the admission of the defendant that he could have stopped his automobile before he struck the deceased, who was standing in the road bewildered, according to the testimony of two witnesses called for the defense, the correct conclusion of the learned court below in denying defendant's motion for judgment was that his negligence was a question of fact for the jury.

The deceased was lawfully on the highway, and he was not guilty of any negligence in attempting to cross it. The blowing of the horn and the approach of the automobile dazed him, and the law did not exact from him in his bewilderment the degree of care which he would have been bound to observe, if he had not been suddenly confronted with unexpected peril through the act of the defendant. It was manifestly for this reason that the learned trial judge refused to affirm defendant's fifth point, which embodied a correct general rule. As a fair

inference to be drawn from the testimony was that the deceased was not, under the circumstances, guilty of contributory negligence, that question was for the jury. *Cohen v. Philadelphia & Reading Railway Co.*, 211 Pa. 227, 60 Atl. 729; *Clark v. William M. Lloyd Co.*, 254 Pa. 168, 98 Atl. 866.

Nothing is to be found in any of the assignments of error calling for a disturbance of the judgment, and it is accordingly affirmed.

(361 Pa. 177)

**NORTHWESTERN CONSOL. MILLING CO.
v. YOUNG.**

(Supreme Court of Pennsylvania. April 22, 1918.)

1. ASSUMPSIT, ACTION OF — AFFIDAVIT OF DEFENSE.

In assumpsit for money had and received to plaintiff's use, where defendant had been employed as a salesman and collector, affidavit of defense that defendant had paid the money by applying it to other accounts owing by plaintiff was insufficient, where there was no averment of authority to so apply it.

2. ASSUMPSIT, ACTION OF — AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In assumpsit for money had and received by salesman and collector for plaintiff, affidavit of defense held insufficient, where it did not appear that transactions alleged to be a defense to the claim were ever acquiesced in by plaintiff, or that he ever had knowledge of the same, or that the manager under whom defendant was acting had knowledge of such transaction or authority to agree to it for the plaintiff.

Appeal from Court of Common Pleas, Schuylkill County.

Action by the Northwestern Consolidated Milling Company against George D. Young. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Bechtel, P. J., in the common pleas:

This case comes before us on a rule on the defendant to show cause why judgment should not be entered in favor of the plaintiff, notwithstanding the affidavit of defense to a portion of the plaintiff's claim. The plaintiff maintains a branch office and warehouse at Shenandoah, in this county, for the carrying on of its business in that vicinity and the defendant, George D. Young, was employed by it and acted as salesman and collector for it at the said place. Acting in such capacity, the affidavit of defense admits that the defendant received * * * amounts of money from certain customers.

[1] He claims, however, that he should not be charged with these amounts by reason of the fact that he paid them to the plaintiff by applying them to other accounts; that is, the credits were given to people other than those who actually paid the amounts. Where he received the authority to do this, or whether or not it was done with the knowledge of the plaintiff or the parties whose money was so credited, does not appear in the affidavit of defense. We do not see by what right this defendant collected the money from one man and credited it on the account of another, and we do not feel that this would be a valid defense in the trial of the case. We therefore grant judgment for this amount, \$2,805.97.

The declaration claims from the defendant the sum of \$6,166.64 for flour under the defendant's

control and in his possession while he was employed as salesman and collector, and which he caused to be charged on the books of the plaintiff as having been sold to certain persons; * * * whereas, in truth and fact the flour to the amount above named was never received by said parties, but was disposed of and delivered by the said defendant to other parties and he has received payment for the same and declined to make payment to the plaintiff. The affidavit of defense, replying thereto, sets forth that the defendant was under the orders and direction of F. D. Watts, assistant manager for Eastern Pennsylvania, Philadelphia branch of the plaintiff company, and that the said F. D. Watts would call on defendant for money and insist on having advances without delay. Whereupon the deponent would make sales of flour to different customers and others to realize money quickly, and in order to do so, and to induce immediate purchases, so as to provide for the demands of the said F. D. Watts, defendant sold, to the different persons named, flour at less than the prevailing or market price, but, on the books of the company the persons purchasing at reduced price were charged the prevailing or market price of flour, and this course of dealing was carried on for a considerable time, and in that way balances against the customers, being the difference between what they actually paid for the flour and the market price, increased from time to time. He alleges that all moneys received from the customers at less than market price were paid by the defendant to the milling company from time to time, and that the balances against such customers, as appear in the fourth paragraph hereinabove set forth, defendant never received, and was not and is not personally responsible to the company for the amounts.

[2] There nowhere appears in the affidavit of defense any averment that this arrangement was ever acquiesced in by the plaintiff, or that the plaintiff had any knowledge of the same, nor does it appear that F. D. Watts, assistant manager for Eastern Pennsylvania, had any knowledge of it, or acquiesced in it, nor does it appear that the said F. D. Watts had the authority to make any such arrangement for the plaintiff company.

In view of these facts, we do not think that the affidavit of defense is sufficient as to these items.

The court entered judgment for plaintiff for want of sufficient affidavit of defense, for \$8,877.16 with interest from August 14, 1916. Defendant appealed.

Error assigned was in entering judgment for plaintiff for want of sufficient affidavit of defense.

Argued before POTTER, STEWART, MOSCHIZSKER, FRAZER, and WALLING, JJ.

John F. Whalen and George Ellis, both of Pottsville, for appellant. J. F. Mahoney and James B. Reilly, both of Pottsville, for appellee.

PER CURIAM. The court below was fully justified in entering judgment for want of a sufficient affidavit of defense in this case for the amount for which judgment was claimed. There was no sufficient denial of the claim of plaintiff that the defendant collected upon its account, and failed to pay over to it, the sums of money in question. The judgment is affirmed.

(261 Pa. 190)

JONES et al. v. WYOMISSING CLUB et al.
(Supreme Court of Pennsylvania. April 22,
1918.)

INJUNCTION \Leftrightarrow 118(2)—PAROL BUILDING RESTRICTION—PLEADING—SUFFICIENCY.

A bill to restrain violation of a parol building restriction entered into between remote predecessors in title of plaintiffs and defendants, respectively, was demurrable, where it did not allege that defendants or any of their predecessors in title, except the one who made the agreement, had notice thereof.

Appeal from Court of Common Pleas, Berks County.

Bill by Margaret E. McCarty Jones and husband against the Wyomissing Club and another. From a decree sustaining demurrer and dismissing the bill, plaintiffs appeal. Affirmed.

Endlich, P. J., filed the following opinion in the common pleas sur defendants' demurrer to the bill:

Mrs. Jones, the principal plaintiff, and the Wyomissing Club, the principal defendant, are the owners of adjoining properties in the city of Reading fronting on Fifth street, the plaintiff deriving title through successive holders from one Sallade, and the defendant similarly from one Dunn. On plaintiffs' property there is a house (plaintiffs' residence), and on defendant's property there was one until recently, when it was demolished to make room for a new building. The purpose of this action is to inhibit the defendant, in the erection of the new structure, from building $8\frac{1}{2}$ feet west of a certain line which, it is stated in the bill as now amended in the fourth paragraph, was in 1848 agreed upon as a building line by the then owners of the respective properties, and subsequently by Sallade, when he became the owner of and built upon plaintiffs' property; the former also constructing the north wall of his house (the side towards plaintiffs' property) as a party wall, which, however, is not alleged to have been utilized by Sallade.

Defendant has demurred to the bill, specifying a number of grounds, of which, since the amendment of the bill, the significant ones are the seventh and eighth, to the effect that the bill avers neither the appearance of any such agreement and restriction in the title of the property to be affected thereby, nor any notice of the same to defendant or any of its predecessors in title under Dunn. The portions of the bill, as amended, which are important for present purposes, are as follows:

"4. That on or about August 30, 1848, James L. Dunn, Esq., erected the building on the corner of Fifth and Walnut streets, which the defendant club building is now succeeding. He and the then owner of the adjoining property fronting on Fifth street, now owned by the plaintiffs, made an agreement whereby they established a line 20 feet east of the street line for the location of all future buildings to be erected upon these premises. Pursuant thereto the said James L. Dunn erected a building 20 feet back from the street line, and erected a party wall between him and the adjoining owner, the western end of which was 20 feet back from the Fifth street line. That subsequently, to wit, on or about April 1, 1850, Andrew M. Sallade, Esq., who succeeded to the title of the premises now owned by the plaintiffs, pursuant to and in compliance with the said agreement, built upon the line established, as aforesaid, observing the said building line and restriction for the purpose of mutually increasing the value and comfortable enjoyment of their respective

premises; each party observing and confirming the servitude or easement established by agreement as aforesaid in favor of the estate of the other, for their mutual advantage and benefit.

"5. That notwithstanding the restriction and servitude thus imposed upon the lot of the defendants, they have commenced the erection of a building on said Fifth street to extend $3\frac{1}{2}$ feet west of said covenant building line (being the line of plaintiffs' residence), established by the predecessors in title of the parties to this action more than 60 years ago and maintained continuously and uninterruptedly in good faith and mutual understanding ever since.

"6. That the said plaintiffs, and the prior owners of 206 North Fifth street have enjoyed, since said buildings were erected, an open area and unobstructed space in front of said buildings to the west, with the attendant comforts of light and air; and the owners of the property north of the Dunn property, in subsequently building, followed the covenant line thus established for future buildings, as appears by the marks upon the ground, covering the seven buildings now thereon erected."

In a bill in equity, every fact essential to the right to the relief prayed for must be averred. *Thompson's Appeal*, 126 Pa. 387, 17 Atl. 643; *P. S. V. R. R. Co. v. P. & R. R. Co.*, 180 Pa. 277, 23 Atl. 784; *Finletter v. Appleton*, 195 Pa. 349, 45 Atl. 1063; *Luther v. Luther*, 216 Pa. 1, 64 Atl. 868; *Rittenhouse v. Newhard*, 232 Pa. 433, 81 Atl. 445; *Spangler Brewing Co. v. McHenry*, 242 Pa. 522, 89 Atl. 665. And a demurrer admits only what is adequately stated in the bill, not conclusions of law, or argumentative or doubtful inferences from facts detailed. *Com. v. Allegheny Com'rs*, 37 Pa. 277, 279; *Getty v. Pa. Inst. for Blind*, 194 Pa. 571, 575, 45 Atl. 333; *Bussier v. Weekey*, 4 Pa. Super. Ct. 69, 72. A right of the kind here asserted over another's land must, save in exceptional conditions not found in this case, rest upon express agreement (*Rennyson's Appeal*, 94 Pa. 147, 153, 39 Am. Rep. 777; and see *Haverstick v. Sipe*, 33 Pa. 365), which, in order to avail against succeeding owners, must clearly and positively appear to have been intended, not only to bind the immediate parties to it, but permanently to control the situation (*Hubbell v. Warren*, 8 Allen [Mass.] 173, 178). Nor is it or can it be disputed, or required to be demonstrated by the citation of authorities, that subsequent purchasers cannot be affected by such agreement unless they have notice, actual or constructive, of the restriction created thereby; and that notice must have reached every one in the line of the title of the party against whom the right is asserted, for, if any one purchased without notice, that party, though himself visited with notice, is protected by the equity of the unnotified purchaser. *Filby v. Miller*, 25 Pa. 264. Of course, the fact of notice is one which is bound to appear affirmatively on the face of the bill (*Finletter v. Appleton*, 195 Pa. 349, 353, 45 Atl. 1063; *Gilkeason v. Thompson*, 210 Pa. 355, 358, 359, 59 Atl. 1114), either by express and formal averment or by deduction from facts explicitly stated which admit of no other conclusions, so that from them the inference of notice must necessarily follow (*Id.*).

There seems to be in this bill no express averment of notice of the alleged agreement or restriction to defendant or any of its predecessors in title under Dunn; nothing to suggest such notice beyond what may be argued to have been conveyed to them by the facts that the houses already spoken of and several others occupying the remainder of the original tract north of the Dunn property stood a uniform distance back of the city building line and that the first one was built with a party wall on the north side. Neither of these circumstances, however, can be regarded as conclusive in the

sense above pointed out. It is virtually decided by Judge King in *Scott v. Burton*, 2 Ashm. 312, 329, 330, that the mere location of the houses is not ordinarily notice to a purchaser of any restrictive agreement such as is here contended for; and the same doctrine may fairly be gathered from *Haverstick v. Sipe*, 33 Pa. 368, 371, and *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80. As ordinarily, so in the present instance, that location, so far as regards anything to be indicated by it, may have been a mere matter of neighborly accommodation, of personal convenience, of individual taste, without any contractual basis or possibly of an agreement intended to hold only the immediate parties to it. On the other hand, the existence of the party wall, apparently unused by the adjoiner, affords no reason for believing that the latter might not build out further—no more than for treating it as evidencing an agreement not to build higher. The object in putting it up may well have been simply to serve the then present convenience of the first builder, and perhaps the supposed future convenience of the adjoiner as far as the wall went. Besides, its erection being the act of one party, not followed by any act of the other making it his also, it can hardly be deemed evidence or notice of an agreement between them. To both of the matters in question, the rule appears applicable that a fact or facts equally consistent with two contrary inferences cannot be accepted as the sole basis for either. *Breckmann v. Twibill*, 89 Pa. 58, 59; *Mead v. Conroe*, 113 Pa. 220, 228, 8 Atl. 374; *Alexander v. Penna. Water Co.*, 201 Pa. 252, 256, 50 Atl. 991. If the facts averred clearly involved the inference of notice of a restrictive agreement designed to be perpetual, there would be no need for an express allegation of such notice. But in view of their inconclusiveness, the allegation is essential to the completeness of the bill, and it lacks ground for demurrer under the authorities above cited.

No doubt the averments of this bill state the plaintiffs' case as strongly for her side as it can be stated. It can only be adjudged that, in the particulars discussed, it falls short of what is needful to warrant a decree granting the relief prayed. Hence there is no alternative but to consider the demurrer in those particulars to be good.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WAILING, JJ.

J. Milton Miller and C. H. Ruhl, both of Reading, for appellants. Snyder, Zieher & Snyder, of Reading, for appellees.

PER CURIAM. The agreement upon which the appellants base their right to an injunction was in parol, and there is no express averment in their bill that the Wyomissing Club, or any of its predecessors in title under Dunn, had notice of it. The demurrer was therefore properly sustained, and the decree dismissing the bill is affirmed, at appellants' costs.

(361 Pa. 153)*

TRACTION MATERIALS CO. v. PITTSBURGH, M. & W. RY. CO. (No. 1.)
(Supreme Court of Pennsylvania. April 22, 1918.)

1. RECEIVERS §98—LIABILITIES—MISAPPLICATION OF FUNDS.

Funds allowed receiver of insolvent corporation for necessary improvements and current

expenses cannot be diverted by him to the payment of unsecured creditors of the corporation, and if he does so he is liable to a surcharge for the amount paid.

2. RECEIVERS §98—LIABILITIES—MISAPPLICATION OF FUNDS.

Where a receiver paid for personal property turned over to the insolvent by a bondholder's committee, and the property was not worth the price paid, and the payment covered the property and also a balance due the committee, the receiver was properly surcharged with the difference between the value of the property and the amount paid.

3. RECEIVERS §99(3)—PAYMENT OF STATE TAX.

Where receiver paid state tax assessed prior to his appointment against the insolvent corporation and prior to Act June 15, 1911 (P. L. 955) dispensing with necessity of filing a lien for taxes against the property of a corporation, and the assessment had not been filed, the receiver was chargeable with such payment.

4. RECEIVERS §98—LIABILITIES—EXTENSION OF ROAD.

Where, before appointment of receiver of a street railroad company, contract had been made with another company for extension of its lines, and receiver made extension by leave of court, which extension passed to purchaser at receiver's sale, receiver was not chargeable with amount expended for making such connection.

5. RECEIVERS §202—EXCEPTIONS TO REPORT—BURDEN OF PROOF.

Where specified exceptions are filed to certain credits claimed by the receiver, burden is on him to support same by evidence.

6. RECEIVERS §123—CERTIFICATES—SALE BY RECEIVER—PAYMENT OF COMMISSION.

Where receiver was authorized to sell certificates at not less than 80 per cent. of the par value, and an agent sold them for 94 per cent., and kept 4 per cent. as commission, the receiver was not liable for the amount of such commission.

7. RECEIVERS §196—COMPENSATION.

Where receivership extends over term of years, a single act of misfeasance, by which receiver does not profit, will not deprive him of all compensation.

8. APPEAL AND ERROR §955—COMPENSATION OF RECEIVER—DISCRETION OF TRIAL COURT.

Appellate court will only interfere with allowance of compensation to receiver in order to correct abuse of discretion.

9. RECEIVERS §196—COMPENSATION—MISAPPLICATION OF FUNDS.

Where receivership lasts four years, contention that receiver should not be allowed any compensation, because he paid a bondholder's committee more than the fair value of certain property, was without merit, where he made no profit personally.

10. RECEIVERS §155—OPERATING EXPENSES—IMPROVEMENTS.

As a general rule, the court appointing a receiver for a street railway corporation may allow for operating expenses and necessary improvements out of the corpus of the estate, even against the mortgage lien creditors.

11. RECEIVERS §155—PREFERRED CLAIMS.

Where court directed its receiver to continue trolley road as going concern, and road was sold by receiver divested of liens, expenses in connection with running thereof, in addition to certificates issued by order of court, were preferred claims.

12. RECEIVERS §154(1)—COSTS.

Where receiver kept honest accounts, and his surcharge exceeded his commission, the court properly ordered the costs paid out of the fund.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the Traction Materials Company against the Pittsburgh, McKeesport & Westmoreland Railway Company for the appointment of a receiver. Exceptions to report of auditor were sustained in part, and the Union Trust Company of New Jersey, the Farmers' & Merchants' Bank of West Newton, Pa., and James G. Hasking and the Union Trust Company of Pittsburgh, trustees, appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHIZSKER, FRAZER, and WALLING, JJ.

M. W. Acheson, Jr., and Sterrett & Acheson, all of Pittsburgh, for appellants. W. Clyde Grubbs and W. B. Secrist, both of Pittsburgh, for appellee.

WALLING, J. These three appeals raise the same questions and will be considered together. They are from the decree of the court below disposing of exceptions to the auditor's report and making distribution of the balance in the hands of the receiver. In November, 1911, the appellee, James B. Secrist, was appointed receiver of the Pittsburgh, McKeesport & Westmoreland Railway Company, which owned and operated an electric street railway, about nine miles long and extending from McKeesport, Allegheny county, to Irwin, Westmoreland county. The appointment was made in above case on a creditors' bill alleging the defendant's insolvency. The company was a financial failure, and had outstanding first mortgage bonds to the par value of \$442,000, on which no interest had been paid since 1905. About three months prior to the appointment of the receiver, a bondholders' committee had been organized, to whom was transferred \$424,000 par value of said bonds. The committee practically had charge of the road during those three months, and among other things secured a loan of \$15,000 from the Columbia Knickerbocker Trust Company of New York, for which it pledged bonds of the company as collateral. Some of this money was used to pay for two new car bodies, which the company had ordered, but could not obtain for lack of funds, and the balance was expended for other necessities of the road. The committee had turned the car bodies over to the company on a lease at the price of \$7,900.

[1, 2] Soon after his appointment, the receiver applied to court for an order authorizing him to issue receiver's certificates to the amount of \$20,500 for the purpose, *inter alia*, of paying \$15,000 for the two car bodies. The order was made and certificates to the last-named amount were turned over to the committee, ostensibly to pay for the car bodies, but, as it appears, in reality to

pay, not only for the car bodies, but also for the balance which the committee had expended for the road. While the receiver made the payment in this way, under the advice of counsel, he knew the car bodies were not worth the \$15,000. The auditor characterizes this transaction as an exhibition of gross carelessness and bad faith on part of the receiver, and a legal fraud, and surcharges him with the difference between the \$15,000 and the real value of the car bodies as stated in the lease. This was approved by the court below. The receiver gained nothing personally by the transaction, and possibly intended no wrong; but, in the most favorable aspect of the case, he used the balance of the \$15,000 to pay a pre-existing indebtedness of the company to the committee, which he could not lawfully do. So the surcharge was right. Funds allowed the receiver of an insolvent corporation for necessary improvements and current expenses cannot be diverted by him to the payment of certain unsecured creditors of the corporation, thus giving them an unlawful preference, whether it be done directly or indirectly. Knowingly or negligently paying a fictitious value for property would result in a surcharge of the receiver, and he is not relieved because the excess is applied to a pre-existing indebtedness which he had no authority to pay.

[3] The receiver paid a state tax of \$961.74, which had been assessed against the corporation prior to his appointment, but had not been filed of record, so as to become a lien; this being prior to the act of June 15, 1911 (P. L. 955), dispensing with such filing. The court below properly sustained the auditor in surcharging the receiver with the amount of that payment, for under such circumstances the claim of the commonwealth was postponed to that of lien creditors. *Wm. Wilson, etc., Co.'s Estate*, 150 Pa. 285, 24 Atl. 636; *Goodwin Gas Stove & Meter Co.'s Estate*, 166 Pa. 296, 31 Atl. 91.

[4] The Pittsburgh Railways Company had tracks on Fifth avenue, McKeesport, while the road of the defendant company ended at a suburb about one-half mile therefrom. It was deemed desirable to extend the road, so as to form a connection with the railway in the avenue and thereby run cars to the center of the city. For that purpose the defendant company in 1910 made an agreement with the railways company for such connection, and the city also gave municipal consent conditioned on bonds being given to complete the connection and protect the city from damages in the operation of the road. Before the extension was made the company went into the hands of the receiver, who obtained leave of court for that purpose and proceeded with the project, expending thereon \$3,948.50. However, he was unable to furnish the stipulated bonds and never used the

connection. The above-mentioned agreement for the connection had expired before it was actually constructed, and at that time the receiver had only a verbal arrangement relating thereto with the railways company; but that seemed satisfactory to the latter, as it did the work of making the connection for the receiver, but insisted upon an indemnifying bond. The auditor surcharged the receiver with that expense, but we agree with the court below, who allowed it. Greater prudence might have suggested securing the bonds before doing the work; but the receiver was acting in good faith, under the advice of counsel, and as authorized by the court, and making a long-contemplated and seemingly necessary improvement, of some value to the company, as the court below finds, and which passed to the purchaser of the road. Under such circumstances he should not be held personally liable.

[5, 6] The receiver was authorized to and did issue additional certificates to the face value of \$30,000, which he was authorized to sell at not less than 90 per cent. of the par value, and he accounts for them at that amount. One Manning Stires had been connected with the company in various capacities, and also represented the bondholders' committee, and later was in some matters associated with the receiver, who intrusted him with the sale of the \$30,000 issue of certificates. Mr. Stires sold them at 94 per cent., of which he kept 4 per cent., and turned over the balance to the receiver, who is found to have acted in good faith in the matter, and without knowledge of what Stires received for the certificates. We see no reason to differ from the auditor and court below, who held the receiver blameless in that transaction. Where specific exceptions are filed to certain credits claimed in the account of a receiver or other trustee the burden is cast upon him of supporting the same by proof, and where he fails to do so the exceptions will be sustained.

[7-9] The receivership lasted four years, and the auditor allowed the receiver \$5,000 for his services, which the court increased to \$8,000. The appellants, as bondholders and creditors, strenuously urge that the receiver should not be allowed any compensation, largely on account of the transaction relating to the car bodies. As the presidents of two of the appellant banks were members of the bondholders' committee to whom the excess was paid, their objection does not appeal strongly to our sense of fairness. Aside from that, while the finding of bad faith was warranted, yet it was more a matter of bad faith in law than in fact, for which the payment of \$7,180.53 by the receiver out of his own pocket is a sufficient penalty. Where a receivership extends over a term of years, a single act of misfeasance, by which he profits nothing, will not necessarily deprive the receiver of all compensation. The allowance to a receiver for services is largely a mat-

ter for the court, whose officer he is, and with which an appellate court will only interfere to correct an abuse of discretion. *Hillard v. Sterlingworth Railway Supply Co.*, 236 Pa. 82, 83, 84 Atl. 680, Ann. Cas. 1913D, 1115; *Covington v. Hawes-Law Anna Co.*, 245 Pa. 73, 79, 91 Atl. 514, Ann. Cas. 1915D, 1254; *Schwartz v. Keystone Oil Co.*, 153 Pa. 283, 286, 25 Atl. 1018. Such a finding will not be reversed by an appellate court, except on clear proof of error. *York Trust Co. v. Pullman Mfg. Co.*, 237 Pa. 261, 85 Atl. 143.

It is also urged that he unnecessarily prolonged the receivership. That criticism is not without force, yet appellants took no steps to hasten its termination. There is nothing in the compensation allowed the receiver, or in the \$5,000 allowed for counsel fees, that calls for our interference. See *McDowell's Appeal*, 4 Pennypacker, 384.

[10, 11] The court directed the receiver to continue the road as a going concern. This was in the interest of all parties, as it saved the franchise, tended to conserve the property, and promoted public convenience. By some arrangement the road was sold in 1915 at receiver's sale divested of liens. Its operation had resulted in a loss, and some expense connected therewith in addition to the certificates was allowed as a preferred claim. The general rule undoubtedly is that the court, who appoints a receiver for a public service corporation, may allow for operating expenses and necessary improvements out of the corpus of the estate and as preferred claims, even against mortgage lien creditors. 34 Cyc. 353; *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. To the same effect is a per curiam decision of Judge Sharswood, at nisi prius, in *Patterson v. Hempfield R. R. Co.*, 1 Wkly. Notes Cas. 127. This is a power, however, to be exercised sparingly and with great caution. We cannot say that the giving of such preference in this case was error.

[12] The receiver kept honest, but not expert, accounts, and, as the case was decided by the court below, his surcharge exceeds his commissions; so we see no ground for disturbing the finding that the costs should be paid out of the fund for distribution.

The assignments of error are overruled, and the decree is affirmed, at the costs of the appellants.

(361 Pa. 163)

TRACTION MATERIALS CO. v. PITTSBURGH, M. & W. RY. CO. (No. 2.)

(Supreme Court of Pennsylvania. April 22, 1918.)

Appeal from Court of Common Pleas, Allegheny County.

Bill by the Traction Materials Company against the Pittsburgh, McKeesport & Westmoreland Railway Company. From a decree dismissing exceptions to the auditor's report,

James B. Secrist, receiver, appeals. Appeal dismissed.

Argued before BROWN, O. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

W. Clyde Grubbs and William B. Secrist, both of Pittsburgh, for appellant. M. W. Acheson, Jr., and Sterrett & Acheson, all of Pittsburgh, for appellee.

WALLING, J. In the opinion filed herewith on the appeals of Union Trust Company of New Jersey et al. from the same decree (Traction Materials Co. v. Pittsburgh, McK. & W. Ry. Co., 104 Atl. 552), we have considered the questions raised by the receiver on this appeal; and, for reasons there stated, the assignments of error in this case are overruled, and the appeal dismissed, at the costs of appellant.

(261 Pa. 223)

In re REISHER'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. WILLS §476—CODICIL—RESTRICTIONS—CONSTRUCTION.

Where codicil refers to restrictions in the body of the will, such reference is to be given the same effect in construing the gift in the codicil as if the restrictions had been set out immediately following it.

2. WILLS §597(2)—CONSTRUCTION—LIFE ESTATE—"RESTRICTIONS."

Where testator devised realty in equal shares to his sons for life, one-half in remainder to the youngest daughter of the first son, and the other half to the children of the second son, and by codicil revoked the devise to the first son and devised the property to his wife for life, with remainder to his second son under "restrictions" in the body of the will, held, that testator had reference to provision by which he gave to the children of the second son upon their father's death a remainder in fee in one-half of the property, so that the second son took a life estate only, and his children took by implication a remainder estate in fee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Restriction.]

3. WILLS §478—IMPLIED DISPOSITIONS.

A devise may be implied, where necessary to carry out, and not to contradict, the expressed intention of the testator.

Appeal from Orphans' Court, Franklin County.

In the matter of partition proceedings in the estate of Samuel Reisher. From a decree dismissing exceptions to the sheriff's inquisition, Metta C. Reisher and others appeal. Reversed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Walter K. Sharpe, William S. Hoerner, T. Z. Minehart, and Irvin C. Elder, all of Chambersburg, for appellants. J. R. Ruthrauff, A. J. W. Hutton, O. C. Bowers, and W. O. Nicklas, all of Chambersburg, for appellees.

STEWART, J. The point at issue here can be understood only as we have before us the main features of the will and codicil,

which together give rise to the dispute. The will of the testator, Samuel Reisher, late of Chambersburg, dated July 6, 1892, contains the following devise:

"The Smith property on Main street adjoining Wm. M. Wallace's estate on the south, and Adam Christ on the north, I give, devise and bequeath to my two sons, Daniel S. and Jacob Sener, they to receive the rents, issues and profits thereof during their lives, to be divided equally between them, after all taxes, repairs and insurance is deducted off. Daniel S. to manage said property, and to account to Jacob S., for his share, and in event they can not agree, upon petition to the judge of the orphans' court by either, I authorize said court to appoint a trustee to manage the same. At the death of either Daniel S. or Jacob S., I give, devise and bequeath the said property to the youngest daughter of Daniel S. and to the children of Jacob S., their heirs, or assigns, they to take their father's share."

By codicil dated February 5, 1893, testator directs as follows:

"The whole bequest in my will to my son, Daniel S. Reisher and at his death to his youngest daughter is hereby revoked. The house in which I live not being fully sufficient for the support of my wife, I devise and bequeath the $\frac{1}{2}$ of the Smith property to the said Nancy during her natural life, and at her death the said $\frac{1}{2}$ (one-half) devised to wife is given to my son, Jacob S. Reisher under the same restrictions as I have given him the other half in the body of my will, and further I appoint H. Gehr, trustee to manage said property."

A proceeding in partition was begun with respect to the Smith property by the children of Daniel S., who meanwhile had died intestate, claiming that an undivided half interest in the Smith property had vested at the death of the testator in Daniel S. Reisher and Jacob S. Reisher as residuary devisees, there being no gift over of the fee in said one-half, and that upon the death of Daniel S. and Jacob Sener, the said fee in the one-half descended under the intestate laws to their children and heirs at law. Inquisition was awarded, and, upon return made, exceptions were filed on behalf of appellants, children of Jacob Sener, who claimed that under the will one-half interest in the property had been given to their father, and that under the codicil the other half which in the will had been given to Daniel S. was devised to testator's widow and his son Jacob Sener for life, and upon the death of the widow the entire life estate in said one-half and the fee was devised to the children of Jacob Sener; that, both these life tenants being now deceased, the exceptants as owners of the fee in the entire property are entitled to the possession; and that therefore, the petitioners being without interest or title in the premises, the proceedings should be dismissed. The view advanced by the petitioners as to the true constructions of the will and codicil prevailed in the lower court, and the return to the inquest was accordingly confirmed. The appeal is from the decree of confirmation.

[1] In searching for the intention of the

testator, which, of course, when ascertained, must govern, whatever difficulty is encountered arises because of the inapt way in which he devises upon the death of the widow the remainder interest in the one-half of the Smith property to the son Jacob S. The language of the codicil is:

"And at her death the said one-half devised to wife is given to my son Jacob S. under the same restrictions as I have given him the other one-half in the body of my will."

This reference by the testator to the restrictions in the body of the will is to be given the same force and effect as though the restrictions had been set out in totidem verbis immediately following the gift itself, since will and codicil constitute but one instrument and are to be construed together. The question therefore is: What are the "restrictions" in the body of the will to which the gift to Jacob was subjected? Answer to that question can be returned only as we first ascertain what the testator understood by the word "restrictions," as he here employed it. We may dismiss all idea that he used it in a technical sense, for it has none. In its popular sense it means limitation or qualification of something said, and to give it any effect in the connection here used it must be so understood and applied, and even then with more or less liberality of construction. Turning to the will proper, as distinguished from the codicil, what is there appearing there that testator could have understood as a restriction on the interest given to his son Jacob S. in the Smith property? Were it not for the fact that by the very codicil whose provisions we are now considering the devise to Daniel S. and at his death to his youngest daughter of a half interest in the Smith property had been expressly revoked, it might with no little force be argued that what the testator had in mind was to subject the half interest given under the codicil to Jacob S. to the management and control of the property to Daniel S., as provided in the body of the will with respect to the cotenancy there established. But with the elimination of Daniel and his daughter from all connection with or interest in the Smith property, as shown by the revocation of the devise to him and her, and the appointment of Mr. Gehr to do just what Daniel S. was appointed by the will to do, these considerations make it impossible to accept any such explanation.

[2] What, then, remains in the will that the testator could have understood as a restriction? Absolutely nothing, unless we find it in what follows immediately after the provision with respect to the management of the property during the continuance of the life estate of Daniel S. and Jacob S., which is as follows:

"At the death of either Daniel S. or Jacob S., my sons, I give, devise and bequeath the said property to the youngest daughter of Daniel S. [revoked by codicil] and to the children of Jacob

S., their heirs or assigns, they to take their father's share."

Nowhere by express words in the will is the estate given to Daniel S. and Jacob S. as a life estate in each. To the educated mind there could be no doubt, however, that no greater estate was intended; but to the mind unskilled in such matters it might very well seem that the gift over was a "restriction," which made certain that which had not been adequately expressed in connection with the preceding gift. However that may be, and independent of it, we think it reasonably certain that the testator, in subjecting the gift to the same "restrictions" as he had imposed in the will, had reference to the provision by which he gave over to the children of Jacob S. a remainder in fee in the one-half of the property. Certain it is that, except for this construction, there is nothing to which the provision could apply, and it is otherwise meaningless. If we are correct in this construction of the will, what results with respect to the fee in the one-half given to Jacob S. for life? It is nowhere disposed of in express words, except as we discover it included in the gift over to the children of Jacob S. contained in the will, and accept that as one of the "restrictions" under which Jacob S. was to enjoy his gift under the codicil. It is the contention of the appellee that, for the lack of any express disposition of this fee, it falls into the residuary estate in which, under the will, Daniel and Jacob S. are to share equally. As against this there is the conclusion expressed above, which we need not discuss further, that the one "restriction" testator had in mind to impose on the gift to Jacob S., when he published his codicil, was that which in the will limited the gift to a life estate. The gift contained in the codicil was "under the same restrictions" as that expressed in the body of the will with respect to the gift there made. That "restriction" in the will proper expressly stated that the gift over was to the children of Jacob S. still there is in the codicil no express gift of the fee to the children of Jacob S.; but it is not necessary that there should be, if we have succeeded in ascertaining the true intention of the testator.

[3] A devise, although not formally expressed in the will, may be implied, where it is needed in order to carry out the intentions of the testator. *Bellstein v. Bellstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692. True, such implication never arises where it contradicts some expression of intention, and only when it affords such a strong probability that an intention to the contrary cannot be supposed. *Rupp v. Eberly*, 79 Pa. 141. Here the implication contradicts nothing in the will and affords such strong probability that it correctly gives effect to the real meaning and purpose of the testator that a contrary purpose cannot be supposed.

We are of the opinion that under the provisions of the codicil the children of Jacob Sener Reisher took by implication an estate in fee in the whole of the Smith property.

This being our conclusion, the decree of the court below in confirming the report of the inquisition must be reversed, and the partition proceedings be dismissed, at the costs of the appellee. It is now so ordered.

(261 Pa. 147)

KUHN v. LIGONIER VALLEY R. CO.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. APPEAL AND ERROR §1050(1) — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where witnesses testified to particular facts without objection, that another witness was improperly permitted to testify to the same facts was not ground for reversal.

2. MASTER AND SERVANT §274(9)—ACTION FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

In action by conductor for injuries from collision, evidence offered by plaintiff that the running of a coach in front of the engine was a customary act in regard to his train was admissible to counteract any inference of contributory negligence in so operating the train.

3. MASTER AND SERVANT §296(13) — EVIDENCE—INSTRUCTION—SUBMISSION OF ISSUES.

In action for injury to a conductor by a collision between two trains, where clerk of defendant testified that plaintiff had been notified verbally to hold his train until the train which collided with him arrived, and plaintiff denied having received the order, a point for charge, presenting question whether plaintiff had received that order, should have been given.

4. MASTER AND SERVANT §293(20)—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in action for injuries to plaintiff, a conductor, by collision of his train with another, an instruction that jury must find whether defendant's clerk gave plaintiff an order to hold his train until the other train arrived in a proper manner was error, as implying that the order should have been given in writing, and that giving it verbally was error.

Appeal from Court of Common Pleas, Westmoreland County.

Action by Charles H. Kuhn against the Ligonier Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Argued before BROWN, O. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

James S. Moorhead, Edward E. Robbins, A. M. Wyant, and Robert W. Smith, all of Greensburg, for appellant. Charles E. Whitten, Paul H. Gaither, John S. Lightcap, and Eugene Warden, all of Greensburg, for appellee.

BROWN, O. J. This case has been tried twice; each trial having resulted in a verdict for the plaintiff. The judgment on the first verdict was reversed, and a new trial awarded, for error in the admission of tes-

timony. *Kuhn v. Ligonier Valley R. R. Co.*, 255 Pa. 445, 100 Atl. 142.

Plaintiff was a passenger conductor on the road of the defendant company. He had charge of a train running from Latrobe, one terminus of the road, to Ligonier, the other. When his train reached Ligonier, it became his duty to take charge of another, which ran over a branch to Wilpen, a mining town about five miles from Ligonier. On July 5, 1912, a freight train started from Wilpen for Ligonier shortly after 3 p. m. The passenger train of the defendant, under the charge of the plaintiff, started from Ligonier for Wilpen at 3:22 p. m., two minutes after schedule time, and collided with the freight train on a curve a short distance from Ligonier. The plaintiff was seriously injured in the collision, and, charging his injuries to the negligence of his employer, the railroad company, in failing to notify him that the freight train was on the track over which his train was to run, he brought this suit for the recovery of damages.

Russell S. Minnich, who was a clerk in the office of the defendant at Ligonier, testified that, in pursuance of orders from the superintendent, he notified the plaintiff verbally to hold his passenger train for Wilpen until the freight train from that place arrived at Ligonier. The plaintiff denied having received such order, and testified that Minnich told him he could go "as soon as Naugle was out of the road." Naugle was a conductor waiting for the freight train from Wilpen to take it from Ligonier to Latrobe. According to the testimony of the plaintiff, he saw that Naugle was out of the road, and, with no knowledge that the freight train was on the track ahead of him, he started, and the collision resulted. On each trial the jury credited his testimony in passing upon the facts of the case, which was as to the order given by Minnich. As to this we said on the former appeal:

"If the order to wait until the freight train had arrived from Wilpen was given to plaintiff, as defendant's three witnesses testified, the accident was due to plaintiff's negligence, and he had no right to recover. If no such order was given to him, then defendant was negligent. The issue was plain and simple."

On this appeal from the judgment entered on the second verdict against defendant it assigns two errors—one to the admission of testimony, and the other to the answer of the trial judge to one of its points.

[1, 2] The train in charge of plaintiff at the time of the collision consisted of an engine and a combination baggage and passenger coach, which was ahead of the engine; in other words, the engine was pushing the coach, instead of pulling it. After two witnesses had testified, without objection, that for a period of two years that particular train had sometimes run with the engine ahead and at other times behind, pushing the

passenger coach, an offer was made to prove the same fact by a third witness. On objection to it, the purpose was said to be to rebut "any possible inference of negligence on the part of the plaintiff as conductor on account of the coach being ahead of the engine on the day of the accident." The admission of the testimony of this third witness is the subject of the first assignment of error.

Even if this testimony had been objectionable, its allowance would be no cause for reversal, for it was substantially the same as that of the two other witnesses, which had been received without objection. Vide cases cited in 38 Ency. of Law and Procedure, 1418. But it was not objectionable. The plaintiff was bound to present a case free from contributory negligence, and as trains are ordinarily operated with the locomotive ahead, instead of behind, the cars, the jury might have drawn an inference that the plaintiff had been guilty of contributory negligence in making up his train with the passenger coach ahead of the engine. If this had been permissible for some time by the defendant company, no such inference could have been fairly drawn, and as the manifest purpose of the testimony was to show that the method of operating the train at the time of the collision had been permissible by the company, it was properly admitted. The first assignment of error is dismissed.

[3] The other error assigned is to the refusal of the trial judge to affirm defendant's first point, which was as follows:

"The important and controlling issue of fact in this case, upon which the liability or non-liability of the defendant depends, is: Did Russell Minnich direct the plaintiff to hold his passenger train until the freight train reached Ligonier from Wilpen? Whether or not the passenger train might have been stopped by the witness Noel, or others, after it was in motion; whether or not the operation of the Wilpen train on the day of the accident with the coach in advance of the engine contributed to the injury of the plaintiff; or whether or not the presence of signals, telephone or telegraph service, along the track between Ligonier and the point of collision, might have averted the accident—are questions which are not for your consideration in ascertaining whether the defendant is or is not liable in this case. The defendant, if liable at all, is liable only in the event you should find from the testimony in this case that Minnich failed to communicate the orders he received from Superintendent Senft to the plaintiff Kuhn, and that the plaintiff did not contribute to his own injury."

This point stated exactly what the narrow issue was and the undoubted law relating to it. If the plaintiff received the order which Minnich says he gave to him, to hold his engine until the freight train had arrived from Wilpen, he was not entitled to recover. If such order was not given to him, he was entitled to recover. This single issue in the case was plain and simple; nothing else was for the jury's consideration in passing upon the question of the defendant's negligence,

and, as this is what the court was asked to say to them by the defendant's first point, it should have been unqualifiedly affirmed. *Citizens' Passenger Railway Co. v. Ketcham*, 122 Pa. 228, 15 Atl. 733; *Lingle v. Scranton Railway Co.*, 214 Pa. 500, 63 Atl. 890; *McNees v. Sims*, 231 Pa. 386, 80 Atl. 866.

[4] After declining to affirm the point, the learned trial judge proceeded to answer it at some length, and in doing so fell into manifest error. He first said:

"The manner of discharging the duty that was owing from the defendant company to its employé is an important matter, and whether that duty was discharged in the manner in which it was said this communication took place, as the defendant's witnesses give it—whether or not that manner of communicating it to Kuhn was a proper discharge of that duty—we think the jury ought to pass on. This [defendant's first point] would limit it to the communication having been made, regardless of the circumstance of the manner of making."

Whether the manner in which Minnich communicated the order to the plaintiff was a proper one was not a question in the case; but, under the court's answer to defendant's point, the jury might have found that the order ought to have been given in writing, and therefore there was negligence in giving it verbally. We do not quite understand what the learned trial judge meant to say by the following words:

"What was reasonably to be expected from the defendant company is something that the jury, under the testimony in this case, we think should pass upon—not simply and baldly that there was a communication. But what was that communication, and did it inform the employé that he would be placed in peril by its not reaching his knowledge?"

A fair inference to be drawn from these words by the jury would have been that the defendant had been negligent in not having informed the plaintiff of the self-evident proposition that, if he disobeyed the order given him, he might be in peril of a collision between his train, going toward Wilpen, and the freight train coming from that point over the same track. There was some testimony that Frank Noel, an employé of the defendant, had made an effort to stop plaintiff's train after it had started, and as to this the trial judge said:

"Whether the passenger train might have been stopped by the witness Noel is perhaps not the most vital thing; it is only one of the circumstances in the case bearing on whether or not the duty that devolved on the representatives of the company, and who, for all practical purposes, were the company on that occasion—whether the efforts made to discharge their duty were carefully performed, or performed with reasonable care or not—it is only one circumstance bearing upon that question."

What Noel may have done or omitted to do was utterly irrelevant to the single question before the jury, but they might well have thought, from what was said to them by the trial judge in the words just quoted, that Noel was guilty of negligence for which his

employer, the defendant company, was answerable to the plaintiff. In refusing defendant's request, made in the hearing of the jury, that they be instructed that whether or not the operation of the Wilpen train on the day of the accident, with the coach in advance of the engine, contributed to the injury of the plaintiff, or whether or not the presence of signals, telephones or telegraph service, along the track between Ligonier and the point of collision, might have averted the accident, were not questions for their consideration, they were given a license to conclude otherwise, and to return a verdict against the defendant by answering these two questions, or one of them, adversely to it. An unqualified affirmance of defendant's first point, which ought to have been given, would have saved the jury from what may have been confusion.

The second assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.

(261 Pa. 83)

CLOTHIER et al. v. HOFFMAN CO., Inc., et al.

(Supreme Court of Pennsylvania. April 3, 1918.)

1. APPEAL AND ERROR ⇐1010(1)—REVIEW—FINDINGS OF FACT.

Findings of fact will not be reversed when based upon competent evidence, although there is sufficient evidence upon which the lower court might have reached a different conclusion.

2. APPEAL AND ERROR ⇐1010(1)—EVIDENCE—CONCLUSIVENESS—REVIEW.

In a suit by an owner of a building to enjoin an adjacent owner from using a party wall until it had paid plaintiff the appraised value of its new use of the wall, a finding on abundant evidence in accordance with plaintiff's contentions was conclusive on appeal.

Appeal from Court of Common Pleas, Philadelphia County.

Bill to compel payment of part of cost of party wall by Isaac H. Clothier, Jr., and others against the Hoffman Company, Incorporated, and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Argued before POTTER, STEWART, MOSCHISKER, FRAZER, and WAL-LING, JJ.

Julius C. Levi, of Philadelphia, for appellants. Henry C. Thompson, Jr., and Edwin S. Dixon, both of Philadelphia, for appellees.

FRAZER, J. Blauner's Incorporated and the Fleischmann Construction Company, two of the defendants, appeal from a decree in equity ordering them to pay to plaintiffs a portion of the cost of constructing a party wall. The bill was dismissed as to the other defendants.

Plaintiffs and defendants own adjoining premises in the city of Philadelphia known as Nos. 831 and 833 Market street, respec-

tively. On plaintiffs' property was erected a hotel, and on defendants' a brick building three stories in front with a two-story addition in the rear; the two properties being separated by a party wall. In 1903 plaintiffs razed their hotel building and erected in its place a five-story structure. At that time the building inspector, after an examination of the party wall, which the plaintiffs for the first time proposed to use, decided that, although adequate for defendants' property, it was not sufficient to support plaintiffs' building, and ordered the wall taken down and a more substantial one erected in accordance with municipal requirements. In 1916 defendants began the construction of a four-story building to extend the entire depth of their lot, and proceeded to make use of the party wall erected by plaintiffs in 1903 by cutting openings in which to insert joists and timbers necessary in the construction of their new building. The parties having failed to agree upon the sum defendants should pay plaintiffs for such use, and defendants having refused to accept the figures of the official measurer, who appraised the value of the new use at \$4,007.63, based on one-half of the cost of a wall of the character required by defendants' building, to which was added measuring charges, making a total of \$4,150.04, plaintiffs brought this bill to restrain defendants from using the division wall until payment for the use is made. The court below, after hearing, adopted the figures of the appraiser as fairly representing the value of the new use made of the wall by defendants, and directed that the sum found due be paid with costs, less a payment previously made.

The contention of defendants is that, instead of being chargeable with one-half of what a new wall would have cost them in 1916, they are liable for only one-half the cost of the difference between the cubical contents of a new wall built at that time and the cubical contents of the wall which existed in 1903. This contention is based on the theory that the old wall was not entirely removed, but merely reconstructed, and that the cost of such reconstruction represented the maximum outlay properly chargeable to them. The act of February 24, 1721 (1 Smith's Laws, p. 125) requires the first builder to be reimbursed for one-half of the cost of constructing a party wall, "or for so much thereof as the next builder shall have occasion to make use of, before such next builder shall in any way use or break into the said wall. The charge or value thereof to be set by the said regulators." The act of May 5, 1899 (P. L. 193, § 24), makes it the duty of the building inspectors to examine party or division walls, and, if defective, out of repair, insufficient, or unfit for the purpose of the existing building, or any new building about to be erected, such wall "shall

be repaired or made good or taken down by the parties building, as the inspector's decision may be," and further provides that the cost of repair, removal, or a new wall, as the case may be, shall be borne by the adjoining owner "in proportion to the amount of such wall or walls which is or shall be respectively used by their said buildings," and that where such walls are "sufficient only for the purpose of the new building," the entire expense is to be borne by the party erecting the new building.

In support of their claim defendants point to section 25 of the act of 1899, which provides that, where there are existing walls "whose thickness at the time of their erection was in accordance with the requirements of the then existing laws, but which are not in accordance with the requirements of this act, may be used, if in good condition, for the ordinary use of party walls: Provided, the height of the same be not increased. In case it is desired to increase the height of the existing party or independent walls, which walls are less in thickness than required under this act, the same may be done with a lining of brickwork to form a combined thickness with the old walls of not less than four inches more than the thickness required for a new wall, corresponding with the total height of the wall when so increased in height." Under this section defendants assert that as the reinforcing of the walls in existence in 1903 with a lining, and reconstructed to the height necessary to support their present building, was practicable, they should be charged only with this portion of the expense.

[1, 2] A serious difficulty in the way of adopting this theory is the finding of the court below that the old wall was in fact taken down and a new one erected in its place. No exception was taken to this finding. Defendants, however, refer to the application made by them to the court below to allow exceptions to be filed nunc pro tunc after appeal was taken, and have assigned as error the refusal to permit such exceptions to be filed. Assuming the question to be properly before us, it would not materially help defendants' case. The act of 1899 permits the inspector, in his discretion, to order an old wall to be repaired or taken down entirely and replaced. The inspector was called as a witness, and there was offered in evidence, in connection with his testimony, his reports to the chief of the bureau of building inspection, which show he concluded the existing party wall was unfit for the new building about to be erected by plaintiffs on No. 831, and that he had "ordered same to be taken down and a legal party wall built." He further testified that while the existing wall was ample for

the requirements of the building then on defendants' premises, it was not suitable for the new building plaintiffs proposed to erect, and "therefore it was condemned as provided for in the act of assembly as insufficient for the purpose of the new building, and was torn down and a new party wall built." He also said that at the time the building No. 831 was erected the division wall was an old one, and had been standing for a period of from 50 to 100 years, which would probably account for his conclusion that it should be taken down. In contradiction of this testimony, and in support of their exception to the finding of the trial judge that the old wall was removed, defendants called the architect who prepared the plans for the building erected in 1916, and who testified that an examination of the party wall showed its greater part had been reconstructed, and that "from an architectural point of view" a part of the old wall was "embodied in the wall constructed" by plaintiffs in 1903. The witness admitted, however, he had not seen the building previous to 1916, 13 years after its reconstruction, and based his conclusion upon an examination of the wall from an architectural point of view, and on the presumption that the wall existing in 1903 was sufficiently strong to carry at least the three-story building. The question for us is not whether we might have taken the same view of the evidence as the trial judge, but whether there is evidence in the case to sustain the conclusion reached by him. The evidence that the old wall was remodeled rather than reconstructed is not so clear and conclusive as to warrant a reversal of the finding of the court below. *Hull v. Delaware & Hudson Co.*, 255 Pa. 233, 99 Atl. 740; *Scranton v. Scranton Coal Co.*, 256 Pa. 322, 100 Atl. 813.

The above disposes of substantially the entire question involved, there being no serious dispute as to the liability of defendants to reimburse plaintiffs to the extent of one-half the cost of so much of the wall as defendants had occasion to use, less deductions provided by statute. In this case we are clearly of the opinion such share was properly represented by one-half of the cost of constructing a wall of the character defendants would have been obliged to build in 1916 (*Bailey's Appeal* [Supreme Court] 1 W. N. C. 350), as found by the court below. This rule is not inconsistent with the principles laid down in *Hoffstot v. Voight*, 146 Pa. 632, 23 Atl. 351, *German National Bank v. Mellor*, 238 Pa. 415, 86 Atl. 487, and *Stevenson v. Mellor*, 246 Pa. 596, 92 Atl. 713, cited and relied upon by defendants.

The judgment is affirmed.

(261 Pa. 163)

LONGBOTTOM v. EMERY et al.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. BANKRUPTCY \Leftrightarrow 143(11)—LIFE INSURANCE—ASSIGNMENT OF POLICY—PAYMENT OF PREMIUMS.

That a husband paid premiums on his life insurance policy, assigned to his wife, does not affect her title to the policy as against her husband's trustee in bankruptcy.

2. HUSBAND AND WIFE \Leftrightarrow 133(1)—PROPERTY CLAIMED BY WIFE—SUFFICIENCY OF EVIDENCE.

Where a wife claims, as against her husband's creditors, property acquired during coverture, though the proof must be clear and satisfactory, a mere doubt will not defeat the wife's claim.

3. BANKRUPTCY \Leftrightarrow 303(3)—CLAIMS OF WIFE—EVIDENCE.

Suit by trustee in bankruptcy against bankrupt's wife, to whom insurance had been assigned, was properly dismissed, where there was nothing to show that at time of assignment defendant was insolvent, or that any of his creditors at the time of the bankruptcy were creditors at the time of the assignment.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Albert S. Longbottom, trustee in bankruptcy, against John W. Emery and others. From a decree dismissing the bill, plaintiff appeals. Affirmed, and appeal dismissed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISER, and FRAZER, JJ.

Wm. Potter Davis, Jr., Samuel W. Cooper, Robert J. Byron, and Stanley Williamson, all of Philadelphia, for appellant. J. Washington Logue, of Philadelphia, for appellee Ida W. Emery. O. Stanley Huribut, of Philadelphia, for appellee John W. Emery. George Douglas Hay and Thomas De Witt Cuyler, both of Philadelphia, for appellee Equitable Life Assur. Soc. of the United States.

POTTER, J. This bill in equity was filed by the trustee in bankruptcy of the estate of John W. Emery, against John W. Emery, Ida W. Emery and the Equitable Life Assurance Society of the United States. It is averred in the bill that the defendant John W. Emery has been adjudicated a voluntary bankrupt, and that plaintiff was duly appointed his trustee; that the bankrupt included in the schedule of his liabilities and assets a policy of insurance on his life, issued March 3, 1901, by the defendant society, which was assigned June 22, 1901, by him to his wife, the defendant Ida W. Emery, and which now has a cash surrender value of \$3,530. This policy was originally made payable to Emery's executors, administrators, and assigns, was indorsed over by him to his wife as stated, was indorsed back on November 29, 1909, to his executors, administrators, and assigns,

and was again indorsed, on March 28, 1912, to his wife, if living, and, if not, then to his executors, administrators, and assigns. The policy contained a provision giving the assured the power at any time to change the beneficiary by filing with the society a written request to that effect and complying with certain other requirements. Plaintiff denied that Ida W. Emery was the owner of or had any interest in the policy, and averred that he had demanded from the bankrupt the delivery of the policy or the payment of the amount of its cash surrender value; but the bankrupt refused to comply with his demand contending that the policy, with all its rights belonged to his wife.

Plaintiff prayed for a mandatory injunction commanding the defendants John W. Emery and Ida W. Emery to turn over to him the policy of insurance, and requiring the defendant society, which held the policy as collateral security for a premium loan, to turn over to plaintiff the policy, or its cash surrender value. He also prayed that defendants be enjoined from assigning the policy or receiving or paying its cash surrender value.

The answers of defendants set up that Ida W. Emery held the policy as security for a loan of \$10,000, made by her in 1901 to her husband, and that it was her sole and separate property, and her husband had no interest whatever in it. The court below dismissed the bill, and plaintiff has appealed. His counsel have filed 111 assignments of error, most of them to the dismissal of exceptions to the adjudication. The eighth and ninth assignments are to the final decree, and, as the questions raised by this appeal may be considered under these assignments, it is unnecessary to consider the others in detail.

The issues involved are essentially questions of fact. The substance of the findings of fact by the trial judge is stated by him as follows:

"Ida W. Emery was the wife of John W. Emery, and was the owner of real estate in Atlantic City, N. J. There is no testimony that this real estate was derived from her husband. In May, 1901, John W. Emery borrowed from Ida W. Emery the sum of \$9,000, or a little less, and this policy of \$10,000 was issued to John W. Emery, and on the 22d of June, 1901, the policy was indorsed as payable to Ida W. Emery, wife of the assured, if living; if not, then to the assured's executors, administrators, or assigns. Ida W. Emery mortgaged her real estate in Atlantic City for the sum of \$9,000, less charges, and the money was handed over to John W. Emery. Subsequently the policy of insurance was reassigned by Ida W. Emery to John W. Emery, that he might use it as collateral security; and, subsequently thereto, the policy was released and the assignment returned to her, and on March 28, 1912, the policy was indorsed in compliance with the written request of the assured, duly acknowledged, and 'it is hereby declared that the amount due at the death of the assured shall be payable, not to the beneficiaries hereunto designated, but to the assured's wife, Ida W. Emery, if living, and, if not, then to the assured's exec-

utors, administrators or assigns; the other conditions and requirements remaining unchanged.' And immediately thereafter the policy was handed back to Ida W. Emery, and remained in her control until after John W. Emery was adjudicated a bankrupt. The petition in bankruptcy filed by John W. Emery was under date of March 27, 1915."

These findings of fact are supported by the evidence. It appears, therefore, that as Mrs. Emery gave a valuable consideration for the policy her title to it is good, and her husband's trustee in bankruptcy has no valid claim upon it. The fact that on two occasions she loaned the policy to her husband for the purpose of raising money can make no difference, for in 1912, three years before the adjudication in bankruptcy, it was re-assigned to her.

[1] The payment of premiums by her husband would not affect Mrs. Emery's title to the policy. *Malone's Appeal*, 38 Leg. Int. 303, affirming *Malone's Estate*, 13 Phila. 313, 8 Wkly. Notes Cas. 179. In that case, Penrose, J., in an opinion adopted by this court said (page 316):

"It is immaterial therefore that the premiums were in some instances paid by the [husband's] firm. Such payments could only make the firm a creditor to the amount advanced and would give no interest in the policy itself."

[2, 3] In the present case there was no evidence whatever to show that John W. Emery was insolvent, either when his wife acquired the Atlantic City property, or in 1901, when she mortgaged it for his benefit, and he made her the beneficiary of the insurance policy on his life. Nor does it appear that any of his creditors at the date of his bankruptcy in 1912 were creditors in 1901 or prior thereto. The cases cited by counsel for appellant in their argument, to the effect that, where a married woman claims property acquired by her during coverture, the burden is upon her, as against her husband's creditors, to substantiate her claim by proof that is clear, full, and satisfactory, relate only to creditors whose rights had accrued at the time she acquired title, and not to those whose rights accrued many years thereafter. In the latest of the cases cited, *Helges v. Pifer*, 224 Pa. 628, 629, 73 Atl. 950, 951, it was said per curiam:

"It is an established rule of evidence that a wife, claiming property acquired during coverture against her husband's creditors, is required to substantiate her claim by proof sufficient to repel all adverse presumptions. But the law does not require proof of such a character as to relieve from every doubt, but only proof that is clear and satisfactory. A mere doubt will not operate to defeat the wife's claim."

In the present case, evidence that there was a lapse of some 14 years between the time when Mrs. Emery acquired title to the insurance policy and the adjudication in bankruptcy, is strongly persuasive of the validity of her claim.

The assignments of error are overruled,

the decree of the court below is affirmed, and this appeal is dismissed, at the cost of appellant.

(361 Pa. 106)

COMMONWEALTH, to Use of COLONIAL TRUST CO. OF READING et al. v.

GREGORY et al.

(Supreme Court of Pennsylvania. April 3, 1918.)

1. EXECUTORS AND ADMINISTRATORS ¶29(2) —NONRESIDENT EXECUTOR — FAILURE TO TAKE BONDS.

Under Act March 15, 1832 (P. L. 142) § 27, providing that letters to a nonresident executor without a bond shall be void, such letters are void only when judicially so declared.

2. EXECUTORS AND ADMINISTRATORS ¶29(1) —DE FACTO EXECUTOR.

After letters testamentary are granted, even though improperly, the person named is a de facto executor, answerable to the orphans' court until duly discharged.

3. EXECUTORS AND ADMINISTRATORS ¶544 —IMPROPER GRANT OF LETTERS—LIABILITY TO ACTION.

While Act March 15, 1832 (P. L. 142), provides that a person to whom letters are improperly granted shall be sued and treated as an executor of his own wrong, such person is liable, not only to citation from the orphans' court, but also to suit at law as an executor de son tort.

4. EXECUTORS AND ADMINISTRATORS ¶461 —PAYMENT TO EXECUTOR—REVOCATION OF LETTER—ACCOUNTING.

Payment to one to whom letters testamentary have been granted, though subsequently revoked, are lawful acts for which the person named as executor may be cited to settle the accounts.

5. EXECUTORS AND ADMINISTRATORS ¶519(1) —DEFAULT OF NONRESIDENT EXECUTOR—LIABILITY OF DOMICILIARY EXECUTOR.

Where a nonresident executor is guilty of culpable omission, resulting in loss to the estate, he and the domiciliary executor are jointly responsible.

6. JUDGES ¶37—LIABILITY OF REGISTER ON BOND.

Where a register of wills grants letters to a nonresident executor without obtaining bond required by Act March 15, 1832 (P. L. 142) § 27, and the executor defaulted and the resident executor died insolvent, register is liable on his official bond.

7. JUDGES ¶37—LIABILITY OF REGISTER ON BOND.

Where a decree was entered against a nonresident and a local executor, before the death of the latter, after a devastavit, such decree is conclusive against the register and his sureties to the extent of their obligation.

8. EXECUTORS AND ADMINISTRATORS ¶427 —RIGHTS OF ACTION—REPRESENTATIVE OR INDIVIDUAL CAPACITY.

Where resident executor was a joint tortfeasor with a nonresident executor for misappropriation of funds of the estate, that the resident executor appeared as a use plaintiff in a representative capacity in action against the register was no ground for objection, as he and the nonresident were answerable in their individual capacity.

9. EXECUTORS AND ADMINISTRATORS ¶519(1) —SUIT ON BOND OF REGISTER—DEATH OF PLAINTIFF—SUBSTITUTION OF USE PLAINTIFF.

Where resident executor died after bringing suit on the register's bond, and a use plaintiff was appointed to continue the suit, he may

collect and remit the money to the domiciliary executor in state in which decedent died.

10. EXECUTORS AND ADMINISTRATORS **§522**
—DEVASTAVIT—RECOVERY FROM REGISTER—
DISTRIBUTION OF FUNDS.

Where through maladministration of an ancillary executor losses occurred in Pennsylvania, and the court of the state determined the amounts due and ordered devastavit made good when the fund is realized, the Pennsylvania creditors will be first paid, and the balance then remitted to the domicile of the decedent.

Appeal from Court of Common Pleas, Berks County.

Action by the Commonwealth, to the use of the Colonial Trust Company of Reading, as administrator de bonis non of Joseph Middleby, deceased, and others, against George R. Gregory and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Joseph R. Dickinson and Fred A. Marx, both of Reading, for appellants. W. K. Stevens and W. B. Bechtel, both of Reading, for appellee.

MOSCHZISKER, J. This suit is against a register of wills and the surety on his bond; the plaintiff recovered a verdict, upon which judgment was entered, and defendants have appealed.

The following facts were established: At the time in question George R. Gregory was the duly elected register of wills of Berks county, and the Berks County Trust Company was the surety on his official bond. Joseph Middleby, domiciled in Massachusetts, but doing business at Reading, Pa., died testate May 20, 1911. He appointed as executors Jere J. McCarthy and Milton A. Gherst, the first a nonresident and the other a resident of this state. The will of Mr. Middleby was duly probated in Massachusetts and letters testamentary issued to McCarthy and Gherst. June 10, 1911, ancillary letters were granted to the same persons by Gregory, without exacting a bond from McCarthy, the nonresident executor, as required by section 27 of our act of March 15, 1832 (P. L. 135, 142 [session of 1831-32]). In due course, the orphans' court of Berks county found a devastavit in the decedent's estate, and, Mr. McCarthy having been dismissed as ancillary executor on January 11, 1913, a decree was entered October 30, 1915, directing M. A. Gherst and Jere J. McCarthy to pay over to "M. A. Gherst, accountant," the remaining ancillary executor, \$49,678.66. Nothing in fact having been done to fulfill the requirements of this decree, and no other substantial recovery being possible in this jurisdiction, December 31, 1915, the present suit, on the official bond of the register, was instituted in the name of the commonwealth "for the use of M. A. Gherst, one of the ex-

ecutors of Joseph Middleby, deceased," and certain designated creditors. Subsequently Mr. Gherst died, insolvent. April 25, 1916, the Colonial Trust Company of Reading was duly appointed ancillary administrator d. b. n. c. t. a. of Joseph Middleby, deceased, and substituted as a use plaintiff upon the present record. The last-mentioned plaintiff elected to try its case separately from those of the other use plaintiffs, and the trial proceeded accordingly.

Most of the material facts involved were established by averments in the statement of claim, admitted or not sufficiently denied in the affidavit of defense, and the others were duly proved; but the defendants raise a number of interesting issues of law, all of which were decided against them by the court below. We shall briefly discuss and determine these issues in the order which seems most suitable to the case as a whole.

Section 27 of the act of 1832, *supra*, provides:

"If any register shall grant letters testamentary to any person, not being an inhabitant of this commonwealth, * * * without having * * * taken a bond and sureties in the manner hereinbefore prescribed, such letters shall be void, and every person acting under them shall be deemed, and may be sued, and in all respects treated, as an executor of his own wrong, and the register granting the same, and his sureties, shall be liable to pay all damages which shall accrue to any person by reason thereof."

The form of bond is prescribed in section 24 of the act, which provides, *inter alia*, that the principal in the obligation must agree to file an account of his administration in the orphans' court of the proper county and pay the awards made by that tribunal.

[1] Appellants contend that under the above-quoted section of the Act of 1832, *supra*, Jere J. McCarthy, not having entered a bond, was simply an executor *de son tort*, and hence the orphans' court had no jurisdiction to find a devastavit against him or order payment thereof. We cannot sustain these contentions. In the first place, it is to be observed the act does not state that letters granted to a nonresident without the entry of a bond shall, for all purposes, be *ipso facto* void; while the word "void" is used, evidently the legislative intention was to provide that letters thus improperly granted shall be void when judicially so declared by a proper tribunal, and that they must be thus adjudged upon showing the nonentry of a bond. *Huff's Estate*, 15 Serg. & R. 39, 41, 42, contains some relevant general principles, by Tilghman, C. J., which it will be helpful to repeat here. It is there said:

"An executor to whom probate has been granted, differs from an executor *de son tort*. The former has acted under letters testamentary, from an officer who had jurisdiction in the case; the latter has never acted but under a usurped authority. * * * The granting of probate by the register of wills is a judicial act, and, while it remains in force, it cannot be contradicted; * * * the probate, until annulled, be-

ing conclusive evidence. * * * A debtor * * * is therefore justified in making payment to the person who appears to be executor."

We there decided that payments made by one to whom letters testamentary had been granted while such letters were in force, even though subsequently revoked, were lawful acts, in consequences of which the person named therein as executor might be cited by the orphans' court to settle an account.

[2-4] When we read as a whole the statutory provision now before us, and apply thereto the legal principles just quoted from Tilghman, O. J., two things are clear: (1) After letters testamentary are granted, even though improperly, the person named therein is a de facto executor, answerable for his deeds to the orphans' court, until duly discharged by the revocation of his *prima facie* right to act. (2) While the statute here in question provides that a person to whom letters are improperly granted shall be deemed and "may be sued and in all respects treated as an executor of his own wrong," yet it does not require that he must be so sued and treated; the manifest intent being that such a person shall be liable, not only to citation from the orphans' court, but also to suit at law as an executor *de son tort*—in other words, that he shall be liable to the strict accountability to which one occupying that position is subject. Furthermore, in the case at bar, as stated by the court below, not only did McCarthy act on the letters granted to him, which would tend to make him liable to account to the orphans' court (Delbert's Appeal, No. 2, 83 Pa. 468, 474), but he appealed to this court from the decree of that tribunal discharging him from his office as ancillary executor (McCarthy's Appeal, 242 Pa. 39, 42, 88 Atl. 773), and we then said that, "for the purpose of the estate," McCarthy was "within the jurisdiction of the [orphans'] court."

[5] Appellants claim, however, that, even though it be conceded the orphans' court had jurisdiction to settle the devastavit and order payment of the amount involved, the present defendants not being parties to the record in that proceeding, there can be no recovery against them here, because the damages alleged to have been sustained by such devastavit were not again proved in this case; in brief, that the finding of the orphans' court as to the amount of the devastavit is not binding against these defendants. We see no merit in this contention. McCarthy was guilty of the misconduct of decedent's business which caused the surcharge by the orphans' court; yet, because of culpable acts of omission on the part of Gherst, his colleague, both of them were properly held to be jointly responsible for the resulting losses. Irwin's Appeal, 85 Pa. 294, 296. Had the register obtained a bond with proper sureties, the latter, upon McCarthy's default, would have been obliged to pay these losses, and, in an action on this bond, the de-

crees following the audit would be conclusive against such sureties, even though they were not parties to the proceedings in the orphans' court. Garber v. Com., 7 Pa. 265, 266; Hartzell v. Com., 42 Pa. 453, 461; Yung's Estate, 199 Pa. 35, 40, 48 Atl. 692; Com. v. Ruhl, 199 Pa. 40, 44, 48 Atl. 905.

[6] We think no error was committed in treating the decree of that tribunal as equally conclusive against the present appellant and his sureties; for, otherwise, the common pleas would be obliged, in effect, to go into, review and determine the question of the proper settlement of the decedent's estate, after all the issues involved had been determined by the orphans' court, as shown by the record thereof, which was properly admitted in evidence at the trial below.

To continue our consideration of this branch of the case, the register failed in his obligation to secure a bond from McCarthy; but the former, himself, was under bond for the proper discharge of his official duties. On the facts at bar, what is the liability of the sureties upon this latter bond? Section 27 of the act of 1832, *supra*, provides that any register of wills who grants letters testamentary to a nonresident without taking a bond, with sureties (stipulating that the person to whom the letters are issued shall, *inter alia*, duly pay the awards of the orphans' court upon the settlement of the estate committed to his care), "shall be liable to pay all damages which shall accrue to any person by reason" of the failure to exact such a bond. Here, no matter whose name appears as representing the estate of Joseph Middleby, deceased, that estate is, and at all times was, the real use plaintiff, and, had the register performed his duty and obtained a bond from McCarthy, on the latter's default, it would presumably have been made whole by the sureties on this bond; but, "by reason of" no bond having been given, damages have "accrued" to the Middleby estate in the amount it would have recovered from such sureties, had the obligation in question been entered as required by law.

[7] The orphans' court was the tribunal vested with authority to determine the fact and amount of the devastavit, its adjudication in that regard is binding upon the register, and it follows, under the circumstances of this case, that he is liable for all damages resulting from such devastavit. Finally, the sum sued for being less than the losses determined by the orphans' court, and the register's sureties having undertaken that he should "faithfully execute the duties of his office," they must answer to the amount of the verdict rendered—that is to say, when the defendant Gregory failed in his duty to obtain a bond with sureties from McCarthy, he, as register, thereby became liable under the statute to answer for any damage that might follow as a natural and logical result

of his default in this respect, which, under the facts at bar, so far as the binding effect of the adjudication of the orphans' court is concerned, places him, and hence his sureties, in practically the same position as sureties on McCarthy's bond, had such an obligation been entered.

[8] Again, appellants assert that to permit Gherst, originally named as a use plaintiff, to recover in this action, would, in effect, recognize in him a right of action against McCarthy, who was a joint tort-feasor with the former, and, they say, this cannot be done. The contention has no merit, for it disregards the fact that Gherst appeared, as use plaintiff, in a representative capacity, i. e., for the estate of Middleby, deceased; whereas, he and McCarthy were answerable in their individual capacities for the devastavit. The fact that the decree of the orphans' court which orders payment calls them "executors" has no controlling significance. The addition of this title is surplusage and may be disregarded. *Hare v. O'Brien*, 233 Pa. 330, 337, 52 Atl. 475, 39 L. R. A. (N. S.) 430, Ann. Cas. 1913B, 624.

[9] Possibly it would have been better practice to dismiss Gherst, as well as McCarthy, from his office as ancillary executor, than to appoint a successor, make an award of the amount of the surcharge against Gherst and McCarthy to such successor, and employ the name of the latter as a use plaintiff in the present suit; but, since Gherst died after the beginning of this action, and the present use plaintiff was appointed, before judgment, to continue the suit, this successor is in a position to collect and remit the money to the domiciliary executor in Massachusetts for distribution, as directed by the decree of the orphans' court, and no harm is done by the course of practice actually followed.

[10] Finally, appellants contend that, when the devastavit was found against Gherst and McCarthy, decedent's domiciliary executors in Massachusetts became entitled to the amount of the surcharge, and, as the domiciliary and ancillary executors happen to be the same person, a presumption arises that the money in question has been paid to the former, which presumption must prevail, at least till these executors have failed to account for the fund in the proper tribunal of the domicile. To sustain this contention, they cite *Stokely's Estate*, 19 Pa. 476, 482, *Com. v. Messinger*, 237 Pa. 1, 85 Atl. 26, and *Skeer's Estate* (No. 1) 249 Pa. 288, 95 Atl. 96. In the first of these cases we said that, where the same person is acting as domiciliary and ancillary executor, there is a presumption that he has done his duty, and "when he comes to settle his account in the state where [final] distribution is to be made, he cannot deny that he has received what the foreign administrator, if he had been a

different person, would have been compelled to pay, and what he would have been bound in duty to demand and get"; but there the evidence showed that the person involved admitted actual receipt of the fund in question, offering no good reason for his refusal to account therefor. In the other two cases the evidence shows what in fact amounts to payment of the fund in controversy to the fiduciary ultimately liable to account therefor; whereas, at bar, as stated by the court below, "the money Gherst and McCarthy received and the estate they mismanaged was in their capacity as ancillary executors, * * * and * * * it is admitted by the pleadings * * * that this money has never actually been paid to [the Middleby estate] by the two ancillary executors," nor, we may add, has it been paid by any one else. In other words, as the court below says, any "presumption of payment is rebutted by the admitted fact of nonpayment."

Moreover, where, through the maladministration of an ancillary trust, losses occur in Pennsylvania, and the proper tribunals here adjudge the questions involved, determine the amount due, and order the devastavit made good, when the order has in fact not been complied with, it will not do to say that, through a fiction, our courts have so far lost control of the matter that they cannot enforce their own decrees. On the contrary, the dignity of our tribunals and the proper administration of the law demand that in every such instance the losses occurring in this state shall, when possible, be made good here; and, when the fund is realized, after Pennsylvania creditors are paid, the balance may then be remitted to the domicile of the decedent. Perhaps in this particular case the surviving domiciliary executor and his sureties can be held liable in Massachusetts for so much of the present devastavit as may not be recovered in Pennsylvania; but this is not a matter for our determination.

The assignments of error are overruled, and the judgment is affirmed.

DUPUY v. JOHNS et al.

(261 Pa. 40)

(Supreme Court of Pennsylvania. March 25, 1913.)

1. TAXATION \S 120—CORPORATIONS—TAX ON CAPITAL STOCK.

Tax levied under Act June 17, 1913 (P. L. 507) against corporations on capital stock is in effect a tax on the property represented by the capital in question.

2. TAXATION \S 238—EXEMPTION OF MANUFACTURING COMPANIES.

It is the public policy of the state to exempt from taxation corporate bodies doing a manufacturing business in the state to the extent that their capital is invested in the state.

3. TAXATION \S 169 — TAX ON CORPORATE STOCK.

A tax on stock of a foreign corporation in the hands of resident stockholders is not a tax

on the capital of the corporation, but is a personal levy against the shareholder.

4. TAXATION §239—STOCK OF FOREIGN CORPORATION—EXEMPTION.

Under Act June 17, 1913 (P. L. 507) § 1, shares of stock of a foreign corporation having assets within and without the state, part of whose capital in the state is employed in manufacturing, are exempt from taxation in the hands of resident stockholders.

5. TAXATION §169—CORPORATE STOCK.

Stockholders in Pennsylvania of corporations doing no business and paying no capital stock tax in the state must pay a tax on stock held by them.

6. TAXATION §239—CAPITAL STOCK.

Capital stock in manufacturing corporations engaged in business in Pennsylvania which report to the auditor general and are liable to the state tax on capital stock or relieved therefrom by statute, is exempt in the hands of resident stockholders from taxation.

7. TAXATION §194—CONSTITUTIONAL LAW—EXEMPTIONS.

Act June 17, 1913 (P. L. 507) § 1, relating to exemption from taxation of foreign manufacturing corporations, held not to violate Const. art. 9, §§ 1, 2, requiring taxation to be uniform on the same class of subjects.

8. TAXATION §493(1)—REVIEW OF TAX ASSESSMENT.

The proper manner to review a tax assessment is by appeal from the board of revision of taxes to a court of common pleas and, if desired, from that tribunal to the appropriate higher court, under Act June 28, 1901 (P. L. 601), Act June 13, 1911 (P. L. 892), and Act June 17, 1913 (P. L. 511) § 5.

Appeal from Court of Common Pleas, Allegheny County.

Bill for injunction by Herbert Dupuy against David B. Johns and others. Injunction granted, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

R. W. Martin, Lee C. Beatty, and Rose & Eichenauer, all of Pittsburgh, for appellants. George E. Shaw, of Pittsburgh, for appellee.

MOSCHZISKER, J. This is an appeal from a decree of the common pleas, striking off an assessment and restraining the collection of a personal property tax.

The plaintiff is a resident of Pittsburgh. In his return for the year 1916 he failed to include certain shares of the preferred stock of the Crucible Steel Company of America, then owned by him. The concern in question is a New Jersey corporation, engaged in making steel and products thereof, the value of its total capital stock being approximately \$75,000,000. Of this amount, \$14,000,000 is employed in Pennsylvania, and all except \$29,000 exclusively in manufacturing. The company is licensed to do business in this state, and in 1916 it paid a capital stock tax on the before mentioned \$29,000, amounting to \$169.17.

Plaintiff, claiming that, under section 1 of the act of June 17, 1913 (P. L. 507), his shares

were exempt, refused to designate them for taxation; nevertheless, the board made an assessment against him in the sum of \$1,153,800, being the value of 12,820 shares at \$90 each, with a penalty of 50 per cent. added, as provided by law, for failure to make the return, totaling, in all, \$1,730,700. At the time this assessment was levied, the stock had a market value of \$110 per share; but, since $14/75$ of the capital of the company in question was employed in Pennsylvania, on which it was either liable to the payment of a state tax or exempt as a manufacturing corporation, the board assessed plaintiff's holdings on only $11/75$ of their value, which explains the rate of \$90 per share. Thereupon a bill in equity was filed, praying that the entire assessment be declared illegal and void and the collection of a tax based thereon restrained. After hearing, the court below granted the desired relief, and defendants have appealed.

Section 1 of the act of 1913 (P. L. 507, 508), supra, makes taxable for county purposes, at the rate of four mills on each dollar of the value thereof, inter alia, shares of stock in both domestic and foreign corporations, "except shares * * * in any * * * corporation * * * that may be liable to a tax on its shares or its capital stock for state purposes under the laws of this commonwealth, or relieved from the payment of tax on its shares or capital stock for state purposes by the laws of the commonwealth."

The contention of appellants is that the exception just quoted was inserted in the statute for the sole purpose of preventing double taxation, and must be read accordingly; that, when the act is so construed, appellee's shares are exempt thereunder from tax on "only such a proportionate part of their value as the capital stock of the corporation employed within the state and on which a capital stock tax is paid or which is relieved from taxation by reason of its being employed exclusively in manufacturing, bears to the total capital stock of the company. In other words, since only $14/75$ of the capital stock of the company is employed in this state, then only $14/75$ of the value of the shares of such company is exempt under the exception in section 1 of said act."

The position taken by appellee is that, under the express terms of the exception contained in the act of 1913, supra, his shares of stock are absolutely exempt from taxation; and, in appellants' printed argument, the latter admit that this construction may be warranted by the strict letter of the law, as written in the statute, but they contend (a) that, to construe the provision in question literally would be "narrow and technical," and leaves out of view what they allege to be its sole purpose, i. e., to avoid double taxation; (b) that, if read according

to its letter, the provision would be void because violative of sections 1 and 2, article 9, of the Constitution of Pennsylvania, requiring uniformity of taxation upon the same class of subjects; and (c) that, if the provision be literally interpreted, that it relieves from taxation only shares of stock in corporations which are liable to the payment of a Pennsylvania state tax on their whole capital stock or whose entire capital stock is duly exempt from such a levy by the laws of the commonwealth, citing *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240.

We shall discuss appellants' several contentions under designations corresponding with those just used; but, before taking up their direct consideration, it seems best to state some relevant propositions generally accepted as established, which should prove helpful in reaching a correct solution of the problems now presented for determination.

[1] The Pennsylvania tax levied directly against corporations on capital stock is, in effect, a tax on the property represented by the capital in question (*Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 145; *Commonwealth v. N. Y., Pa. & O. R. R. Co.*, 188 Pa. 169, 189, 41 Atl. 594; *Commonwealth v. Curtis Publishing Co.*, 237 Pa. 333, 335, 85 Atl. 360); and, in making the assessment of such tax, assets outside of the state cannot be considered (*Commonwealth v. Westinghouse Air Brake Co.*, 251 Pa. 12, 14, 95 Atl. 807), for no property so situated can be taxed, either directly or indirectly, by the commonwealth or any of its political subdivisions.

[2] It is the public policy of the commonwealth (*Commonwealth v. Westinghouse Co.*, 251 Pa. 12, 14, 95 Atl. 807), declared by statute (Act of June 7, 1879, P. L. 112, 116, § 6, 2d proviso; Act June 1, 1889, P. L. 420, 431, § 21; Act June 8, 1891, P. L. 229, 238, § 5; Act June 8, 1893, P. L. 353, 355; Act June 7, 1911, P. L. 673, 675; Act July 22, 1913, P. L. 903, 905), to exempt from taxation corporate bodies, domestic and foreign, doing business in Pennsylvania, to the extent their capital is invested in manufacturing within this state; also, in order to make the exemption effective and avoid the semblance of an indirect tax, we relieve the shares of such manufacturing corporations from taxation in the hands of resident stockholders, the purpose of this policy being to build up and encourage these industries within our borders so as to gain substantial benefits therefrom.

[3] The tax on stock of a foreign corporation, *eo nomine*, in the hands of resident shareholders, is not a tax on the property represented by the capital of the corporation, but is a personal levy against the shareholder in question, based on the value of his stock, without any intent to reach the property that gives the latter its value (*McKeen*

v. Northampton County, 49 Pa. 519, 88 Am. Dec. 515; *Whitesell v. Northampton County*, 49 Pa. 526; see, also, note to *Commonwealth v. Westinghouse Airbrake Co.*, 151 Pa. 276, 281, 24 Atl. 1111, 1113), and this is the sole ground upon which such a tax is sustainable.

[4] (a) As a matter of fact, in all probability the foregoing reasons, principles, and announced public policy influenced the draftsman of the act of 1913, *supra*; and we must assume that they were in the minds of the lawmakers when the statute was passed. The Legislature might have entirely abandoned the state policy of exemption, so far as the stockholders of foreign manufacturing companies are concerned, and authorized assessments upon resident owners of the shares of such corporations, had it seen fit to do so; but evidently the lawmakers, considering the indirect benefits to be derived, preferred to relinquish the revenue which might be obtained from such taxation. In adopting this course, the Legislature no doubt appreciated that, in view of the sole theory upon which a tax on foreign corporate shares, *eo nomine*, is maintainable (i. e., that, for purposes of the tax, they, in themselves, are a distinct species of property), it could not in any instance attempt an intangible, theoretical division of such shares into two parts, one representing capital invested in manufacturing within our state and the other extraterritorial assets, and forego the right to tax the first while authorizing an assessment on the second, without thereby admitting the levy on the latter to be an effort to reach property beyond the jurisdiction of the taxing power. In other words, an avowed attempt to assess a tax against only a fraction of each share of the stock of a foreign corporation possessed by a resident holder, upon the ground that such undivided portion gains its value from property outside of Pennsylvania, which, for that reason, cannot be taxed by this state or any of its subdivisions, would be utterly inconsistent with the only theory upon which a local assessment on such shares is sustainable, and would, in effect, convert the tax in question from one on shares of stock, *eo nomine*, to one upon corporate property. All of these good and sufficient reasons for writing the law as we find it call for due consideration in construing the legislation now before us. Therefore we cannot agree with appellants' contention that a desire to avoid double taxation must be accepted as the sole explanation of the exemption clause here in question, nor can we read its language from that standpoint alone; on the contrary, as we have endeavored to show, when the statute was drawn, the effective maintenance of an important public policy was involved, and this, no doubt, influenced the phraseology now under discussion. The words of the act must be accepted as written, and, when so

read, it is clear that the court below did not err in declaring the shares of stock in controversy wholly exempt from taxation.

The effect of the exemption in wholly relieving the stock of appellee from taxation is by no means unique or unprecedented in the operation of our tax system. As pointed out by counsel for appellee, shareholders of the Pennsylvania Railroad, for example, are relieved from individual taxation on the stock of that company, because the corporation itself pays a state tax on capital. In calculating this latter tax, however, only the assets of the railroad within our borders are considered, and the stockholders go entirely free of either a direct or indirect tax on the very considerable value added to their shares by the extensive extraterritorial possessions of that corporation. In the case at bar, while the company involved is a foreign corporation whose Pennsylvania capital stock tax is comparatively small, yet it has vast assets employed in manufacturing within our state, from which we gain enriching benefits, and this latter fact, for purposes of entitling stockholders to exemption, is treated in the statute under consideration as equivalent to the payment of a capital stock tax; hence, as in the example above cited, since there can be no tax of any character, either direct or indirect on extraterritorial assets, the result is that plaintiff absolutely escapes taxation on his individual shares.

(b) The attack upon the constitutionality of the act of 1913, *supra*, has no merit, since the fundamental validity of tax immunities such as those therein provided for is now beyond question. See opinion of McPherson, J., adopted per curiam in *Commonwealth v. Germania Brewing Co.*, 145 Pa. 83, 22 Atl. 240, where the parts of the Constitution here in question, and their bearing upon exemption provisions like those at bar, are ably discussed. As to the indirect classifying effect of these immunity provisions, the selection and classification of subjects for taxation are, generally speaking, exclusively within the control of the Legislature, the only restriction being that there must be no discrimination between members of the same class. *Commonwealth v. Del. Div. Canal Co.*, 123 Pa. 594, 16 Atl. 584, 2 L. R. A. 798; *Commonwealth v. Sharon Coal Co.*, 164 Pa. 304, 30 Atl. 127, 128.

[5, 6] For purposes of taxation upon shares in the hands of stockholders, the effect of the particular exemption clause now before us is to divide corporations into two distinct groups: (1) Those doing no business, making no official reports, and paying no capital stock tax in Pennsylvania, upon the stock of which resident shareholders must pay a tax; (2) those which are bona fide engaged in business here, report to the auditor general, and are either liable to a state tax on capital stock or relieved therefrom by the laws of the commonwealth—the stock of

which is exempt in the hands of resident shareholders. When the underlying reasons are kept in mind, as we have endeavored to explain them, it cannot be held that this grouping is unwarranted, and, since there is no want of uniformity within the respective classes, the constitutional validity of the legislation is secure.

[7] (c) As to appellants' last contention: The language employed in the statutory provisions under consideration cannot justifiably be construed to mean that only the stock of corporations either liable to a tax on or exempt as to their entire capital is to enjoy exemption in the hands of shareholders. The word "entire" does not appear in the act, and we see no warrant for placing it there. *Sturges v. Carter*, *supra*, cited by appellants, is not controlling; it involves the construction of an Ohio statute which is essentially different from the one under discussion.

Another aspect of the case may be noticed. Appellants argue that, under a literal reading, the words of the act of 1913, *supra*, relieve from taxation, in the hands of the holders thereof, not only stock of corporations here engaged in manufacturing, but also the stock of any corporation that pays a capital stock tax to the state, no matter how small; and appellants express the fear that, unless we put the construction upon the statute for which they contend, foreign corporations, for the benefit of their shareholders, may seek to take an undue or improper advantage of this situation. Why shareholders of foreign corporations liable to a capital stock tax in Pennsylvania, with no apparent regard to the amount of tax paid by their companies, should be put on a par with other shareholders who enjoy tax exemption because their corporations are engaged in manufacturing within our borders is not so clear; but we deem it unnecessary to the determination of this case to discuss that point, for, while the corporation at bar pays a small capital stock tax, the strength of appellee's position, and the fact which controls our decision, is that this particular concern comes bona fide within the manufacturing class. Moreover, if there is danger from the act as it now stands, that is for the Legislature, not for us, to correct; but it may not be out of place to say that, under the ordinary rules of law, an effort to gain an undue advantage by connivance or fraud can usually be frustrated. It is not contended, however, that any such effort confronts us in the present case.

[8] One other matter calls for notice: In a case like the present, in order to secure judicial review, the usual and proper remedy is by an appeal from the board of revision to the common pleas, and, if desired, from that tribunal to the appropriate higher court (see Act June 26, 1901, P. L. 601; Act June 13, 1911, P. L. 892; section 5, Act June

17, 1913, P. L. 507; Van Nort's Appeal, 121 Pa. 118, 123, 15 Atl. 473; D., L. & W. R. R. v. Luzerne County Commissioners, 245 Pa. 515, 517, 91 Atl. 889; Philadelphia v. Phillips, 65 Pa. Super. Ct. 578, 582-584; but, since equity is not entirely without power to restrain the collection of a tax (D., L. & W. R. R. v. Commissioners, supra), and no question of jurisdiction or practice is raised by either party, we have determined the points of law here involved. It must be understood however, that this decision is not to be cited in the future as an authority on correct procedure.

The assignments of error are overruled, and the decree is affirmed at the cost of appellants.

(261 Pa. 261)

CAFFERY v. PHILADELPHIA & R. RY. CO.
(two cases).

(Supreme Court of Pennsylvania. May 6, 1918.)

1. EVIDENCE §370(1)—RECORDS KEPT BY THIRD PERSONS.

Where a photograph was offered in evidence, it was not error to exclude record of establishment where it was made, to show when it was taken, where person who took photograph was not called as witness, and there was nothing to show record was in his handwriting, or that any effort had been made to introduce him as a witness.

2. EVIDENCE §213(1)—INDUCEMENT TO COMPROMISE—THREAT.

Evidence of a threat to give false testimony, made to one party by a witness of the other, is admissible, though expressly made to induce settlement of the case.

3. WITNESSES §374(2)—IMPEACHMENT.

Where plaintiff had some discussion with an uncle, who was in the employ of defendant, as to settlement of the case, and the uncle testified that plaintiff was not injured, it was not error to admit in rebuttal evidence that he had threatened to lie the plaintiff out of court if she did not settle the case.

Appeal from Court of Common Pleas, Philadelphia County.

Actions by Maria B. Caffery and by John M. Caffery against the Philadelphia & Reading Railway Company. Judgments for plaintiffs, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

William Clarke Mason, of Philadelphia, for appellant. Thomas James Meagher, of Philadelphia, for appellees.

WALLING, J. These are actions by husband and wife for personal injuries to the wife. On August 7, 1916, the plaintiff Mrs. Caffery, while a passenger on one of defendant's trains, was injured in a collision under such circumstances as to render the carrier liable therefor. She lived at Coatesville, and with members of her family, set out that morning for Atlantic City. After the accident she completed her journey and remained at said city for three days, when her hus-

band came and took her home. Her condition while there was a controverted question at the trial. Plaintiff's evidence was that she was ill, and defendant's that she was well, and out as usual, enjoying the pleasures of the resort.

[1] On that branch of the case defendant offered a photograph of Mrs. Caffery and members of her party in bathing suits, and evidence that it was taken there at the Palace studio on August 9, 1916. Another picture, in which Mrs. Caffery appears with others in bathing suits, was admittedly taken at a former visit to the same studio on the 18th of the preceding June, and plaintiff's evidence was that both pictures were taken at that time. Defendant called Mr. Lipp, the manager of the studio, who testified that a separate consecutive number was written in pencil on each negative, and that they had a book in which was kept a daily record of the numbers corresponding with those placed on the negatives. This was to enable the studio to furnish additional photographs from the negatives on file. Neither of the photographs in question was taken by the manager, nor was the number on either negative or in the book made by him; nor, so far as appears, was he present when either photograph was taken or either number written. It is not shown that he saw the parties, or had any personal knowledge of the transaction. A Mr. Menelick was employed at the studio, and seems to have taken these photographs; but he was not called as a witness, nor was it shown that the numbers on the negatives or in the book were in his handwriting, or in the same handwriting. Mr. Lipp testified that he did not know where Menelick was; but it is not shown that any search, diligent or otherwise, was made to find him. The trial judge held that the book was not sufficiently proven, and declined to admit it in evidence, or to permit a witness to state as facts information obtained therefrom, in which we see no error. Book entries or other like writings of private parties, to be competent as proof against third parties, must be authenticated by the best evidence attainable. See 16 Cyc. 1208; 2 Wigmore on Evidence, § 1521; Heiskell v. Rollins, 82 Md. 14, 83 Atl. 283, 51 Am. St. Rep. 455; Terry v. Birmingham National Bank, 98 Ala. 599, 9 South. 299, 30 Am. St. Rep. 87; Post v. Kenerson, 72 Vt. 341, 47 Atl. 1072, 52 L. R. A. 552, and note, 82 Am. St. Rep. 948; 2 Wharton on Evidence, § 1131. The authorities cited for appellant do not conflict with this rule.

The same principle applies to photographs, which cannot be received in evidence until verified by the testimony of some qualified person. Wigmore on Evidence, § 793. What is sufficient verification of book entries to warrant their admission is largely a question for the discretion of the trial judge. 10 Ruling Case Law, p. 1175. Here the best evidence is that of the one who made the

entries, or who saw them made, and that was not furnished. There was no effort made to find Menelick, and no reason given for failure to produce him as a witness; hence no ground was laid for the admission of secondary evidence. The fact that Mr. Lipp did not know where Menelick was did not prove that the latter could not be found, as there was nothing to indicate that any effort had been made to find him. Aside from that, there was no proof, or offer of proof, that the entries were in Menelick's handwriting. Nothing appears, except that it is a book of the studio wherein was kept a daily record by numbers of the negatives for the convenience of the business, not verified by the one who made the entries therein, nor by proof of his handwriting, nor by any one having personal knowledge thereof. For lack of proof the book was properly rejected. When duly authenticated, such entries may always be used to refresh the recollection of a witness; but it is not necessary here to determine whether in such case they are admissible, as independent evidence, to affect the rights of third parties.

Mrs. Caffery and her two children went to Atlantic City on the occasion of the accident in the company of her uncle, Adam R. Franciscus, who was an employé of the defendant and its principal witness at this trial. The examination tended to disclose some feeling on his part against the plaintiffs; and it was permissible in cross-examination to bring out the interest he had taken in the defense, even though it might show incidentally that he had tried to bring about a settlement. This was to test the credibility of the witness, not to show an effort on part of defendant to settle the case; no such offer was made, or could have been permitted. In fact, that part of the cross-examination of this witness to which error is assigned seems entirely harmless. It tends only to show that he had some talk about settling the case with a man whose name he did not know, but thought it might be Howell. We do not see how that could prejudice the defendant.

[2, 3] In rebuttal plaintiffs were permitted to offer testimony to the effect that shortly before the trial they had a conversation with Mr. Franciscus, in which he stated that if they did not settle the case he would go into court and lie them out of it. This was relevant and proper, as going to his credibility. Evidence of a threat to give false testimony, made to one party by a witness of the other, is relevant as affecting the truthfulness of such witness, and will not be excluded because expressly made to induce settlement of the case. The threat of a witness to commit perjury unless a case is settled is not privileged, like an offer of a party to compromise litigation. Evidence which affects the credibility of a witness is competent. *Magehan v. Thompson*, 9 Watts & S. 54. "A party seeking to show interest or bias of an ad-

verse witness is not confined to cross-examination, but may introduce independent evidence for the purpose." 40 Cyc. 2676. In the discretion of the trial judge, such independent evidence may be offered without previous cross-examination of the adverse witness with reference thereto. *Cronkrite v. Trexler*, 187 Pa. 100, 41 Atl. 22. We see no error in the comments of the trial judge upon the above-mentioned rebuttal evidence; and, in any event, that part of the charge is not properly before us, as no exception was taken thereto. Error can only be assigned to so much of the charge as was made the subject of exception.

The assignments of error are overruled, and the judgments are affirmed.

(261 Pa. 273)

WANNER v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. May 6, 1918.)

1. RAILROADS §350(9)—INJURIES AT CROSSING—QUESTION FOR JURY.

In an action to recover for death of plaintiff's husband at a grade crossing while passenger in an automobile, question whether sufficient warning of the train was given to notify travelers approaching the crossing, the view at which was obstructed, *held* for the jury.

2. RAILROADS §350(5) — CROSSING ACCIDENTS—WARNINGS—JURY QUESTION.

Whether a railroad provided sufficient warning signs and signals at a dangerous crossing, where the view was obstructed, *held*, on the evidence, for the jury.

3. RAILROADS §350(30) — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Where driver of automobile and deceased were unfamiliar with the road, it was for the jury to say whether, in view of a narrow roadway, a sharp curve, and the necessity of being on the lookout for other vehicles, the driver was guilty of contributory negligence in attempting to drive ahead of the train, instead of coming to a stop at the crossing.

4. NEGLIGENCE §92—IMPUTED NEGLIGENCE.

A passenger in a hired automobile, with his back in the direction from which a train came, where there was nothing to show he was aware of the proximity of a railroad crossing, was not guilty of contributory negligence as a matter of law; the negligence of the driver not being imputable to him.

6. RAILROADS §350(21) — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether plaintiff's intestate, a passenger, sitting with the driver in the front seat of a hired automobile, was guilty of negligence in turning his head toward those in the back seat, with whom he was conversing, while the automobile was approaching a crossing, of which plaintiff did not know, *held* for the jury.

Appeal from Court of Common Pleas, Berks County.

Action by Annie Wanner against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, O. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Jefferson Snyder, of Reading, for appellant. John B. Stevens, of Reading, for appellee.

FRAZER, J. Plaintiff sued for and recovered damages for the death of her husband, who was killed at a grade crossing by defendant's engine while riding as a passenger in an automobile. Defendant now appeals from the action of the court below in discharging its motion for judgment non obstante veredicto, and contends the court's action was erroneous for the reasons, first, there was no evidence of negligence on the part of defendant; and, second, deceased was guilty of contributory negligence.

[1, 2] At the time of the accident deceased was a passenger in an automobile hired from the driver, Mengle, who conducted a taxicab business under the name of the Northeastern Taxicab Service. The accident occurred between Reading and Virginsville, at a crossing near Moselem station on the Berks & Lehigh branch of defendant's railway. Before reaching the crossing the highway over which the automobile traveled paralleled a creek, and turned sharply to the right and up grade to and across a covered bridge 155 feet in length. The sides of the bridge were entirely inclosed, shutting off all view, except at the two entrances. The railway crossed the highway 31 feet from the east entrance to the bridge, and at the moment of emerging from the structure a view of the railroad track is obtainable for a distance of 400 feet. There is no "Stop, Look, and Listen" sign at the crossing; there is, however, a crossing sign attached to the opposite or west entrance to the bridge, approximately 187 feet from the railroad track. The car in which deceased was riding was proceeding at a speed of from 15 to 20 miles an hour, and defendant's train approached the crossing at approximately the same speed.

The driver of the automobile testified he neither saw the railroad nor the train until the forward end of his car was about 8 feet from the track, and, believing a stop on the near side impossible, endeavored to cross ahead of the train, and had almost succeeded in so doing, when the rear wheel was struck by the engine as the automobile was leaving the track. The testimony on the part of defendant, that a whistle was blown at a whistling post located a quarter of a mile from the crossing, is not seriously disputed; but whether further warning of the approach of the train was given is not positively shown. Although the fireman testified he rang the bell, his statement was not verified by the engineer, and a witness standing at the station awaiting the arrival of the train testified he did not hear the bell, and would have heard it if rung. The driver and passengers in the car testified no warning of the approach of the train was given. Owing to the natural obstructions and general contour of the ground, and the fact that

the train and automobile were fully half a mile apart when the whistle was blown, the occupants of the car probably could not have heard the warning. They were, however, in a position to hear the bell, if rung, as the train approached the crossing. The fireman testified he rang the bell continuously from a point 200 or 300 feet from the crossing. Whether this was sufficient warning to persons approaching the railroad through the covered bridge, without opportunity to observe the track until within a few feet of it, could not be determined as matter of law. In view of the circumstances and surroundings, and the condition of the approach to the railroad, it was clearly for the jury to say whether sufficient warning was given to notify travelers approaching the grade crossing. *Bickel v. Penna. R. R. Co.*, 217 Pa. 456, 66 Atl. 756, 118 Am. St. Rep. 926.

[3] The question of contributory negligence was also for the jury. The crossing is a particularly dangerous one. The usual danger sign in the immediate vicinity of the track was absent, and in its stead a warning notice was attached to the framework of the bridge at the opposite end from the line of the railroad, nearly 200 feet from the crossing, and in such position as to not be readily noticed by persons driving on the highway. At the entrance to the bridge is an incline and sharp curve, and, the structure being narrow, the driver of an automobile in approaching the curve would naturally do exactly as the driver in this case testified he was doing, namely, be on the alert for vehicles approaching over the bridge from the opposite direction. The driver and deceased were both unfamiliar with the road; the former having been over it but once previously, and that at night and traveling in the opposite direction, and the latter practically without knowledge of the locality and existence of the crossing. Whether or not, in view of the narrow roadway, the sharp curve, and the necessity of being on the lookout for other vehicles, either the driver or deceased should have noticed the crossing sign at the entrance of the bridge, an unusual place for such signs, was necessarily a question for the jury. According to the testimony of the driver, he first saw the railroad, and also the approaching train, at the time his machine was clear of the bridge, and concluded the safer course would be to cross the track ahead of the train rather than attempt to stop between the bridge and the railroad. Whether his choice was a wise one is not the question; as the danger was sudden and imminent, he was not bound to pursue the safest and wisest course in attempting to avoid an accident. *Centofanti v. Penna. R. R. Co.*, 244 Pa. 255, 90 Atl. 558.

[4] Aside from the question of negligence of the driver there is nothing in the circumstances, or in the relation between deceased and the driver, justifying the imput-

ing of the latter's negligence, if any, to the former. The car was a hired one, engaged to take deceased and his friends to a particular destination, and in the immediate control, aside from the destination and route to be traveled, of the driver. At the time of the accident deceased was sitting on the front seat of the automobile, with his back in the direction from which the train came, in a position enabling him to converse with his friends on the rear seat. In absence of notice or warning to apprise him of danger, no negligence can be imputed to him because of the position in which he was sitting.

[5] There was nothing in the speed of the vehicle, or the way it was operated, to warn him of possible danger, and, it not having been shown he was aware of the crossing, or had better opportunity than the driver to observe either the crossing or the approaching train, it cannot be said he sat without protest and permitted himself to be placed in a position of danger. As a matter of fact, he did see the train an instant after the driver saw it; there was, however, neither time nor occasion for him to remonstrate or interfere with the operation of the car. To do so, under such circumstances, would be to invite more certain disaster. Whether deceased was negligent in failing to discover the presence of the crossing in time to give the driver warning of the approaching train was, under the peculiar circumstances, a question of fact for the jury. *Senft v. Western Maryland Ry. Co.*, 246 Pa. 446, 92 Atl. 553. See, also, *Hardie v. Barrett*, 257 Pa. 42, 101 Atl. 75, L. R. A. 1917F, 444, and cases there cited.

The judgment is affirmed.

(261 Pa. 180)

BUELL v. WILLIAMSPORT STAPLE CO.

(Supreme Court of Pennsylvania. April 22, 1918.)

BANKRUPTCY —LEASE OF MACHINERY—OPTION TO PURCHASE—EXERCISE OF OPTION—BANKRUPTCY OF LESSOR.

Where corporation leased machinery with a right to purchase, and with provision that, if lessor filed petition in bankruptcy, title should pass to lessee company, which elected to purchase before bankruptcy proceedings, its liability for the price was fixed, and verdict for the price was properly rendered in action by trustee in bankruptcy, who sued in affirmance of the contract.

Appeal from Court of Common Pleas, Lycoming County.

Action by Edwin D. Buell, trustee of the G. A. Webster Company, against the Williamsport Staple Company. Judgment directed for plaintiff, and defendant appeals. Affirmed.

Argued before POTTER, STEWART, FRAZER, and WALLING, JJ.

O. E. Sprout, of Williamsport, and John E. Cupp, of Philadelphia, for appellant.

Mortimer O. Rhone and A. R. Jackson, both of Williamsport, for appellee.

PER CURIAM. Under its contract with the G. A. Webster Company the defendant acquired the right to use the machinery and equipment of that company during the period of the contract. It also had the right to purchase the machinery and equipment, together with the stock and merchandise, at a fixed price. It was further provided that, in case a petition in bankruptcy was filed against the Webster Company, title to the machinery, equipment, and merchandise should immediately vest in the defendant company upon certain conditions set forth. The defendant, however, exercised its right under the contract and became the purchaser of the property of the Webster Company, before any proceedings in bankruptcy were instituted, and its liability to pay for the property the price named in the contract, therefore, became fixed. The trustee in bankruptcy brought this suit in affirmance of the contract, and there was no interference with defendant's possession of the property. The court below was right in directing a verdict for the plaintiff, and in overruling defendant's motion for judgment non obstante veredicto.

The judgment entered upon the verdict for the plaintiff is therefore affirmed.

(261 Pa. 183)

KROSHINSKI v. SCHOOL DIST. OF BOROUGHS OF DICKSON CITY et al.

(Supreme Court of Pennsylvania. April 22, 1918.)

APPEAL AND ERROR —§356—TIME FOR TAKING APPEAL—DISMISSAL.

An appeal from a decree dismissing a bill will be quashed, where it was not taken until more than six months after the decree complained of was filed.

Appeal from Court of Common Pleas, Lackawanna County.

Bills by Adam Kroshinski against the School District of the Borough of Dickson City and against the Dickson Lumber Company. The cases were tried together. From a decree dismissing the bills, plaintiff appeals. Affirmed.

Argued before BROWN, O. J., and POTTER, STEWART, MOSCHZISER, and WALLING, JJ.

George Morrow, of Scranton, for appellant. M. J. Martin and Elmer D. Adair, both of Scranton, for appellees.

PER CURIAM. These two cases were disposed of together below, under agreement of counsel, and were so argued here. A final decree dismissing the bill in each case was filed June 6, 1916, more than six months before these appeals were taken, and they are therefore quashed, without prejudice to any right of the appellant in proceedings at law.

(261 Pa. 182)

CITIZENS' ELECTRIC CO. v. LYCOMING-EDISON CO.

(Supreme Court of Pennsylvania. April 22, 1918.)

INJUNCTION §231—CONTEMPT—FINDINGS OF FACT—REVIEW.

Decree dismissing rule for attachment for alleged violations of an injunction will not be disturbed, where lower court, after full hearing, found that defendant had fully complied with its decree.

Appeal from Court of Common Pleas, Lycoming County.

Action by the Citizens' Electric Company against the Lycoming-Edison Company. From an order discharging a rule to show cause why attachment should not issue for contempt of court, plaintiff appeals. Affirmed.

It appeared that an injunction had been awarded as prayed for in the bill; that thereafter plaintiff alleged a violation of the injunction, and a rule to show cause why an attachment should not issue was allowed. After hearing the evidence, the court found as fact that defendant had complied with its former decree and discharged the rule for the attachment.

Argued before POTTER, STEWART, FRAZER, and WALLING, JJ.

John G. Reading, M. C. Rhone, R. F. Allen, Herbert T. Ames, and Thomas H. Hammond, all of Williamsport, for appellant. Addison Candor, of Williamsport, for appellee.

PER CURIAM. The appellant in this case asked for an attachment against the defendant, alleging that it had violated the decree of the court below. After a hearing, and upon careful investigation, the trial court found as a fact that the defendant had fully complied with its decree, and it dismissed the rule for the attachment. We have not been convinced that the court below erred in the conclusion which it reached in this respect.

Its decree is therefore affirmed, and this appeal is dismissed, at the cost of appellant.

(261 Pa. 247)

FORD et al. v. DEIGENDESCH.

(Supreme Court of Pennsylvania. April 22, 1918.)

MUNICIPAL CORPORATIONS §706(6)—INJURY TO PEDESTRIAN—NEGLIGENCE—QUESTION FOR JURY.

In an action against an owner of a horse and wagon for injuries caused to a boy, whether the driver of the wagon exercised due care held for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Francis X. Ford, by his next friend, William J. Ford, and William J. Ford against Paul H. Deigendesesch. Judgment for

plaintiffs, and defendant appeals. Affirmed. Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

William G. Wright, of Philadelphia, for appellant. Augustus Trask Ashton and Victor Frey, both of Philadelphia, for appellees.

PER CURIAM. The evidence in this case shows that an employé of defendant drove defendant's horse at a trot, with a loose rein, through a narrow roadway, some 6½ feet in width, bordered by a sidewalk only 2 feet in width. It appears that the horse suddenly shied, and moved sidewise, so that the wheel of the wagon to which he was attached was thrown upon the narrow sidewalk, striking and injuring the plaintiff, a small boy. Whether or not the driver exercised due care, under the circumstances, in permitting the horse to travel at such a rate of speed, or whether it was careless in him to drive with a slack rein at that time and place, were questions for the jury to determine. Binding instructions in favor of defendant were properly refused, and the question of the driver's negligence was submitted to the jury in a charge to which no exception was taken.

The judgment is affirmed.

GREENBERGER et al. v. SCHWARTZ et al.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. BANKRUPTCY §198—LIENS—VALIDITY.

An adjudication in bankruptcy, under Bankruptcy Act, § 677 (U. S. Comp. St. 1916, § 9651), renders all liens obtained against the bankrupt within four months prior to the filing of the petition in bankruptcy void.

2. BANKRUPTCY §387—COMPOSITION WITH CREDITORS—DISCHARGE.

Whether the bankrupt's estate is administered by a trustee, or there is a composition by the bankrupt with his creditors, the effect of discharge is the same, under Bankruptcy Act, § 14c (U. S. Comp. St. 1916, § 9598), if the composition is confirmed by the court.

3. BANKRUPTCY §198—JUDGMENTS—VALIDITY—COMPOSITION WITH CREDITORS.

Where judgment was entered against a firm and the individual members within four months of bankruptcy proceedings, and plaintiffs were named as creditors, and a composition with creditors was confirmed by the bankruptcy court and carried out, the judgment entered was rendered void by the bankruptcy proceedings.

Appeal from Court of Common Pleas, Lackawanna County.

Action by Israel Greenberger and others against M. Schwartz and Jacob Rosenfeld. On issue to determine the validity of the lien of a judgment. Exceptions to report of referee in favor of defendant dismissed, and plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and WALLING, JJ.

William J. Fitzgerald, and John P. Kelly, both of Scranton, for appellants. L. M. Levy, of Scranton, for appellees.

BROWN, C. J. Moses Schwartz and Jacob Rosenfeld were partners doing business in the city of Scranton under the firm name of Schwartz & Rosenfeld. On June 17, 1912, Rosenfeld executed and delivered, in the name of the firm, to Greenberger & Co., a promissory note, containing a confession of judgment, for \$2,525.55, payable to their order two months after date. At the time this note was executed Schwartz & Rosenfeld were neither insolvent nor in contemplation of bankruptcy. On October 7, 1916, the appellants entered judgment on the note against the defendants individually and as a firm, but the same was subsequently stricken off as to Schwartz, who had not signed the obligation, and was opened as to Rosenfeld and the firm of Schwartz & Rosenfeld, to enable them to set up the defense of a discharge in bankruptcy. At the date of the entry of the judgment the said firm and the two individual members thereof were insolvent within the meaning of the Bankruptcy Act, and this was well known to the appellants. On November 4, 1915, within a month after the said judgment had been entered, a petition in bankruptcy was filed by the creditors of the firm of Schwartz & Rosenfeld, in the District Court of the United States for the Middle District of Pennsylvania, against the defendants as a firm and as individuals, and on the 26th of the same month they were duly adjudged bankrupts by said court. They subsequently filed their schedules in the bankruptcy proceedings, and named the plaintiffs therein as creditors. On January 10, 1916, the defendants in due form offered a composition to their creditors, which was thereafter duly confirmed by the said District Court, and was carried out by the defendants as bankrupts.

The issue on the opened judgment was referred to a very learned referee, by whose report judgment was directed to be entered for the defendants, on the ground that, under the Bankruptcy Act, the judgment entered by the appellants was null and void, and from the judgment so entered by the court below, in confirming the report of the referee, there is this appeal by Greenberger & Co. On it two questions are raised: (1) Is the lien of a judgment entered against an insolvent debtor within four months of bankruptcy proceedings absolutely void, or only voidable? And (2) if it be voidable, can it be attacked by the bankrupt after the termina-

tion of bankruptcy proceedings as to non-exempt property? If the first question was properly answered by the referee and the court below, in holding that the lien of the judgment was void, the second is not in the case.

[1] Section 67f of the Bankruptcy Act provides:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." Act July 1, 1898, c. 541, § 30 Stat. 564 (U. S. Comp. St. 1916, § 9651).

[2, 3] An adjudication of bankruptcy ipso facto renders null and void all liens obtained through legal proceedings against the bankrupt within four months prior to the filing of the petition in bankruptcy against him. Whether the bankrupt estate is administered by a trustee, or there is a composition by the bankrupt with his creditors, the effect of a discharge in bankruptcy is the same, if the composition is confirmed by the court. Section 14c Bankruptcy Act (U. S. Comp. St. 1916, § 9598). In view of the plain words of section 67f of that act, the referee was of opinion that the judgment in question was null and void. In so holding he regarded *Chicago, Burlington & Quincy Railroad Company v. Hall*, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, as controlling, and simply followed it in making his report. While the question in that case was as to the liability of property of a bankrupt, exempt by the laws of his own state, to attachment proceedings instituted in another state within four months of the filing of the petition in bankruptcy, the Supreme Court of the United States said of the said section 67f:

"Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. 'All liens obtained by legal proceedings' within that period are declared to be null and void. That universal language is not restricted by the later provision that 'the property affected by the * * * lien shall be released from the same and pass to the trustee as a part of the estate of the bankrupt.'"

In thus construing the said section of the Bankruptcy Act, the only construction of which it is susceptible was given to it, and nothing more need or can be said in dismissing this appeal.

Judgment affirmed.

(261 Pa. 248)

**DOYLE v. PHILADELPHIA RAPID
TRANSIT CO.**(Supreme Court of Pennsylvania. April 22,
1918.)**1. STREET RAILROADS ⇐90(4)—COLLISION—
EVIDENCE.**

Motorman of street car can assume that driver of wagon, in the street ahead of him alongside the track, will not drive in front of the car.

**2. STREET RAILROADS ⇐117(11)—COLLISION
—EVIDENCE.**

In action against street railroad company, to recover for personal injuries from collision between plaintiff's wagon and a street car, compulsory nonsuit held properly entered on the evidence, which showed that it was impossible to stop the car in time to avoid the collision after plaintiff suddenly drove onto the track from behind another vehicle.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Onney B. Doyle against the Philadelphia Rapid Transit Company. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

The facts appear by the following from the remarks of Ferguson, J., in the common pleas, in entering the compulsory nonsuit:

In this case we have nothing but the fact that there was a collision. We have an automobile standing against the curb on the north side of Arch street, east of Broad street (in the city of Philadelphia); we have the wagon of Mr. Field standing on the north side of Arch street, east of Broad street, 80 feet back of the automobile, and from the horse's head to the tail-board of the wagon was 16 feet, so the distance between the automobile and the wagon was just about twice the length of the horse and wagon. The case absolutely depends upon the testimony of Mr. Field, if there is any case at all, because Doyle saw nothing. All he knows is that there was a crash, and, as I said before, the mere fact that there was a crash, and that he was injured as a result of the crash, does not prove that the transit company was negligent, because, when there is another wagon, which is a free agent in the streets and may go wherever the driver directs it, you can easily see that it might possibly be that a collision would have resulted, no matter how careful the motorman might have been. Mr. Field says that when he came out of the cigar store he saw the car coming west on Arch street and crossing Thirteenth street, and he walked down to the curb and got into his wagon and looked through the window in the back and saw the car was coming. He did not tell us where it was; he did not tell us how close it was. He took the reins and drove ahead, and at some point between where the wagon had been standing and where the automobile was, as to which he leaves us entirely in the dark, he pulled his horse out to straddle the track, in order to get around the automobile, and was struck by the car.

[1] That that resulted from the negligence of the motorman of the car there is no evidence. The car had the right of way, and the motorman had the right to assume that a man driving a wagon in the street ahead of him, alongside of the track, would not drive the wagon in front of the car. If he did pull the wagon in front of the car, it did not make the motorman negligent. He could only be held negligent, under circumstances such as are indicated in this case, if the wagon had been on the track, or approaching the track, a sufficient distance from the car for

the motorman to have stopped the car and to have avoided the collision. Those distances are not given to us, and juries are not permitted to guess what must have been the fact. They have to have the evidence, and they have to have an opportunity of determining whether they will believe it or not; but, assuming that they believe it, they have to have evidence from which they could conclude that there was negligence. That evidence does not appear in this case, and for that reason I enter a nonsuit.

The lower court entered a compulsory nonsuit, which it subsequently refused to take off.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Eugene Raymond and John Martin Doyle, both of Philadelphia, for appellant. Bernard J. O'Connell, of Philadelphia, for appellee.

PER CURIAM. [2] The record in this case shows no evidence of negligence upon the part of the defendant which was sufficient to justify its submission to the jury. Judgment of compulsory nonsuit was properly entered, and the court below did not err in refusing to take it off.

The judgment is affirmed.

(261 Pa. 188)

In re NOLAN'S ESTATE.(Supreme Court of Pennsylvania. April 22,
1918.)**WILLS ⇐316(2)—TESTAMENTARY INCAPACITY
—DEVISAVIT VEL NON.**

Where evidence shows that testator was a man of intemperate habits, but was perfectly sober at time of the execution of his will, and understood what he was doing, an issue devisavit vel non was properly refused.

Appeal from Orphans' Court, Berks County.

In the matter of the estate of Francis Reilly Nolan, deceased. From decree refusing issue devisavit vel non, Charles J. Nolan appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

E. H. Deysher, of Reading, for appellant. H. P. Keiser, of Reading, for appellee. Lee Joseph R. Dickinson and J. Bennett Nolan, both of Reading, for appellees Nolan and Reading Trust Co.

PER CURIAM. The learned judge below, specially presiding, found that the testator—"appeared at the office of his attorney, unaccompanied by any person, and gave directions concerning the disposition he desired to make of his property by will. The will was drawn in accordance with the directions received by the attorney. It was, on a subsequent visit to the office of the attorney, read to the testator, and, upon being asked if that was the disposition of his property intended, he replied that it was. He desired certain persons to witness the will, and the will was taken by the testator and the

son of the attorney who drew it to the store of the witnesses, and there signed after the testator had declared it was his will. The attorney who drew the will, his son, and the two witnesses all testify that the testator was not intoxicated; that he was mentally capable at the time of its execution to dispose of his property by last will and testament."

In view of the testimony that, though the testator was a man of intemperate habits, he was at the time of the execution of his will perfectly sober and sane, and understood exactly what he was doing, the issue asked for was properly refused. *Tasker's Estate*, 205 Pa. 456, 55 Atl. 24.

Appeal dismissed, at appellant's costs.

(261 Pa. 206)

In re PEIFFER'S ESTATE.

(Supreme Court of Pennsylvania. April 22, 1918.)

EXECUTORS AND ADMINISTRATORS \Leftarrow 206(1)— CLAIMS FOR SERVICES—EVIDENCE.

Claim against decedent's estate presented by daughter-in-law for nursing decedent held properly disallowed, where claimant, her husband, and decedent had lived together on the latter's farm, and the crops and income were regularly divided, and claim was not presented until claimant's husband, who was executor, had been surcharged for mismanagement of the estate.

Appeal from Orphans' Court, Berks County.

In the matter of the estate of Edward Peiffer, deceased. From decree dismissing exceptions to adjudication, Mary Peiffer appeals. Affirmed.

From the record it appeared that Mary Peiffer, the wife of the executor, and the daughter-in-law of the decedent, presented a claim of \$2,400 for nursing decedent. The claimant, her husband, and decedent resided together on the latter's farm for many years. The crops and income from the farm were regularly divided between the claimant's husband, who was the tenant, and the decedent. There was no evidence to support the claim, except testimony as to a number of loose and vague declarations on the part of the decedent that the claimant should be paid for her services. There was evidence that claimant, immediately after the funeral, when asked what the estate owed her, re-

plied, "I don't want anything; I gave it willingly."

The facts further appear from the following opinion of Schaeffer, P. J., in the orphans' court:

We have carefully examined again the evidence bearing on this claim, and we do not see how, in the light of it, we can sustain the exceptions filed here. The testimony shows that the claimant and her husband occupied this farm with the decedent for many years, and that they lived together on it as one family, up to the time of his death. In view of this family relation, the testimony—loose expressions of gratitude and appreciation, and of a desire that she should be paid, and the like (*Wise v. Martin*, 232 Pa. 159, 81 Atl. 184)—is of a character which is always regarded as insufficient to support a claim of this nature. No express contract is even alleged, and no demand is shown to have been made by the claimant in the lifetime of the decedent. Services for nursing are presumed to be periodically paid (*Gummiskey's Estate*, 224 Pa. 509, 73 Atl. 916, 132 Am. St. Rep. 787), and it is almost incredible that the decedent should receive his share of income of the farm from the claimant's husband, who had the sole control of the same, for this period of 2½ years, during which she rendered these services, and not some settlement be made for the nursing, if payment was contemplated by the parties. The facts and circumstances surrounding this whole case justify the conclusion that these services were either voluntarily performed by the claimant by reason of the relation existing between her and her father-in-law, the decedent, or were paid for at stated periods when they were due, and that this claim would not have been made, if claimant's husband, the accountant, to whom the farm was devised, had not been charged with the mismanagement of the estate, and finally surcharged with the sum of \$1,442.19.

Despite the earnest and exhaustive argument of counsel for the exceptions, we are constrained to dismiss them, and confirm the distribution absolutely.

The lower court dismissed the exceptions to the adjudication. Mary Peiffer appealed. Error assigned was in dismissing exceptions to the adjudication.

Argued before BROWN, O. J., and POTTER, MOSCHZISKE, FRAZER, and WALLING, JJ.

William Kerper Stevens, of Reading, for appellant. W. S. Rothermel and W. E. Sharman, both of Reading, for appellees.

PER CURIAM. For the reasons given by the learned court below for disallowing appellant's claim for services, her appeal from its disallowance is dismissed, at her costs.

\Leftarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(117 Me. 357)

STROUT v. STROUT et al.

(Supreme Judicial Court of Maine. Sept. 12, 1918.)

1. PERPETUITIES \S 1—RULE AGAINST—INTENTION.

Rule against perpetuities is not, like rule of construction, test to determine intention, but its object is to defeat intention, so that every provision in a will is to be construed as if rule did not exist, and rule then applied.

2. PERPETUITIES \S 1—CONSTRUCTION OF WILL—INTENTION.

In construing residuary clause of will to determine whether it violates rule against perpetuities, intention of testatrix is to be gathered from entire will, and not from residuary clause alone.

3. PERPETUITIES \S 1—RULE AGAINST—TERMINATION OF ESTATES.

Rule against perpetuities concerns itself only with vesting, commencement of estates, not with their determination.

4. PERPETUITIES \S 4(12)—ABSOLUTE LEGACY—POSTPONEMENT OF PAYMENT.

When gift of legacy is absolute, time of payment alone being postponed, since time is not of substance of gift, vesting of legacy is not postponed to render it violative of rule against perpetuities.

5. PERPETUITIES \S 4(15)—VESTING OF LEGACY—DISCRETION OF TRUSTEE.

Discretionary power in trustee as to time of payment of legacy does not prevent its vesting, thus rendering it violative of rule against perpetuities.

6. WILLS \S 529—BEQUEST TO CLASS—PRESUMPTION.

Law presumes that testator, when he bequeaths fund generally to class, intends that members shall share equally, that being legal meaning of such bequest.

7. WILLS \S 529—CONSTRUCTION—FUTURE OR CONTINGENT INTEREST.

Legacy or devise should be construed as giving vested rather than contingent interest.

8. PERPETUITIES \S 4(15)—RULE AGAINST—RESIDUARY CLAUSE OF WILL—"WISH."

Residuary clause reading that testatrix gave to M. S. to hold in trust all residue of her personality, "and I wish it to be distributed to the children of L. B. S. and herself [M. S.] or their descendants at such times as she sees fit for their best benefit," did not violate rule against perpetuities, "I wish" being mandatory, time of payment alone being postponed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Wish.]

9. WILLS \S 498—CONSTRUCTION—"DESCENDANTS."

"Or their descendants," used in a will, includes only lineal heirs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Descendant.]

10. WILLS \S 538—CONSTRUCTION—BEQUEST TO DESCENDANTS—TIME OF DEATH.

Where, by residuary clause, testatrix gave to M. S. to hold in trust all residue of personality, directing distribution to children of L. B. S. and M. S. "or their descendants," independently of Rev. St. c. 79, § 10, testatrix provided lineal descendants of child dying in her lifetime should take parent's share.

11. TRUSTS \S 268—EXPENSES OF LITIGATION—ADVERSARY SUIT.

Where father of beneficiaries under will sued to take trust estate from possession of his wife, the trustee, to deprive them of all benefit of fund and to divert it to his benefit,

having been defeated, he was not entitled to have trust estate charged with expenses of litigation.

Report from Supreme Judicial Court, Cumberland County, in Equity.

Suit by Leon B. Strout against Mildred Strout and others. Case reported. Bill dismissed.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Woodman & Whitehouse, of Portland, for complainant. Clarence E. Sawyer, W. R. & E. S. Anthoine, and Paul E. Donahue, all of Portland, for defendants.

MORRILL, J. Viola Phipps, late of Brunswick, died on the 18th day of February, 1913, leaving a will, which has been duly proved and allowed. The residuary clause of that will is as follows:

"I give and bequeath to Mildred Strout, to hold in trust, all the rest and residue of my personal property, and I wish it to be distributed to the children of Leon B. Strout and herself or their descendants at such times as she sees fit for their best benefit."

On October 28, 1914, prior to the commencement of the present action, the executor of this will filed a bill asking for instructions and for the construction of certain portions of said will. To that bill the present plaintiff was a party. A justice of this court entered a decree that one of the preceding clauses of said will was invalid as contrary to the rule against perpetuities, and directed the executor, after paying certain legacies, to pay and deliver the remainder of the property mentioned in the clause so held to be invalid to the residuary legatee. Acting under this decree, Mr. Sawyer, the executor, paid and delivered to Mildred Strout, who had qualified as trustee, cash and securities to the amount of \$14,718. The executor has about \$700 in his hands for further distribution.

The plaintiff, who is the father of the three beneficiaries named in the residuary clause, and the next of kin and sole heir of the testatrix, now claims that the residuary clause is void and contrary to the rule against perpetuities, and that Mildred Strout, the mother of his children, shall account to him for the fund held by her. In other words, he now endeavors to deprive his children of the benefit of a fund which the testatrix intrusted to their mother, and not to him, "for their best benefit."

Without expressing any opinion as to whether this contention is now open to the plaintiff after the decree in the former suit, to which he was a party, we proceed to examine his claim, which his counsel states as follows:

"The sole question for construction and determination by the court is whether said residuary clause contained in the fourteenth para-

graph of the will is void as violating the rule against perpetuities."

[1, 2] It should be borne in mind that the rule against perpetuities is not, like a rule of construction, a test more or less artificial to determine intention. Its object is to defeat intention. Therefore every provision in a will is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be applied. Gray on Perpetuities, p. 378. In so construing the provision in question the intention of the testatrix is to be gathered from the entire will and not from the residuary clause standing alone.

[3] The rule concerns itself only with the vesting, the commencement of estates, and not at all with the termination. It makes no difference where such a vested estate or interest limited terminates. Pulitzer v. Livingston, 89 Me. 359, 365, 372, 36 Atl. 635.

[4, 5] Moreover, when the gift of a legacy is absolute, and the time of payment only is postponed, the time, not being of the substance of the gift, is held to postpone the payment, but not the vesting, of the legacy. Kimball v. Crocker, 53 Me. 268, 271. And the discretionary power in the trustee as to time of payment does not prevent the vesting of the legacy. Hone's Ex'rs v. Van Shaick, 20 Wend. (N. Y.) 564; Kimball v. Crocker, supra.

The will in this case is, in some respects, artificially drawn. The scrivener evidently did not have in mind the rule against perpetuities, nor the distinction between vested and contingent interests. He appears not to have realized, or to have disregarded, the care which should be observed in the creation of trust estates; nor does he appear to have considered the various changes which might arise after the death of the testatrix.

Yet, carefully considering the entire will, we think that it is not difficult to ascertain the intention of the testatrix. At her death three children of Leon B. Strout and Mildred Strout were living, Marjorie, Marian, and Roger. In the preceding paragraphs of the will, wherever provision is made for them, the testatrix makes it clear that there is to be no discrimination between them; they are to "share and share alike," or to "share equally."

[6] Referring to the residuary clause, we see no reason to doubt that the children were to share equally in the legacy thereby bequeathed. The law presumes that a testator, when he bequeaths a fund generally to a class, intends that the members of the class shall share equally in the fund bequeathed, and such is the legal meaning of such a bequest. Tucker v. Bishop, 16 N. Y. 402, 406. Mildred Strout has no power over the legacy except to fix a proper and discreet time for payment, "as she sees fit, for their best benefit." The will does not say that the legacy is to be distributed "at such times and in such sums and proportions as she sees fit," but only "at such times." The time of pay-

ment only was postponed. The shares of the children were fixed beyond the power of the trustee to alter. Counsel for the plaintiff, in attempting to distinguish this case from the case of Haley v. Palmer, 107 Me. 311, 78 Atl. 368, and the prior case of Holcomb v. Palmer, 106 Me. 17, 75 Atl. 324, says: "But the trustee here is given power to distribute to the children, if she sees fit, and not to the descendants, or, if she prefers, all to the descendants and none to the children, or part to some of the children and none to the others, or a part to some of the descendants and none to the rest;" and upon this construction he bases his argument that "it is inconceivable under these circumstances how any interest in a residuum can be said to have vested in any definite beneficiary." We cannot accede to this construction, and our construction of the residuary clause distinguishes this case from Whelan, Trustee, v. Reilly, 5 W. Va. 356, cited in support of counsel's position.

[7, 8] Applying, then, the rules and principles hereinbefore referred to, and having in mind the familiar principle that a legacy or devise should be considered as giving a vested rather than a contingent interest (Kimball v. Crocker, 53 Me. 268, 267), we think that the residuary clause of the will of Viola Phipps does not violate the rule against perpetuities. The words "I wish" are equivalent to a command; they are mandatory. Clifford v. Stewart, 95 Me. 38, 46, 40 Atl. 52. The trustee took the legal estate; the three children, Marjorie, Marian, and Roger, took the beneficial or equitable estate; no other interests were bequeathed; all interests, legal and equitable, vested at the death of the testatrix. The bequest is present and absolute; the time of payment only is postponed.

[9, 10] In Manice v. Manice, 43 N. Y. 803, on page 369, it is said: "Where the terms of a bequest import a gift, and also a direction to pay at a subsequent time, the legacy vests, and will not lapse by the death of the legatee before the time for payment has expired, but will pass to his personal representatives." The words "or their descendants," when used in a will, are construed to include only lineal heirs in the direct descending line. Baker v. Baker, 8 Gray (Mass.) 101, 119. So under the statute (R. S. c. 79, § 10). Morse v. Hayden, 82 Me. 227, 19 Atl. 443. In harmony with the idea of an equal division among the children, which we adopt, we think that the testatrix intended by the use of these words to provide, independently of the statute (R. S. c. 79, § 10), that if a child died in her lifetime leaving lineal descendants, such descendants should take the share of the deceased parent. Perhaps she was not advised of the existence of the statute. The construction that by the use of these words the testatrix intended that the share of one of the children dying after her death, and before distribution, would pass to such deceased child's lineal descendants, cannot be adopted.

It is inconsistent with the view that the children of Leon B. Strout and Mildred Strout, living at the death of the testatrix, take absolutely. Since the will fixes no other period to which the fact of the death of any child can be referred, the death of such child must occur in the lifetime of the testatrix. *Traver et al. v. Schell et al.*, 20 N. Y. 89; *Tucker v. Bishop*, 16 N. Y. 402, 404.

A provision very similar to the provision in the case before us was sustained in *Morton v. Southgate*, 28 Me. 41. The case of *Rogers v. Rogers*, 11 R. I. 38, 72, et seq., is also very instructive. The bill must be dismissed.

[11] In the agreed statement which is made part of the case, the parties request and agree "that the reasonable expenses, costs, and counsel fees of the parties, both plaintiff and defendant in the cause, be allowed and ordered by the court to be paid out of the fund now in the custody of the clerk of this court; and for that purpose the parties by their attorneys shall file their bills for such expenses, costs, and counsel fees with the clerk of this court, to be passed upon by the single justice reporting the cause, after mandate by the law court, and incorporated in the final decree rendered in said cause, pursuant to mandate." The fund in the custody of the clerk referred to in above agreement consists of the securities which have been turned over to the trustee, Mildred Strout, by the executor of the will, pursuant to a decree entered upon the earlier bill in equity filed by the executor and mentioned in the early part of this opinion; the securities were so deposited to abide the final decree and order in this cause.

We think that the plaintiff is not entitled to have his expenses, costs, and counsel fees paid him from the trust fund. This is not the ordinary case of a bill in equity for the construction of a will; such a bill had already been filed by the executor and proceeded to final decree; nor is it a bill for the protection and preservation of the trust fund in the interest of all the beneficiaries. This litigation instituted by the plaintiff is of a highly adversary character; it has for its object to wrest the trust estate from the possession of the trustee, to deprive the children of the plaintiff of all benefit of the fund, and to divest the fund to the personal benefit of the plaintiff. In such a case the defeated party must bear the expense which he has incurred in his own interest alone. The trust estate is chargeable only with that expense which is incurred in the interest of all the cestuis que trustent. *Somerset Railway v. Pierce*, 98 Me. 528, 57 Atl. 888.

The judgment must be:

Bill dismissed. The securities of the trust, deposited with the clerk of courts, are to be restored to the trustee. The reasonable expenses and counsel fees of the trustee, Mildred Strout, incurred in the protection

of the trust may be allowed and paid from the fund. The executor may be allowed his reasonable expenses and for his services in this cause, the same to be retained from the funds in his hands.

(117 Me. 309)

CURRAN v. HOLT.

(Supreme Judicial Court of Maine. Oct. 2, 1918.)

1. PHYSICIANS AND SURGEONS \S 18(8)—MALPRACTICE—NEGLIGENCE.

That an operation for cataract and for removal of plaintiff's right eye was unsuccessful, and that vision of left eye was lost, was not alone sufficient to establish the operator's negligence, as a surgeon cannot insure recovery, in view of the fact that, with due care, loss of sight results in a percentage of cases in operations for cataract depending largely on patient's condition.

2. PHYSICIANS AND SURGEONS \S 14(1)—SKILL AND CARE REQUIRED.

A physician and surgeon must exercise the ordinary skill of members of his profession in like situation, and must use reasonable care and diligence in his treatment of case, and his best judgment in the application of that skill to the case.

Exceptions from Supreme Judicial Court, Cumberland County, at Law.

Action by William S. Curran against E. Eugene Holt, Jr. Judgment of nonsuit, and plaintiff excepts. Exceptions overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHELPROOK, DUNN, and MORRILL, JJ.

Dennis A. Meaher, of Portland, for plaintiff. Hinckley & Hinckley, of Portland, and Edward I. Taylor, of Boston, Mass., for defendant.

CORNISH, C. J. Action against a surgeon for alleged malpractice. Plaintiff was treated by defendant from November, 1911, until January, 1913. On January 28, 1913, the defendant performed an operation for cataract on plaintiff's right eye. The operation was not successful, and sight was not restored. As the left eye subsequently became involved from what was apparently sympathetic inflammation, the right eye was removed by the defendant on April 14, 1913. This removal, however, did not allay the trouble with the left eye, and, after further treatment for several months, vision in that eye was also lost.

The plaintiff in his writ alleges many negligent acts on the part of the defendant, which he says might have produced the blindness. These he summarizes in his brief as follows:

"Such as general negligence; that the incision on the eyeball of the right eye was within what is called the danger zone; that the defendant did not make a proper diagnosis of the eyes, and did not understand the real condition of the eyes before he operated; that he did not use proper methods in preparing the eye for the operations, and in treating the eyes

before and after the operations, of January 28 and April 14, 1913."

[1] The evidence introduced by the plaintiff, including that of an eye specialist, failed utterly to substantiate a single one of the many claims set forth in the writ. True, the operation proved unsuccessful, and upon that fact alone the plaintiff seems to rest his case. But that is not sufficient to establish negligence on the part of the operator. The surgeon cannot insure recovery, and the testimony shows that, with all due care, loss of sight results in 5 or 6 per cent. of the cases in operations for cataract, depending in large measure upon the condition of the patient. It was shown here that the plaintiff's trouble was of long standing. His vision had been more or less affected for 40 years.

[2] It is not claimed that the defendant did not possess the ordinary skill of members of his profession in like situation. The law required him to exercise that ordinary skill, and to use reasonable care and diligence in his treatment of the case, and his best judgment in the application of that skill to the case in hand. *Coombs v. King*, 107 Me. 376, 78 Atl. 408, Ann. Cas. 1912C, 1121; *Merrill v. Odiorne*, 113 Me. 424, 94 Atl. 753; *McCann v. Twitchell*, 116 Me. 490, 102 Atl. 740.

The evidence does not show that the defendant failed to measure up to the legal requirement in a single particular, either in the care and treatment prior to the operations, in performing the operations, or in the care and treatment subsequent thereto. The defendant was not called upon to offer any testimony. A jury would not have been justified in drawing from the evidence an inference of legal liability on the part of the defendant, and therefore the nonsuit was properly ordered by the presiding Justice.

Exceptions overruled.

(261 Pa. 195)

QUINTER v. QUINTER.

(Supreme Court of Pennsylvania. April 22, 1913.)

1. REFORMATION OF INSTRUMENTS §45(4) — CONSIDERATION—EVIDENCE.

Where father-in-law executed deed to his daughter-in-law for expressed consideration, and in action to recover the consideration expressed grantee alleged that transfer was a gift, the writings must prevail, unless the jury was clearly satisfied beyond any reasonable doubt that defendant's statement of the transaction was true.

2. APPEAL AND ERROR §171(1)—CHANGE OF THEORY ON APPEAL.

Where, in an action for price of land sold, the affidavit of defense raised the issue that the transfer was in fact a gift, and not a sale, and the case was tried on that issue, the claim cannot be made on appeal that a different consideration than that mentioned could be shown by a mere preponderance of evidence.

3. APPEAL AND ERROR §730(1) — ASSIGNMENTS OF ERROR—NECESSITY OF EXCEPTIONS.

Assignments of error complaining of parts

of charge are defective, where they do not show exceptions taken to the charge.

Appeal from Court of Common Pleas, Berks County.

Action by Charles R. Quinter, Sr., against Cora Belle Quinter. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKE, FRAZER, and WALLING, JJ.

Walter S. Young and William J. Rourke, both of Reading, for appellant. Henry D. Green and Lee Friday, both of Reading, for appellee.

FRAZER, J. Plaintiff executed to his daughter-in-law, the defendant, a deed for a house and lot for the expressed consideration of \$2,000, and about a week later also executed a bill of sale for the household furniture and other personal property on the premises for a consideration of \$75. Against the realty was a mortgage with an unpaid balance of \$600, which defendant paid, but made no further payment on account of either realty or personalty. Plaintiff sued in assumpsit, and recovered a verdict for the entire balance, and from the judgment entered thereon defendant appealed.

[1] The sole defense set forth in the affidavit of defense is that the transfer of both real and personal property was intended as a gift in consideration of a promise by defendant to pay the indebtedness secured by the mortgage, and, as that payment had been made, no further amount is due plaintiff. The evidence adduced at the trial was conflicting, and the trial judge submitted the case to the jury, and charged the writing must prevail unless the jury were "clearly satisfied . . . by the evidence beyond any reasonable doubt, as strongly as oral testimony can satisfy the mind," that defendant's statement of the transaction was true. The only error of which defendant complains is that the trial judge, by the language quoted, placed upon her the burden of furnishing a degree of proof necessary to reform a written instrument, as to which it seems to be conceded the charge was not erroneous. *Rowand v. Finney*, 96 Pa. 192; *Ott v. Oyer's Executrix*, 106 Pa. 6, 17. It is, however, contended, as the issue is merely one of showing a different consideration from that expressed in the deed, the case is not within the rule stated, and a different consideration may be shown by the ordinary measure of proof, namely, a preponderance of testimony. *Henry v. Zurdieh*, 208 Pa. 440, 53 Atl. 243; *McGary v. McDermott*, 207 Pa. 620, 57 Atl. 46.

The difficulty in defendant's contention is that the issue made up by the affidavit of defense was, not that the consideration was less than expressed in the deed, but that

the transfer was a gift, and not a sale. The case was tried on this theory, and the trial judge in his charge said, in referring to defendant's testimony:

"She says that there was no sale, that there was never intended to be a sale; that there was a gift, on condition of her payment of the \$600 mortgage."

[2] Defendant's contention was in effect that the transaction fundamentally differed from that appearing from the face of the papers executed by plaintiff, and was therefore inconsistent with their terms. The case was tried on this theory, and no exception taken to the charge at the time of the trial; nor was the trial judge asked to give different instructions, or to submit the case to the jury on the theory of merely an attempt to change the amount of the consideration in the writing. That the question now presented was not raised by defendant on the trial further appears from the opinion of the court below discharging the rule for a new trial, where it was said:

"It is perfectly clear from the record of this case that, it was tried by both parties and by the court upon the theory that the effort was by parol evidence to convert the written contract of sale into a gift, and it is to be noted that there is no exception to the charge so assuming, and laying down the chancery rule. It is well settled that it is too late after trial to shift to another theory. *Lane v. Smith*, 103 Pa. 415; *Bank of Pottsville v. Schuylkill County*, 190 Pa. 188 [42 Atl. 539]; *Taylor v. Sattler*, 6 Pa. Super. Ct. 229; *Gallagher v. Burke*, 13 Pa. Super. Ct. 244, 250."

[3] The assignments of error are defective, in that they fail to show exceptions taken to the charge. We have repeatedly held such assignments must be self-sustaining, and show exceptions were taken to the parts assigned for error. *Browarsky's Estate*, 252 Pa. 86, 97 Atl. 91.

The judgment is affirmed.

(261 Pa. 117)

BENEDICT v. BENEDICT et al.

(Supreme Court of Pennsylvania. April 3, 1913.)

FRAUDULENT CONVEYANCES §111 — TRUST FOR GRANTORS.

Where person settled his property in irrevocable trust for his own use for life, reserving power to devise by will, and that his wife and children should take if he did not exercise such power, property is subject to attachment by creditor of settlor.

Appeal from Court of Common Pleas, Franklin County.

Action by Mary A. Benedict against J. L. Benedict, with the Farmers' & Merchants' Trust Company as garnishee. Judgment against garnishee, and it appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

T. Z. Minehart, Walter K. Sharpe, William S. Hoerner, and Irvin C. Elder, all of Cham-

bersburg, for appellant. O. C. Bowers, of Chambersburg, for appellee.

MOSCHZISKER, J. J. L. Benedict, in consideration of "natural love and affection toward his wife and children," and the sum of \$1, executed and delivered to the trust company here named as garnishee a sealed written instrument, whereby he placed \$11,000 in the latter's custody, for and upon the following uses and trusts:

"To invest and keep the same invested, * * * and pay the [net] income * * * to the said J. L. Benedict during the term of his natural life, and, at his death, to pay the principal of said trust fund * * * to such person or persons or objects as the party of the first part [the settlor] may appoint by any last will and testament which he may leave at the time of his death. In case he shall leave no such will, then one-third thereof to his widow, and the remaining two-thirds, or, in case he shall leave no widow, the whole, in equal shares, to such children of the party of the first part as may be living at the time of his death. In case any child or children shall die during the lifetime of the said J. L. Benedict, leaving children to survive who shall be living at the death of the said J. L. Benedict, such children of such deceased child or children shall take their parent's share. In case the said J. L. Benedict shall leave no children or issue of such children living to survive him, then the share or part of said trust fund that would go as aforesaid to such children shall be paid to the next of kin."

The deed in question stipulates that the trust shall be irrevocable, and that no part of the fund, either principal or income, shall be transferred or assigned by the settlor; further, that it shall not be liable for his future debts, contracts, or engagements, nor subject to attachment or other legal process at the suit of his creditors. On the date of the deed, March 24, 1915, Mr. Benedict had a wife and three children. June 15, 1917, he executed and delivered to plaintiff a judgment note for \$2,500; the debt for which this was given having been contracted after March 24, 1915. August 14, 1917, judgment was entered on the note, and on the same day execution issued against the trust company, as garnishee, attaching any property in its hands belonging to the settlor. In due course, the court below held that the so-called "trust fund" was liable for plaintiff's claim, and defendants have appealed.

Under our decisions, the court below was clearly right in its disposition of this case. Had Mr. Benedict not retained absolute power to dispose by will of the corpus of the fund here in question, the present case would fall within the principle of *Egbert v. De Solms*, 218 Pa. 207, 67 Atl. 212, where the trust was held unassailable by an attaching creditor; but in the deed before us the settlor first expressly reserves unrestricted power to control by will the disposition of the entire fund after his death, his widow and children or next of kin taking only in the event of his failure to exercise this absolute right. *Egbert v. De Solms* is sufficiently distinguished in

Rienzi v. Goodin, 249 Pa. 546, 551, 95 Atl. 259, where it is correctly stated that the decision in the former case in no way modified "the established law"; and this, as laid down in *Nolan v. Nolan*, 218 Pa. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369, cited by the court below, clearly sustains the judgment at bar.

It may be noted that *Egbert v. De Solms*, supra, is reported in the same volume as *Nolan v. Nolan*, and that the facts in the latter are strikingly like those in the case before us. There, as here, the deed, by its terms, is irrevocable, and, at the time of the execution thereof, the indebtedness in controversy had not arisen, nor was it in contemplation; finally, in both instances, at the creation of the trust, the settlor had several children living. In the present case, after reserving an absolute and unrestricted power of appointment in himself, the settlor provides that, upon default of its exercise, the fund in question shall go to his widow and children, or the latter's issue, in certain proportions; these being in accordance with the shares they would take under the intestate laws, or, if no widow, children, or issue, then to his next of kin. In *Nolan v. Nolan*, after reserving a like power of appointment, the settlor provided that, upon default in its exercise, the fund should go to her next of kin. While the phraseology is different, it will be observed that, so far as the question here involved is concerned, both of these provisions are, in effect, the same. In the *Nolan Case* (218 Pa. at pages 139, 140, 67 Atl. 53, 54 [12 L. R. A. (N. S.) 369]) we thus state the law:

"In order to make it [the trust] valid as to subsequent creditors, it must appear that the settlor has divested himself of all rights of ownership in, and control over, the property thus conveyed, reserving only to himself the right to receive the income during life; and * * * it is against public policy * * * that a settlor should be permitted to play fast and loose with his property, in such a manner as to have the use of the income during life and the right to dispose of the principal by will at any subsequent time he chooses to exercise the power. * * * A person sui juris cannot, as against creditors, either prior or subsequent, settle his property in trust for his own use for life, and over to his appointees by will, and, in default of such appointment, to the use of his lawful heirs in fee. *Mackason's Appeal*, 42 Pa. 330 [82 Am. Dec. 517]."

The fact that, by the deed in *Nolan v. Nolan*, supra, the trustee was authorized to convey the property to the settlor, if the former deemed it expedient so to do, is not of controlling significance; for no such provision appears in *Rienzi v. Goodin*, supra, where the terms of the deed are almost precisely like those in the instrument at bar, and where *Nolan v. Nolan* was treated as a binding authority. We conclude that there are no substantial points of distinction between the present case and the two just cited.

The assignments of error are overruled, and the judgment is affirmed.

(361 Pa. 199)

DAVIS v. EDMONDSON.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. NEGLIGENCE — 113(1) — CONTRIBUTORY NEGLIGENCE—PLEADING.

A statement of claim is insufficient, where it fails to make out a case clear of contributory negligence on the part of plaintiff.

2. PLEADING — 345(1)—MOTION FOR JUDGMENT—STATEMENT OF CLAIM — CONTRIBUTORY NEGLIGENCE.

In action against owner of dance hall for injuries from falling off a platform at the rear door of the hall, judgment for defendant held properly entered, where statement of claim affirmatively showed contributory negligence on the part of plaintiff.

Appeal from Court of Common Pleas, Montour County.

Action by William Elwood Davis against George D. Edmondson. Judgment for defendant, and plaintiff appeals. Affirmed.

Trespass for personal injuries. The following is the opinion of Evans, P. J., in the common pleas:

The affidavit of defense in this case is practically a demurrer to the plaintiff's statement—that the statement does not set forth a cause of action against the defendant. Therefore every material allegation of fact stated therein must be regarded as true for the purpose of determining the question now before the court.

The Practice Act of May 14, 1915 (P. L. 483), abolishes a demurrer as a possible pleading in actions of assumpsit and trespass, except for libel and slander, brought in the common pleas. Section 4 of the act reads as follows: "Demurrers are abolished. Questions of law heretofore raised by demurrer shall be raised in the affidavit of defense, as provided in section 20."

Section 20 of the act reads as follows: "The defendant in the affidavit of defense may raise any question of law, without answering the averments of fact in the statement of claim; and any question of law, so raised, may be set down for hearing, and disposed of by the court. If in the opinion of the court the decision of such question of law disposes of the whole or any part of the claim, the court may enter judgment for the defendant, or make such other order as may be just."

The plaintiff in this case claims to recover damages for personal injuries because of the failure of the defendant to erect a guard rail around a platform 3 by 6 feet erected in a private alley in the rear of the opera house building in the borough of Danville in this county. The facts upon which the plaintiff bases his right to recover as disclosed by the statement and amended statement are as follows:

(1) On and prior to February 17, 1917 (date of accident), the defendant was the owner of a four-story brick building at the northeast corner of Mill and Mahoning streets in the borough of Danville.

(2) The defendant rented a room on the ground floor in said building to Mrs. Jacobs for the purpose of conducting dancing classes and the holding of dances therein.

(3) During the time the room was so rented and occupied, and at the time of the accident, there existed a narrow private alley or passage-way in the rear of the building.

(4) A door opened from the rear of the room directly on a wooden platform about 3 by 6 feet extending across the private alley at a level of from 5 to 7 feet above the ground. The plat-

form was directly outside of the door and doorway in the rear of the room leased to Mrs. Jacobs, and was unguarded by railing or barrier of any kind.

(5) During the time dances were going on in the room, it was customary for the tenant to open said rear door, and for dancers and musicians and others attending to pass through the same, go upon, stand on, and temporarily occupy the said wooden platform.

(6) On the night of February 17, 1917, the plaintiff was employed as one of the musicians who played for the dance held that night in the room leased to Mrs. Jacobs. During an intermission between the dances he passed through said door and doorway, out on the said small wooden platform, and stepped off and was injured.

(7) The plaintiff was not familiar with the said small wooden platform, did not know of its existence, and had never been in the dance room before that night.

(8) Some one other than the plaintiff opened the door on the night of the accident, and during an intermission the plaintiff walked out through the open door on the little wooden platform. He could not see the ends thereof because of the darkness of the night, and he walked off of the platform and was injured.

Upon this statement of facts the defendant contends in the affidavit of defense that the plaintiff is not entitled to recover: (1) Because the statement does not show any liability on the part of the defendant, entitling the plaintiff to recover the damages claimed. (2) Because the statement does not aver any negligence upon the part of the defendant, making him liable for the damages claimed. (3) Because the statement shows no cause of action against the defendant.

Upon the argument on the part of the plaintiff it was contended that the defendant rented his room for a dance hall, knowing that it would be used for such purpose; that it had a doorway in the rear opening upon the narrow, unguarded and unlighted platform; that if attendants upon dances passed through the doorway and attempted to stand on the platform in the nighttime they were in danger of stepping off of the same by reason of its being unguarded and unlighted; that he knew that the opening of such a door, and the passing out on this platform by those attending the dance, was the usual, ordinary, and probable act to be expected and anticipated; that dancers or musicians engaged in violent exercise in a heated room would open this rear door, and during intermissions step out on the platform to temporarily occupy the same for air and relaxation, and this was such a natural, reasonable, and probable use of the premises as should have been foreseen and anticipated, and the danger incident thereto guarded against, and the defendant, having failed to do so, was guilty of negligence.

On the other hand, on the part of the defendant it was contended that the plaintiff is not entitled to recover for the following reasons: (1) Because no negligence is alleged or shown; that the statement nowhere shows any negligence on the part of the defendant which would entitle the plaintiff to recover; that the room was rented as shown by the third paragraph of the statement to Mrs. Jacobs; that the defendant landlord owed no duty outside of the room to third parties, the patrons of his tenant; that the private alley or passageway in the rear of the building, paved with cobblestones, was no part of the room leased; and that the lease gave the tenant no right to the said alley or passageway; and (2) because the plaintiff's statement clearly shows and convicts him of contributory negligence.

[1] As the court views this case, the plaintiff's contributory negligence as disclosed by his statement is decisive. In the trial of a negligence case, where damages are claimed for per-

sonal injuries, the plaintiff is not required to disprove contributory negligence, but only to make out a case clear of contributory negligence. If he fails to make out a case clear of contributory negligence, a verdict should be directed for the defendant. The universal rule is that, if negligence on the part of the person injured contributed to the injury, he is not entitled to recover therefor; and the rule applies, although the contributory negligence is of a negative character, such as a lack of vigilance. 29 Cyc. 507.

[2] In the opinion of the court the thirteenth, fourteenth, fifteenth, and sixteenth paragraphs of the plaintiff's statement clearly convict him of contributory negligence. He was employed as one of the musicians to play for the dance on the night of the accident; he had never previously attended any of the dances held in the room leased to Mrs. Jacobs; he did not know of the existence of the little 3 by 6 foot wooden platform erected across the private alley or passageway in the rear of the building. Some one other than the plaintiff opened the door earlier in the evening on the night of the accident, and the plaintiff, a total stranger to the place and surroundings, walked out through the doorway in the darkness of the night on the little wooden platform, and because he could not see the ends of the platform he stepped off and was injured.

In *Sweeny, Appellant, v. Barrett*, 151 Pa. 600, 25 Atl. 143, the syllabus of the case reads: "In an action for damages for personal injuries, a nonsuit is properly entered, where it appears that plaintiff, on a dark night, stepped from the rear door of the saloon leased to the defendant with the intention of going onto a lot with which he was unfamiliar, and, turning as he stepped out, fell down an outside open stairway leading to a cellar; there being no evidence that the stairway was built in an improper or unskillful manner."

In *Johnson v. Wilcox*, 135 Pa. 217, 19 Atl. 939, it was held that where a plaintiff, while on his way to a dance room in the third story of a building having a safe entrance by a well-lighted hall and stairway, stepped aside through a door on the second floor out in the dark, upon a platform which he thought was protected by a railing, but fell and was injured, was guilty of such contributory negligence that in an action against the owner of the building it was proper to direct a verdict for the defendant.

The injury of which the plaintiff complains in this case was so clearly the result of his own carelessness or negligence that he is not entitled to recover. He did not even know of the existence of the platform as he walked out through the open door in the darkness of the night and stepped therefrom.

Defendant filed an affidavit of defense in the nature of a demurrer. The lower court entered judgment for the defendant.

Argued before BROWN, C. J., and POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

Fred Ikeler and H. R. Stees, both of Bloomsburg, for appellant. Russell Duane, of Philadelphia, and H. M. Hinckley, of Danville, for appellee.

PER CURIAM. The correct conclusion of the learned court below was that it clearly appears from plaintiff's statement of his cause of action that the injuries he sustained were due to his carelessness or negligence, and the judgment, which was properly entered under Act May 14, 1915 (P. L. 483), is affirmed.

(261 Pa. 280)

DE NARDO v. STEPHENS-JACKSON CO.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. NEGLIGENCE ⇨184(11)—CAUSE OF INJURY—EVIDENCE.

Where the evidence points to a certain cause for an accident rendering defendant liable, the plaintiff will not be denied redress because there may be some other possible cause.

2. MASTER AND SERVANT ⇨118(9)—INJURIES TO SERVANT—SAFE TOOLS.

The operation of a quarry is a hazardous business, and it is the operator's duty to furnish such tools as will, so far as is reasonably practicable, protect his employes from danger in blasting.

3. MASTER AND SERVANT ⇨137(1)—INJURIES TO SERVANT—USE OF EXPLOSIVES.

In the employment of powder or other explosives in a quarry, it is the duty of the master to exercise care commensurate with the danger to be reasonably anticipated, and, if he employs a defective system as a result of which the workmen are not adequately protected, he is liable for injuries to one of them from an explosion.

4. MASTER AND SERVANT ⇨97(2)—INJURIES TO SERVANT—DANGEROUS APPLIANCES.

A master who places in the hands of an employe a dangerous article knowing that it is likely to produce injury is liable for natural consequences.

5. MASTER AND SERVANT ⇨219(1)—ASSUMPTION OF RISK—INJURY TO EMPLOYE.

The rule as to assumption of risk does not apply where the danger is hidden or unknown to the employe.

6. MASTER AND SERVANT ⇨236(19)—INJURIES TO SERVANT—EXPLOSIVES—QUESTION FOR JURY.

Where a quarry owner permitted an illiterate foreign laborer, who was not familiar with quarrying methods, to use an iron bar to tamp the holes containing explosives, and failed to supply him with a wooden rod or other safe implement, the question of negligence was for the jury.

7. MASTER AND SERVANT ⇨289(10)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an illiterate foreign laborer not familiar with quarrying methods was guilty of contributory negligence in using an iron rod in tamping a hole loaded with explosives held, on the evidence, for the jury.

8. MASTER AND SERVANT ⇨238(11)—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether an illiterate foreign laborer not familiar with quarrying methods assumed the risk of injury from an explosion while he was tamping a loaded hole with an iron bar, the master not having supplied a wooden rod or other safe implement, held a question for the jury.

9. MASTER AND SERVANT ⇨108(1)—INJURIES TO SERVANT—DEFECTIVE TOOLS—BY WHOM SUPPLIED.

Where an illiterate foreign laborer, without knowledge of methods of quarrying, was injured by an explosion while tamping a loaded hole with an iron bar, that being the only implement furnished to him, the master was liable, though he did not supply the particular bar, it having been the practice in the quarry to use iron bars for that purpose.

Appeal from Court of Common Pleas, Northampton County.

Action by James De Nardo against Ste-

phens-Jackson Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKE, FRAZER, and WALLING, JJ.

W. H. Kirkpatrick, of Easton, for appellant. Robert A. Stotz, of Easton, for appellee.

WALLING, J. Plaintiff, an Italian laborer, was employed by defendant in its business of mining slate rock, and was injured January 7, 1915, by the premature explosion of a blast. The business required a large amount of blasting, and plaintiff had been engaged seven years at that work for defendant. He was called a "hole man," and his work was to load the holes after they had been drilled. He also performed other duties in this mine, where he began work when a boy. On the day in question a hole three-fourths of an inch in diameter had been drilled to a depth of three and one-half feet, and plaintiff proceeded to load it by putting in blasting powder until the hole was filled to within about six inches of the surface, then he inserted the fuse and put in some hemp rope. After this he took an iron tamping bar, about eight inches long, placed it in the hole, and struck it a light blow with a metal hammer; then removed the bar, put in some soil or scrap, replaced the bar, and struck it another light blow with the hammer, when the blast exploded, causing the injury complained of. Prior to the accident the only tool used in this mine for tamping was an iron bar similar to that above described. These bars were picked up by the workmen around the mine, and on one occasion a fellow employe of plaintiff had made three of them, including the one here in question, by cutting up an iron rod found in the mine. Defendant knowingly permitted the tamping to be done with the iron bars and failed to supply any wooden rods or other implements for that purpose. The evidence tended to show that wooden rods were in common use for that purpose in other mines, and were safer, because they absorbed the shock and would not create sparks or strike fire by contact with the rock. An expert witness expressed the opinion that the use of the iron bar caused the explosion, which, in his opinion, was the result of a spark or possibly of concussion. It appears from the testimony that powder will sometimes adhere to the rough edges of the drilled hole, by which a spark at the top may be carried down and cause an explosion, or it may be caused by concussion as a result of a blow on the iron bar. Other possible causes are mentioned. The jury, to whom the question was referred, found that the accident resulted from the use of the iron bar, and charged the defendant with negligence. A jury cannot be permitted to guess at the cause of an

accident, but here the finding is supported by some competent testimony.

[1] Where the evidence points to a certain cause for an accident, which would fasten liability upon the defendant, the plaintiff will not be denied redress because there may be some other possible cause for the accident. In such case the question is for the jury.

[2-4] The evidence justified a finding that iron bars were unsafe tools to use for tamping loads in blasting, and that defendant was negligent in making general use of them for that purpose. Defendant was engaged in a hazardous business, and it was its duty to furnish such tools as would, so far as reasonably practicable, protect its employes from danger. "In the employment of inherently dangerous agencies, such as powder or other explosives, it is the duty of the master to exercise a degree of care for the safety of the servant commensurate with the danger reasonably to be anticipated. This rule is especially applicable to the plan or method of operation deliberately adopted by the master or his representatives. The master is liable if the injury to the servant is the result of a defective system not adequately protecting the workmen at the time of the explosion." 9 Ruling Case Law, p. 691. See, also, *Tissue v. Baltimore & Ohio R. R. Co.*, 112 Pa. 91, 3 Atl. 667, 56 Am. Rep. 310. So far as relates to defendant's negligence it is not important who supplied the particular bar in question, as, by the method in use for years in this mine, all the tamping was done by iron bars. The company's negligence resulted from the unsafe method of using and authorizing the use of iron bars for that purpose. "And one who places in the hands of or authorizes the use of by another person of a dangerous instrument or article under such circumstances that he has reason to know it is likely to produce injury is liable for natural consequences." 29 Cyc. 460. And see *Mahoney v. Cayuga Lake Cement Co.*, 208 N. Y. 164, 101 N. E. 802.

[5] As plaintiff had been doing the same work for seven years, it is urged that he assumed the risk. This contention is not without force. However, he was an illiterate foreign laborer, had never been employed in any other mine, and, so far as appears, had no knowledge of blasting except as done by defendant. He had never been warned of the danger, and might assume that the employer had taken proper precautions for his safety. Under such circumstances the question of assumption of risk was for the jury, as it always is where the facts or inferences are in doubt. See 18 Ruling Case Law, p. 692. The rule as to assumption of risk does not apply where the danger is hidden and unknown to the employe.

[6-9] As the court below properly says:

"In the absence of any testimony to the effect that plaintiff had knowledge that an iron tamping bar was an improper tool to use and

one which was not in common and ordinary use by other companies engaged in the same line of business, the court cannot hold that the plaintiff was charged in this respect with the assumption of the risk."

So far as appears no similar accident had occurred at this mine, and the danger was not so obvious and immediate as to convict plaintiff of contributory negligence as a matter of law, merely because he remained at his work. Whether he was guilty of such negligence as matter of fact, under all the evidence, was for the jury. No case similar to this has been cited from our own state, and elsewhere there is some lack of uniformity in the decisions; but the conclusion of the court below seems well founded and free from error. Under like circumstances a recovery was sustained in the well-considered case of *Ohio Valley Ry. Co. v. McKinley* (Ky.) 33 S. W. 186. See, also, *Pitts & Hankins v. Wells* (Ky.) 101 S. W. 1192. *King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507, cited by appellant, is distinguishable from the present case. There plaintiff was intelligent, well educated, and had done like work in different mines. That decision was by a divided court, but, if accepted as authority, it would not control this case.

The assignments of error are overruled, and the judgment is affirmed.

(361 Pa. 269)

IN RE MORAN'S ESTATE.

Appeal of DUFFY.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. EXECUTORS AND ADMINISTRATORS §=93(1) —UNLAWFUL CONTINUANCE OF DECEDENT'S BUSINESS—CLAIM FOR REIMBURSEMENT.

Where personal representative of deceased, a liquor dealer, continues deceased's business without obtaining a transfer of the license, the continuing sale is a violation of law, by which no claim to reimbursement is acquired, if loss results therefrom.

2. EXECUTORS AND ADMINISTRATORS §=93(1) —CONTINUANCE OF DECEASED'S BUSINESS—LIABILITY OF EXECUTOR.

Where will gives no authority to continue decedent's business, but the administrator does so, the gain, if any, belongs to the estate, while the loss falls on him.

3. EXECUTORS AND ADMINISTRATORS §=482—PROSECUTION OF DECEDENT'S BUSINESS—LIABILITIES.

Where administrator continues decedent's business as a liquor dealer, and incurs certain expenses in the sale of eatables, but credits the estate with the amount received from such sale, it is error to surcharge the accountant.

4. EXECUTORS AND ADMINISTRATORS §=281—PAYMENT OF CERTAIN CREDITORS—INSOLVENCY OF ESTATE.

An administrator, who made advance payments to certain general creditors in full, to the exclusion of others, was properly surcharged with the amount of such payments, where the fund was not sufficient to pay all the creditors in full, with the right to take the place of creditors so paid and prorate with those unpaid in the funds for distribution.

5. EXECUTORS AND ADMINISTRATORS \rightarrow 477—ACCOUNTING OF ADMINISTRATOR—RENTS OF REALTY.

A charge for rent received by an administratrix from real estate is properly stricken from her account, as the real estate had no proper place therein, except as authorized by will, or where sold for payment of debts.

6. EXECUTORS AND ADMINISTRATORS \rightarrow 483—ACCOUNT — DISBURSEMENTS AFFECTING REALTY.

Disbursements on account of real estate should not be carried into the administrator's account.

Appeal from Orphans' Court, Lackawanna County.

In the matter of the estate of Patrick F. Moran, deceased. From a decree dismissing exceptions to adjudication, Thomas P. Duffy, executor of Daisy M. Moran, administratrix, appeals. Modified and affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and WALLING, JJ.

Thomas P. Duffy and Joseph F. Gilroy, both of Scranton, for appellant. William J. Fitzgerald and Charles P. O'Malley, both of Scranton, for appellee.

WALLING, J. This is an appeal on behalf of accountant from an adjudication on exceptions to an administration account. Patrick F. Moran died testate on April 13, 1913, leaving a widow, Daisy M. Moran, but no children. Letters of administration with the will annexed were granted to the widow, who took charge of the estate. Mr. Moran conducted a licensed hotel in Scranton; his license and lease of the hotel building expiring April, 1914. The administratrix conducted the place as a licensed hotel, until she sold the property, which included the furniture, fixtures, and stock of liquors, to an owner of the building at private sale in January, 1914, for \$2,000. The property so sold was appraised at \$3,026.25; but owing to the approaching expiration of the lease, it was unsalable to an outside customer. So far as appears, the sale was for the best interest of the estate, and the accountant claims credit for \$1,026.25, as a loss on the sale of that property, which was allowed by the orphans' court. The correctness thereof is not before us, as the appeal is on behalf of the accountant only. Probably by mistake, such credit is stated in the adjudication as \$756.25, instead of the correct amount. The error assigned as to that is sustained, and the credit is allowed at the full amount of \$1,026.25.

[1, 2] In the conduct of the hotel Mrs. Moran expended \$9,786.79 and received \$8,726, sustaining a net loss of \$1,060.79, for which she claims credit in the account. This was properly disallowed. The will gives no authority to continue the business, and as a general rule in such case the executor or administrator may not properly do so; when he does, the gain, if any, belongs to the es-

tate, while the loss falls upon him. Allam's Estate, 199 Pa. 573, 583, 49 Atl. 252. It was Mrs. Moran's duty to make disposition of the property for the best price obtainable. There was no transfer of the license, and the continued sale of liquor there was a violation of law, by which she acquired no legal or equitable claim to reimbursement. See Grimm's Estate, 181 Pa. 233, 37 Atl. 403; Buck's Estate, 185 Pa. 57, 39 Atl. 821, 64 Am. St. Rep. 816.

[3] She kept a daily account of expenditures for eatables, amounting in all to \$1,665.65, for which she claims credit; this is disallowed in the adjudication. It should be allowed. The estate is credited with the amount received for meals and lunches, and therefore should be charged with the expense of keeping up that branch of the business. To so hold saves the estate harmless, without injustice to accountant. The rule requires an executor, who unsuccessfully continues testator's business without authority, to stand the loss; while the effect of the adjudication in this case is that, in addition to the loss, accountant must pay the estate \$1,665.65. The error assigned as to that is sustained and the credit allowed.

[4] This is a partial account, and before it was filed the administratrix had expended \$3,965.22 by paying in full certain creditors of the estate, while she had paid nothing to other creditors of equal rank. As the fund was not sufficient to pay all the creditors in full, the court below properly surcharged her with that amount, without prejudice; that is she takes the place of the creditors so paid and prorates with those unpaid in the fund for distribution. In the end accountant will lose nothing thereby, should the estate prove solvent. An administrator has no right to make advance payment to certain general creditors in full to the exclusion of others, and in doing so takes the risk of the solvency of the estate.

[5, 6] In the account as filed the administratrix was charged with \$600 rent received by her from real estate and credited with \$268.13 expended thereon. As we gather from the record, the court below struck out this debit and credit, and rightly so, as real estate has no proper place in an administration account, except as authorized by will or when sold for payment of debts. See Fross' Appeal, 105 Pa. 253.

The administrator is charged in the account with the \$3,026.25, as the inventory value of the personal property in the hotel, and also with the \$2,000 received from its sale, and is credited with the \$1,026.25 for the loss, apparently making a double charge against accountant of the \$2,000. However, this question is not raised, nor do we decide it; but, as the matter appears on the face of the record, if an error, possibly it can be corrected by bill of review. The account

was filed April 8, 1914, Mrs. Moran died four days thereafter, and this appeal is by her executor.

The decree of the orphans' court, as modified by this opinion, is affirmed at the cost of the Patrick F. Moran estate.

(281 Pa. 304)

BELL v. JACOBS.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. MASTER AND SERVANT ⇨300—COLLISION WITH AUTOMOBILE—LIABILITY OF OWNER.

The owner of a car is not relieved of responsibility because he is not personally at the wheel, where another is driving with his permission, especially where the owner tacitly assents to the manner in which the car is driven.

2. MUNICIPAL CORPORATIONS ⇨706(4)—COLLISION WITH AUTOMOBILE—VIOLATION OF ORDINANCE—NEGLIGENCE.

A city ordinance requiring vehicles to keep to the right of the center of the street in the direction in which they are going may be considered in connection with the evidence of the case on the question of the evidence of negligence of the driver of the car.

3. MUNICIPAL CORPORATIONS ⇨702—MOTOR VEHICLES—OVERTAKING CAR.

Act July 7, 1913 (P. L. 872), requiring driver of motor vehicle, when overtaken, to turn reasonably to the right of the center of the highway, allowing the other vehicle free passage to the left, does not change the rule of the road, or conflict with ordinance requiring approaching vehicles to pass to the right.

4. TRIAL ⇨191(1) — INSTRUCTIONS — ASSUMPTION AS TO FACTS.

A request for an instruction, assuming the existence of a disputed fact, is properly denied.

Appeal from Court of Common Pleas, Berks County.

Action by Mattie M. Bell against William R. Jacobs. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKE, FRAZER, and WALLING, JJ.

Cyrus G. Derr and Oliver M. Wolff, both of Reading, for appellant. William Kerper Stevens, of Reading, for appellee.

WALLING, J. This is an action of trespass for alleged negligence resulting in the death of plaintiff's husband. Spring street extends through the city of Reading in an easterly and westerly direction, and passes under the tracks of the Philadelphia & Reading Railway by a right-angle subway. The paved roadway of the street is of the width of 42 feet and descends sharply to the east as you approach the subway from the west. On May 20, 1916, plaintiff's husband rode his motorcycle west on this street, and, after passing through the subway, met defendant's automobile coming down the grade, and the vehicles collided, causing the death of Mr. Bell. The evidence was conflicting. That for plaintiff tended to show that the automobile was moving at high speed, and on the

left or north side of the street, and that the deceased was driving carefully, and kept to his right, according to the rule of the road. Evidence for defendant (appellant) was to the effect that his car was moving at moderate speed and on the right side of the road, and that the deceased came at high speed, with his head down and moving in a zigzag course, and ran into defendant's car on the south side of the street, after it had come to a stop. Under the charge of the court, the verdict established the truth of plaintiff's contention. It was in the daytime, and the vehicles were in plain sight of each other for over 300 feet, so the collision could not be termed unavoidable; but whether it resulted from the fault of the deceased, or of the defendant, or of both, depended upon conflicting evidence and was for the jury. Each had the right to assume that the other would use due care; and it could not be declared as a matter of law that the deceased was, or that the defendant was not, guilty of negligence.

[1] Defendant had secured Mr. Fink, an expert workman, to make some repairs to the automobile, and, before leaving it at the repair shop, they were taking it for a drive to see what was needed. Fink was acting as chauffeur, and defendant sat beside him, but made no request or suggestion as to the driving of the car. It was defendant's car, and he acquiesced in what Fink, who was acting for him, did, and cannot be excused because he was not personally at the wheel. A man out riding in his car is not relieved from responsibility for its management because, with his permission, another is acting as driver; and this is especially so where the owner tacitly assents to the manner in which the car is driven. There is a presumption, not here rebutted, that an owner present in his car has power to control it.

There were other elements of negligence charged, aside from being on the wrong side of the street; hence the trial judge properly refused to charge that the verdict must be for the defendant, if the jury believed he was on the south (right) side of the street at the time of the accident. One may not drive recklessly, or with undue speed, even on his own side of the street, nor necessarily escape liability for an accident because of that fact. It is quite possible that defendant came down on the north side of the street, and turned to the south side too late to avoid the accident.

[2-4] It was a controverted question which vehicle collided with the other; therefore the points which assumed that the motorcycle ran into the automobile were properly declined. A request which assumes the existence of disputed facts cannot be granted. The city ordinance requiring all vehicles to keep to the right of the center of the street in the direction in which they are going was properly admitted in evidence. While such ordinance is not per se evidence of negligence,

It may be considered in connection with the evidence in the case. *Footte v. American Product Co.*, 195 Pa. 190, 45 Atl. 984, 49 L. R. A. 764, 78 Am. St. Rep. 806; *Lederman et ux. v. Penna. R. R.*, 165 Pa. 118, 80 Atl. 725, 44 Am. St. Rep. 644. Section 18 of the act of July 7, 1913 (P. L. 872) requiring the driver of a motor vehicle, when overtaken, to turn reasonably to the right of the center of the highway, allowing the other vehicle free passage to the left, does not change the rule of the road, nor conflict with the ordinance in question. A regulation requiring vehicles to keep to the right of the center of the street may be practicable in cities, but not in country districts, while the rule of turning out to the right applies to both. We will not review the action of the court below in refusing a new trial, except in case of manifest abuse of discretion.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 288)

LAUDENBERGER v. EASTON TRANSIT CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

STREET RAILROADS — 99(14) — INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, a guest of the driver of an automobile, was guilty of contributory negligence, barring recovery for injuries received in a collision of the automobile with a street car at a crossing, where he paid no attention to the surroundings, although the street car was plainly visible, and neither the intestate the driver or the motorman saw the danger until it was too late to avert the collision.

Appeal from Court of Common Pleas, Northampton County.

Action by Isabella M. Laudenberger against the Easton Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The facts appear in the following excerpt from the opinion of Stewart, J., in the common pleas sur defendant's motion for judgment n. o. v.:

This is a motion by defendant for judgment n. o. v. It appeared from the evidence in this case that the husband of the plaintiff was riding in an automobile with Martin Neeb and his son, Elvin Neeb. Martin Neeb owned the automobile, and was driving it, seated on the left-hand side of the automobile. Mr. Laudenberger was on the right of the driver, and in the back seat was Elvin Neeb. They were proceeding northwardly on the road known as the Wilson Crossing road. This road ran into and stopped at the Easton and Bethlehem state road. On the south side of the state road is the track of the Easton Transit Company, which was built very close to the property line. Along the state road towards the east at a very close distance on September 11, 1916, was a peach orchard which was in full leaf. This orchard also extended southwardly along the Wilson Crossing road, back nearly to the railroad track, which crossed the road, 800.5 feet south from the transit company's track. It was impossible for any one going along the Wilson Crossing road

towards the transit company's track to obtain a view of a car approaching from the east until he reached a point, 10, 12, or 15 feet from the track.

The undisputed evidence is that from a point on the transit company's track, where the center of the Wilson Crossing road intersects it, a person standing beside the south rail could see a car approaching from the east at a distance of 1,010 feet. At a distance of 322 feet from the transit company's tracks, on the Wilson road, there is a railroad warning sign, and on a telephone pole about 3½ feet from the south rail of the transit company's track, where the road runs into the state highway, there is a large transit company sign, with large letters on it, and the words, "Stop, Look, Listen." That is Exhibit No. 8 in the case. Two hundred feet west of the transit company's crossing is what is known as the Elliott House. There is a downward grade from east to west in the transit company's track for at least 760 feet, east from the crossing, varying in degree, but the highest grade is 8.33%. There is also a slight upward grade on the Wilson Crossing road, extending from a point about 10 or 15 feet to the transit company's track. At about 4:30 p. m. on a perfectly clear day Mr. Neeb drove his automobile along the Wilson Crossing road at a speed of 20 miles an hour, until he came within a point about 150 feet from the transit company's track, when he slackened down to about 8 to 10 miles an hour, when he threw on his power to go up the slight incline and to cross the tracks. He testified that he heard no whistle, and he also testified that he looked ahead for the crossing. He did not stop at any time, and while the auto was on the track it was struck by a trolley car which was proceeding from the east at a speed, according to the motorman's testimony, of from 18 to 20 miles an hour. One of the witnesses, however, states that they were going, to the best of his judgment, 80 to 35 miles an hour. Mr. Laudenberger was instantly killed. Both the motorman and Mr. Neeb testified that they saw each other within a very short space; the car being not over 20 feet from the point of collision, and the automobile from 12 to 15 feet. We are here endeavoring to accurately present the situation, but the exact distances will appear in the testimony, which we shall quote hereafter.

The learned counsel for the defendant insists that there is no evidence that the defendant company was negligent; that a preponderance of the evidence shows that the motorman blew his whistle at a proper place; that both he and the conductor so testified; that it was plainly heard by the boy, Brunell, who was right at the crossing, and by Miss Hammann, who was in an automobile; that plaintiff's testimony is purely negative; that the evidence discloses that the motorman was standing in a proper position, and that he threw on the brakes as soon as he saw the automobile; and that there was no negligence in the rate of speed at which the car was traveling. We do not propose to discuss these questions, because a careful examination of the entire testimony has convinced us that the other defense of contributory negligence is conclusive of the case. * * *

Dunlap v. Philadelphia Rapid Transit Co., 248 Pa. 130, 93 Atl. 873, is on all fours with this case. In that case Dunlap was killed. He was riding in an automobile with Beckman, its owner and driver. Beckman was a constable, and Dunlap was his deputy. They were transacting business in the city of Philadelphia. The negligence charged was excessive speed and failure to give warning. The collision occurred at a crossing of two streets. Beckman was a witness for the plaintiff, just as Neeb was here. Mr. Justice Frazer sums up the matter so fully

that we quote from his opinion as follows: "He further testified that plaintiff's husband said nothing as they approached Eighteenth street as to the likelihood of meeting an approaching car, nor made any effort to observe whether or not the track was clear, and that 'he was just simply sitting there looking.' Under these circumstances, was plaintiff's husband chargeable with negligence? As a general principle of law a passenger is not chargeable with the negligence of his carrier. That rule, however, does not relieve the passenger of the duty of exercising reasonable care to avoid danger. He is responsible for his acts of either omission or commission. In this case plaintiff's husband should be held to a somewhat higher degree of duty than a passenger for hire would be held. Beckman and plaintiff's husband were engaged in a common purpose, and had a common object in view, that of transacting business, in which both were interested. While Beckman's negligence should not be imputed to plaintiff's husband, the latter, however, was not relieved from all responsibility. It was incumbent on him to exercise proper care, and not sit quietly by and fail to see danger that was plainly imminent. *Deany v. Pennsylvania Railroad Company*, 129 Pa. 514 [18 Atl. 718, 6 L. R. A. 143, 16 Am. St. Rep. 733]; *Brommer v. Pennsylvania Railroad Company*, 179 Fed. Repr. 577 [103 C. C. A. 185, 29 L. R. A. (N. S.) 924]. He was as familiar with the neighborhood as Beckman, and undoubtedly saw the car tracks of defendant on Eighteenth street, and presumably was aware that a car might pass at any moment. Under such circumstances it was the duty of plaintiff's husband to at least have used his eyes in the proper direction and if he saw the car coming, as he undoubtedly would, warned Beckman of the danger. In not having done so, or made any effort to discharge a plain duty he owed to Beckman, as well as himself, he was chargeable with negligence, which contributed to and made the accident possible. Plaintiff therefore is not entitled to recover."

We are unable to see any difference between the principle of that case and the present case, and we were in error in permitting the jury to consider the question whether Mr. Laudenberger exercised reasonable care for his own safety, and whether he joined in testing a patent danger.

Verdict for plaintiff for \$3,000. The court subsequently entered judgment for defendant n. o. v. Error assigned was in entering judgment for defendant n. o. v.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Clayton J. Heermance, of New York City, and Kirkpatrick & Maxwell, of Easton, for appellant; Robert A. Stotz, of Easton, for appellee.

PER CURIAM. The judgment for the defendant non obstante verdicto was entered on the ground of the contributory negligence of the deceased. This was inevitable under the testimony, and defendant's tenth and eleventh points should have been affirmed. The learned trial judge so admits in his opinion granting defendant's motion for judgment and on so much of that opinion as points out that no distinction can be made between *Dunlap v. Philadelphia Rapid Transit Company*, 248 Pa. 130, 93 Atl. 873, and the present case, the judgment is affirmed.

(231 Pa. 201)

IN RE OLD FORGE BOROUGH'S CONTESTED ELECTION.

Appeal of TAROLI.

(Supreme Court of Pennsylvania. May 6, 1918.)

ELECTIONS — 295(1) — CONTEST — BALLOTS — EVIDENCE.

In a contest of election for a borough councilman, a decree declaring the election of a contestant held proper on the evidence.

Appeal from Court of Quarter Sessions, Lackawanna County.

In the matter of the contest of election of the office of councilman in the borough of Old Forge. From an order declaring Hugh B. Garvin legally elected, Sam Taroli appeals. Appeal dismissed.

Edwards, P. J., filed the following opinion in the quarter sessions:

At the election held in the borough of Old Forge, in November, 1915, the returns from the Fifth ward show that for the office of councilman of said ward Sam Taroli received 53 votes and Hugh B. Garvin 51, thus electing Taroli by a majority of 2 on the face of the returns. A contest was instituted on behalf of Garvin, and the only question raised in the petition to contest, as well as in the amended petition, related to certain informalities in the marking of the ballots for the said office.

The answer of the respondent denied the allegations of the petition, and charged that many votes were cast for Garvin which were illegal for various reasons other than irregularities in the marking of ballots. As to the defective markings of the ballot, the best evidence would be the ballots themselves. The ballot box was opened by order of the court, and the vote for councilman was counted in open court in the presence of one of the judges. Because of the averments of the answer attacking the qualifications of certain voters on the ground of non-residence, nonpayment of taxes, noncitizenship, etc., we appointed an examiner to take the testimony and to report to the court. The parties in interest appeared before the examiner. Counsel for the contestant offered in evidence the proceedings before Judge Edwards in the recount of the votes, and rested. The respondent's counsel examined many witnesses, and much testimony is found in the record. The final conclusion reached by the examiner is that the evidence failed in the proof of illegal votes on the grounds set forth in the answer. We concur in the conclusion reached by the examiner.

It appears, therefore, that the only question left in this case is the recount of the vote in open court. The recount was made on February 26, 1916. After some preliminary proof we made the following announcement from the bench:

"The ballot box having been opened and the ballots counted and examined, it appears that 91 ballots are valid, and counsel on neither side make any objection to the validity of the 91 ballots. Of these Taroli receives 46 votes, for councilman, and Garvin 45 votes. It also appears that there were in the box 4 ballots marked with a party mark, and also with a mark opposite the name of an individual for one office or another, and these 4 ballots are declared void, leaving for further examination 13 ballots, which are objected to on one side or the other. The court orders that the ballot box be closed and sealed and delivered to the sheriff, to be retained in his custody until the further order of the court. The 13 ballots which are yet to be

examined, and about which there is a dispute on one side or the other, will be sealed and placed in the custody of the clerk of the court, and a later day will be fixed for argument in regard to these ballots and the examination of them."

The 13 ballots objected to on one side or the other are before us. We have numbered them consecutively from 1 to 13, inclusive. The following ballots are defectively marked: Nos. 3, 5, 8, 11, and 13, and cannot be counted for either candidate. Ballots Nos. 1, 2, 4, 6, 7, 9, and 12 are properly marked. Of these 8 good ballots 6 were cast for Garvin and 2 for Taroll. The tabulation of the total vote for councilman is as follows:

Number of ballots for councilman.....108
Defectively marked ballots..... 9

Total number of good ballots..... 99
—of which 51 were cast and are counted for Hugh B. Garvin and 48 for Sam Taroll. We therefore declare that Hugh B. Garvin was legally elected councilman of the Fifth ward in the borough of Old Forge at the general election held November 2, 1915, and we direct that the borough of Old Forge pay the costs of these proceedings.

The court decided that Hugh B. Garvin was legally elected councilman of the Fifth ward in the borough of Old Forge at the June election of November 2, 1915. Sam Taroll appealed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

John Memolo, of Scranton, for appellant.
A. A. Vosburg and Clarence Balentine, both of Scranton, for appellee.

PER OURIAM. This appeal is dismissed, on the final opinion of the learned president judge of the court below, filed February 13, 1918; the costs here to be paid by the appellant.

(261 Pa. 184)

Application of PENNSYLVANIA STATE CAMP, PATRIOTIC ORDER OF AMERICANS.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. BENEFICIAL ASSOCIATIONS — APPLICATION FOR CHARTER.

Act April 6, 1893 (P. L. 7), providing an exclusive method for incorporation of societies operating on the supreme and subordinate lodge plan, petition of such a beneficial association to be incorporated under the general incorporation act (Act April 29, 1874) was properly refused.

2. STATUTES — CONSTRUCTION.

Where two acts are in *pari materia* and passed at the same session of the Legislature, they are construed with reference to each other.

Appeal from Court of Common Pleas, Berks County.

Application by the Pennsylvania State Camp, Patriotic Order of Americans, for a charter. From an order of the court of common pleas, refusing the application, petitioner appeals. Appeal dismissed.

Endlich, P. J., filed the following opinion in the common pleas:

This is an application for the incorporation of a beneficial organization with power to create subordinate lodges. It is made under and in conformity with the provisions of the General Incorporation Act of 1874 (P. L. 73) and its supplements. The question is whether it is grantable under these enactments, or whether it ought to be made under and in conformity with the act of April 6, 1893 (P. L. 10), differing in a variety of essential details from those prescribed by the former laws.

[1] As far back as 1890 it was pointed out by the Supreme Court, in *Com. v. Equitable Ben. Ass'n*, 137 Pa. 412, 18 Atl. 1112, that the beneficial societies authorized to be incorporated by the act of 1874 were the kind of local beneficial associations existing and well understood at the time. And in January, 1896, it was decided by Judge Simonton, in *Com. v. Order of Vesta*, 2 Pa. Dist. R. 254, that, whilst local beneficial societies might be incorporated under the act of 1874, the latter did not authorize the incorporation of beneficial societies operating on the supreme and subordinate lodge plan. Possibly with a view to meeting the effect of this decision and conferring the power denied by it, the act of April 6, 1893 (P. L. 7), was passed, "defining fraternal and relief societies and their status, authorizing them to create subordinate lodges," etc., and applying to "any association * * * now or hereafter formed or organized and carried on for the sole benefit of its members," etc. Assuming the validity of this legislation, it would, standing alone, doubtless have affected beneficial societies thereafter erected under the act of 1874. But on the same day was approved another statute, Act April 6, 1893 (P. L. 10), "regulating the organization and incorporation of secret fraternal beneficial societies, orders or associations and protecting the rights of members therein"—a statute, which expressly gives the power to operate through supreme and subordinate lodges, and which, as pointed out by Judge Sulsberger, in *Lady Foresters of America*, 18 Dist. Pa. R. 790, embodies a complete system for the incorporation of such societies, and is not an amendment or supplement to the general incorporation law of 1874.

[2] The two enactments of 1893, being in *pari materia*, and passed at the same legislative session, are, of course, to be interpreted with reference to each other. *White v. Meadville*, 177 Pa. 643, 35 Atl. 695, 84 L. R. A. 567. If, therefore, the second enactment (P. L. 10) provides an exclusive method of incorporation of societies operating on the lodge plan, the direction of the first enactment (P. L. 7) that it apply to beneficial societies "hereafter formed," etc., must be understood as contemplating such societies formed, etc., under the act of April 6, 1893 (P. L. 10). Now it was held in *Rhoads v. Hoernerstown B. & S. Ass'n*, 82 Pa. 180, following *Johnston's Estate*, 33 Pa. 511 (relating to statutes revising the subject-matter of earlier ones and evidently intended as substitutes for them), and *Gwinner v. Lehigh & D. G. R. R. Co.*, 55 Pa. 126 (declaring that acts granting a right conditioned on different things are inconsistent and that, to the extent of such inconsistency, the later supersedes the earlier), and in turn followed by many other decisions, that a later statute, providing a complete system for the incorporation and regulation of certain corporations upon conditions differing from those prescribed by a previous statute, necessarily takes the place of the latter and affords an exclusive method of incorporation of such associations thereafter. It is not apparent how the operation of this principle with respect to the statutes here in question can be denied. The effect of it seems clearly to be that the incorporation of a beneficial society, to be conducted on the lodge plan, must be under the act of 1893.

Nor has any adjudication even impliedly to the contrary been pointed out or come to our notice. In Derry Council Order U. A. M. of Hummelstown, Pa., v. State Council, 197 Pa. 413, 47 Atl. 208, 80 Am. St. Rep. 838, where the incorporation, decreed April 10, 1893, was under the act of 1874, the question does not appear to have been mooted—perhaps because it was not conceived as legitimately arising. The decision in *Re Court Manayunk*, No. 52, *Foresters of America*, 24 Pa. Dist. R. 331, goes only to the extent of holding that a pre-existing unincorporated local subordinate lodge may be incorporated under the act of 1874, as distinguished from the creation of a new organization with power to establish subordinate bodies. Finally, when in *Lady Foresters of America*, 18 Pa. Dist. R. 780, already referred to, Judge Sulzberger intimates that the applicants for incorporation might choose whether to proceed under the act of 1874 or that of 1893, the proper understanding of that remark would seem to be that they might ask for incorporation as a purely local concern under the earlier statute, or as one operating on the lodge system under the later statute. The proviso in section 7 that the act shall not apply to incorporated or unincorporated societies not accepting it, nor be understood as requiring them to accept or be incorporated under it, evidently refers to societies then existing, and has no bearing upon the method of incorporation to be pursued in the case of newly formed bodies. It seems to be in that sense that the proviso is adverted to in *Court Manayunk*, No. 52, *Foresters of America*, 24 Pa. Dist. R. 331, above cited.

Thus, without laying any stress upon the past rulings of this court on the question presented, we are led to the conclusion that we are obliged, however reluctantly, to refuse this application, because of its nonconformity with the requirements of the act of 1893.

The court refused the application. The applicant appealed. Error assigned was the order of the court.

Argued before BROWN, O. J., and POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

Bertram D. Bearick, of Philadelphia, for appellants.

PER CURIAM. This appeal is dismissed, at appellant's costs, on the opinion of the learned court below refusing the application for a charter.

(261 Pa. 232)

SWARTZ v. BIXLER et al.

(Supreme Court of Pennsylvania. March 6, 1918.)

LANDLORD AND TENANT §76(2)—LEASE TO FIRM—COVENANTS AGAINST UNDERLETTING—DEATH OF PARTNER.

Where lease made to three partners provides for forfeiture on assignment or underletting, and one lessee dies, and surviving lessees purchase his interest from his executors, covenant against assignment or underletting is not broken.

Appeal from Court of Common Pleas, Northampton County.

Action by Mark T. Swartz against Fannie T. Bixler and Arthur B. Bixler, individually and as partners trading as A. B. Bixler &

Co. Judgment for defendants, and plaintiff appeals. Affirmed.

McKean, J., filed the following opinion in the common pleas:

The plaintiff in the above-stated case brought an action of ejectment to recover premises demised by his predecessor in title unto Fannie T. Bixler, Arthur B. Bixler, and Samuel P. Ludwig, copartners doing business as "the C. W. Bixler Company." It was agreed between the parties that trial by jury should be dispensed with, and that decision should be submitted to the court in accordance with the act of assembly entitled "An act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," approved April 22, 1874 (P. L. 100). The essential facts submitted by the parties, upon which the conclusions of law must be based, are not disputed. The requests for findings of facts and requests for findings of law, together with the court's replies thereto, are filed herewith and made a part of this opinion. From the undisputed facts it appears that the Northampton Trust Company, trustee under the will of Charles Pomp, made an agreement of leasing with Fannie T. Bixler, Arthur B. Bixler, and Samuel P. Ludwig, copartners doing business as "the C. W. Bixler Company," on the 6th day of July, 1911, for the premises described therein, located at the northwest corner of Fourth and Northampton streets, in the city of Easton, Pa. Mark T. Swartz, the above-named plaintiff, on the 18th day of May, 1916, acquired title to said premises subject to the lease of defendants. Samuel P. Ludwig, one of the lessees, died on the 15th day of June, 1916. Plaintiff received and accepted, on the 1st day of August, 1916, the rent due from the surviving tenants for the quarter annual period ending on that day. On the next quarter annual period, to wit, November 1, 1916, the rent then due was tendered to plaintiff and refused by him. The lease contains the following covenant: "And the said parties of the second part also agree not to sublet the said demised premises, or any portion thereof, or to assign this lease, either by themselves, judicial sale, operation of law, or otherwise, without permission in writing to that effect first had and obtained from the said party of the first part." Another clause in the lease provides: "This agreement shall be binding upon the executors, administrators, successors, or assigns of the parties hereto." It further appeared that letters testamentary on the last will and testament of Samuel P. Ludwig, deceased, were granted to Etta Ludwig on the 28th day of June, 1916, and that on the 15th day of September, 1916, the interest of Samuel P. Ludwig in the copartnership of the C. W. Bixler Company was purchased by Arthur B. Bixler, one of the surviving copartners, and that the firm name was changed to that of A. B. Bixler & Co. An inventory of the firm's assets, from which the interest of Samuel P. Ludwig was ascertained in accordance with the terms of the articles of copartnership, did not include any interest in the lease in question, nor was any assignment of Samuel P. Ludwig's interest in said lease made.

Plaintiff urges the court that judgment should be entered in his favor for the following reasons:

(a) The death of Samuel P. Ludwig and the passing of his interest to Etta Ludwig, the personal representative of Samuel P. Ludwig, deceased, constituted such an assignment of the lease as violated the covenant "not to sublet the said demised premises, or any portion thereof, or to assign this lease, either by themselves, judicial sale, operation of law, or otherwise, without permission in writing to that effect first had and obtained from the said party of the first part."

(b) The sale of the interest of Samuel P. Ludwig, deceased, in said partnership to Arthur B. Bixler constituted such a transfer or assignment as violated the covenant "not to assign this lease, either by themselves, judicial sale, operation of law, or otherwise."

Plaintiff's contention is in effect an attempt to enforce a forfeiture under the clause prohibiting an assignment of the lease without permission in writing first obtained of the lessor. Upon the theory that the lease was a part of the partnership assets, and when the interest of Samuel P. Ludwig in the partnership assets passed first on the death of Samuel P. Ludwig to his personal representative it was an assignment by operation of law, and when the interest of Samuel P. Ludwig in the firm was sold to Arthur B. Bixler it was an assignment of the lease by the act of the parties. The acts complained of by plaintiff in violation of the forfeiture clause in the lease did not bring any new member into the firm, nor was the business of the firm discontinued. The surviving partners retained their possession of the premises and continued the business under the firm name of A. B. Bixler & Co. There is no evidence of any assignment of the lease made by the executrix of Samuel P. Ludwig. An inventory was taken of the interest of Samuel P. Ludwig in accordance with the partnership agreement, and this interest was purchased by Arthur B. Bixler, one of the surviving partners, from the executrix of said decedent. This inventory did not include a valuation of the lease, and all that was transferred to Arthur B. Bixler was decedent's interest in the stock of goods contained in the store of the firm. The interest of Samuel P. Ludwig in the lease, so far as the evidence discloses, remains as it was at the time of his decease. It is not asserted that the lessees assigned this lease "by themselves." In order to effect an assignment of this lease, there must be some voluntary act on the part of the parties. "Covenants in restraint of assigning without license, though they prohibit the lessees from giving, granting or selling without license, the word 'assign' comprehending each of these modes of disposition, have ever been regarded with jealousy, to prevent the restraint from going beyond the express stipulation, and very easy modes have always been countenanced for defeating them. * * * Such assignments only without consent as are the voluntary act of the lessee amount to a breach of the covenant, and therefore the vesting of the term in the administrator of the lessee on his intestacy is no breach. * * *

The same law obtains with regard to its vesting in the executor." Platt on Leases, vol. 2, p. 250. It would have been possible for the parties to provide that in the event of the death of one or more of the parties the lease was to become null and void, or prohibit the continuance of the business by the survivors or survivor upon the death of one or more of the members of the firm. This was not done, and the court cannot write into the lease covenants of this character. Death dissolved the partnership, but it did not terminate the lease.

If it could be held, in accordance with the contention of plaintiff, that the death of Samuel P. Ludwig and the passing of his interest to Etta Ludwig, the personal representative of Samuel P. Ludwig, constituted such an assignment of the lease as violated the covenant "not to sublet the said demised premises, nor any portion thereof, or to assign this lease, by themselves, judicial sale, operation of law, or otherwise, without permission in writing to that effect first had and obtained from the said party

of the first part," then we are met by the payment of the rent, which was accepted and received by plaintiff on the 1st day of August, 1916, after the decease of Samuel P. Ludwig, and the granting of letters testamentary to Etta Ludwig, which would operate as a waiver on the breach. In 24 Cyc. 1861, it is said: "The acceptance by a landlord of rent which accrues after the breach of a condition contained in the lease is a waiver of the right to declare a forfeiture of the lease and re-enter because of such breach, provided the acceptance was with full knowledge upon the part of the landlord of the fact of the breach and all the circumstances thereof." The plaintiff testified that he knew of the death of Samuel P. Ludwig at the time of his decease. The legal construction of the lease in question must be obtained from a strict interpretation of the written intention of the parties therein expressed. The members of the firm of the O. W. Bixler Company consisted of the estate of C. W. Bixler, represented by the executors, Fannie T. Bixler and Arthur B. Bixler, Arthur B. Bixler individually, and Samuel P. Ludwig. The lessees named in the premises of the lease, containing the names of the parties and the date thereof, are Fannie T. Bixler, Arthur B. Bixler, and Samuel P. Ludwig, and they have signed in like manner in the execution of the lease. It is not material that the lease is also signed by "The O. W. Bixler Company, by Samuel P. Ludwig." The words after their names in the premises of the lease "copartners doing business as 'the O. W. Bixler Company,'" are descriptive, and have no significance, as throughout the entire agreement the parties are treated as individuals. So far as the lease is concerned they are tenants in common, and as such entitled to a unity of possession. The death of one of the lessees cannot destroy this unity of possession, nor could their unity of possession be destroyed, except by the joint act of the three tenants. It has not been asserted by the plaintiff, nor does the evidence disclose, that any written assignment has been made by the lessees which would affect their right of possession. In 2 Williams, Executors, 686, it is said: "If a lease be made for a term of years upon condition that, if the lessee shall assign his term without the assent of the lessor, it shall be lawful for the lessor to re-enter, the term, nevertheless, shall vest in the executor or administrator without any breach of the covenant." The facts presented in the case at bar do not establish a breach of the covenant whereby the plaintiff would be entitled to recover.

The court entered judgment for defendants. Plaintiff appealed. Errors assigned were in dismissing exceptions to findings of fact and conclusions of law and the judgment of the court.

Argued before BROWN, C. J., and STEWART, MOSCHIZSKER, FRAZER, and WALLING, JJ.

Calvin F. Smith and W. S. Kirkpatrick, both of Easton, for appellant. E. J. Fox and Evans & Beck, all of Easton, for appellees.

PER CURIAM. The judgment in this case is affirmed, on the opinion of the learned judge below, finding that the appellees were entitled to it.

(91 N. J. Law, 611)

STATE v. JOHNSON. (No. 18.)

(Court of Errors and Appeals of New Jersey.
June 17, 1918.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION \Leftrightarrow 159(2)—
AMENDMENT—POWER OF COURT.

Under section 44 of the Criminal Procedure Act (2 Comp. St. 1910, p. 1834), the court cannot by amendment make the indictment charge a crime when none is presented, or make it charge a crime different from that presented by the grand jury.

2. INDICTMENT AND INFORMATION \Leftrightarrow 159(2)—
AMENDMENT—POWER OF COURT.

The power of amendment of an indictment under section 44 of the Criminal Procedure Act is applicable to that class of cases where, on the face of the indictment, a specific criminal charge can be perceived, which fails to be effective only by means of an error which, looking at the charge and averments of the indictment, the court can clearly infer was a clerical error.

3. INDICTMENT AND INFORMATION \Leftrightarrow 159(2)—
AMENDMENT—SUBSTITUTION OF CHARGES.

An indictment based on section 166 of the Crimes Act (2 Comp. St. 1910, p. 1795) charged that defendant received \$2,547.54 of the goods and chattels of one A. C., well knowing said moneys, goods, and chattels to have been fraudulently converted, etc. *Held*, that an amendment by insertion of the word "moneys" immediately after statement of the amount, so as to read "\$2,547.54 of the moneys, goods, and chattels," etc., made no material change in the charge, as it was obvious that a charge of receiving of money fraudulently converted was originally intended, and appeared on the face of the indictment.

4. RECEIVING STOLEN GOODS \Leftrightarrow 2—CHECKS—
STATUTES.

Section 166 of the Crimes Act is violated by receiving and collecting checks on a lawyer's bank account of moneys belonging to his client, knowing the ownership of such moneys.

Swayze and Taylor, JJ., dissenting.

Error to Supreme Court.

Elwood Johnson was convicted of fraudulent conversion. His conviction was affirmed by the Supreme Court (90 N. J. Law, 21, 100 Atl. 242), and he brings error. Affirmed.

Halsted H. Wainwright, of Manasquan, for plaintiff in error. Charles F. Sexton, Prosecutor of Pleas, of Long Branch, for the State.

PARKER, J. The writ of error in this cause was dismissed for failure to comply with the rules (103 Atl. 187), and later reinstated on application of plaintiff in error, to the end that any meritorious questions existing might be considered.

So far as relates to points treated in the opinion of the Supreme Court, we agree with the views expressed by that court and adopt them as our own. But counsel for plaintiff in error urges that there were two points raised before the Supreme Court which it did not decide, and relies on them for a reversal here. The opinion below expressly states that the other errors assigned were not argued or briefed and that the court

considered them as abandoned. Such is the well-settled rule. And that an appellate court will ordinarily not consider points not raised in the court below is as well settled, except in cases of public policy or lack of jurisdiction over the subject-matter. *Dodd v. Una*, 40 N. J. Eq. 672, 713, 5 Atl. 155; *State v. Shupe*, 88 N. J. Law, 610, 97 Atl. 271; *McMichael v. Horay*, 90 N. J. Law, 142, 160 Atl. 205.

[1] One of the points now raised does bear on the matter of jurisdiction, viz. the amendment of the indictment, which is based on section 166 of the Crimes Act, quoted in the opinion below. It is claimed that as originally presented the indictment charged the receiving of goods and chattels, and not money; and that the trial court undertook by amendment to insert a charge of receiving money, thus giving the indictment an effect that it did not originally possess. If this point is well taken, there should be a reversal, because the well-recognized rule is that under section 44 of the Criminal Procedure Act the court cannot by amendment make the indictment charge a crime when none is presented, or charge a crime different from that presented by the grand jury. *State v. Flynn*, 76 N. J. Law, 473, 477, 72 Atl. 296, and cases cited; *State v. Unsworth*, 85 N. J. Law, 237, 240, 88 Atl. 1097. And if it charged a crime different from that originally presented and could not be so amended, the trial court was without jurisdiction over this part of the subject-matter. We proceed therefore to examine the indictment and the amendment to ascertain whether the point made has actual merit.

[3] The charge of the indictment is that the defendant on, etc., at, etc., within the jurisdiction of the court, \$2,547.54 or the goods and chattels of one A. O. before then feloniously, unlawfully, and fraudulently obtained, taken, and converted by one Charles Harvey, unlawfully and feloniously did receive and have, well knowing said moneys, goods, and chattels to have (been) feloniously, etc., taken and converted by said Charles Harvey, contrary to the form of the statute, etc. The amendment consisted simply of inserting the word "moneys" between the statement of the amount and the words "of the goods and chattels," so that it should read, at, etc., within the jurisdiction, etc., \$2,547.54 of the moneys, goods and chattels of one A. C., etc., thus making it conform to the later language "well knowing said moneys, goods and chattels" which appeared in the indictment as presented by the grand jury.

[2] We think this case is within the rule laid down in the Supreme Court case of *State v. Kern*, 51 N. J. Law, 259, 284, 17 Atl. 114, that the power of amendment may be held to apply to that class of cases where, on the face of the indictment, a specific criminal charge can be perceived, which fails to be

effective only by means of an error which, looking at the charges and averments of the indictment, the court can clearly infer was a clerical error. The argument is that defendant was charged, not with receiving \$2,547.54 of money, but with that amount of goods and chattels, and that it was without the power of the court to amend the indictment so as to charge him with receiving money. Conceding the lack of that power, we do not agree that the court attempted to exercise it. There is nothing in the section of the Crimes Act which says anything about the value of the goods, chattels, chose in action, or other valuable thing taken and converted, or which makes the value a test of the punishment; and in such cases allegations of value are unnecessary. 1 Bish. New Criminal Procedure, §§ 541, 567. The legitimate inference is therefore that the pleader meant receiving money in charging the receiving of a specific amount; and, if there were any doubt on this point, it is cleared up by the actual employment of the word "money" in the allegation of scienter. For these reasons we conclude that the amendment made no substantial change in the crime intended to be charged, and hence was a proper amendment to make.

[4] The other point is one which strictly need not be considered in view of the statement of the court below that it was not argued there. It is that the proof failed to show the identity of the money stolen with that received by the defendant. We think the proof was adequate on that point. It indicated that Harvey had certain funds of A. C. in his custody, which he placed in a special bank account opened for the purpose, and which account, and the checks drawn thereon, were earmarked so as to show the ownership by A. C. of the fund; that Johnson knew Harvey had received that money and what he had done with it; that Harvey owed Johnson money and could not pay; and that Harvey on the suggestion and solicitation of Johnson drew earmarked checks to Johnson against the fund which Johnson cashed or otherwise collected, he having promised Harvey that he would see that he was reimbursed so as to make the account good. It is indubitable that there was a fraudulent conversion by Harvey of the money represented by every check he drew to Johnson, and, as Johnson received it knowing its ownership, by the one transaction there was a conversion by Harvey and a receiving by Johnson in the sense contemplated by the statute. If the money had been in cash in Harvey's safe, and he took it out of the safe and handed it to Johnson, saying, "This belongs to A. C., but I will pay it to you for my own debt," the infraction of the statute would have been no more clear.

The judgment will be affirmed.

SWAYZE and TAYLOR, JJ., dissent.

EAST RIDGELAWN CEMETERY CO. v. FRANK et al.

(Court of Chancery of New Jersey. March 24, 1911.)

1. CEMETERIES ⇨5—ASSOCIATIONS—CERTIFICATES FOR SHARES OF PROCEEDS OF SALE.

A certificate issued by a cemetery association, to the effect that the holder is to receive a share of proceeds of sale of lots, is invalid, as unauthorized by Cemetery Act.

2. SPECIFIC PERFORMANCE ⇨64—REMEDY AT LAW.

Remedy for breach of agreement to cancel mortgages or to procure land to straighten lines is at law for damages, and not by specific performance.

3. SPECIFIC PERFORMANCE ⇨114(2)—BILL—STATUTE OF FRAUDS.

Bill for specific performance of agreement to convey land must show agreement is written.

4. SPECIFIC PERFORMANCE ⇨49(1)—CONSIDERATION.

Specific performance will not be granted of an agreement not founded on valuable consideration.

Suit by the East Ridgelawn Cemetery Company against Adam Frank and others. On demurrer to amended bill. Demurrer allowed.

John R. Hardin, of Newark, for demurrant Adam Frank. George P. Rust, of Passaic, and Michael Dunn, of Paterson, for defendant Cemetery, etc.

STEVENS, V. C. The original bill filed in this cause was demurred to and the demurrer sustained. East Ridgelawn Cemetery Co. v. Frank, 77 N. J. Eq. 36, 75 Atl. 1006. The complainant has amended its bill, and the bill as amended has again been demurred to. The amendments consist largely in a more detailed statement of what was before matter of inference.

[1] In the original bill it was inferred from what was stated that the two companies, the East Ridgelawn and the West Ridgelawn Cemetery Companies, had joined in issuing certificates for 13,500 shares of proceeds of sale of cemetery lots. This is now distinctly alleged and the certificate set forth. It certifies that the holder is to receive his pro rata share of the proceeds of sale by the two companies of sublots or plots after deducting certain expenses, etc. The certificate is plainly open to the objections mentioned in my former opinion, and I shall not here repeat them. Its issuance is not a valid consideration for a promise. The Cemetery Act (1 Comp. St. 1910, p. 372) does not authorize a single company to issue such a certificate, and still less does it authorize two companies to join in issuing it. The policy of the law is to restrict cemetery companies to the ownership of 135 acres. If this scheme is valid, any number of companies may be organized to join in one certificate and form what would be, virtually, a consolidated com-

pany possessing as many acres of land as their organizers might see fit to acquire.

[2-4] One of the causes of demurrer is that the action, if sustainable, is legal and not equitable. If the defendant Frank has, contrary to agreement, failed to cancel the mortgages upon parts of the cemetery property, the remedy is plainly a suit at law for breach of contract. If he has, or in so far as he has, failed to procure enough land to enable the cemetery company to straighten its lines, such failure on his part (there being a valuable consideration for the promise) would also entitle the company to sue at law. It is, however, alleged that four tracts of land, containing 6.25 acres, stand in the name of either Gruber or Howe, who hold for Frank (Pond having released his interest), and it is prayed that Frank be compelled to convey these, as he agreed to when he received the 13,500 shares. It is not alleged that this part of the agreement is in writing. A bill for specific performance must show a written agreement to convey. Fry on Sp. Per. § 332; Titus v. Taylor (N. J. Ch.) 65 Atl. 1003. Aside from this, it appears that the only consideration for the promise was the illegal issue of the 13,500 shares. No rule is better settled than that specific performance of an agreement, not founded on valuable consideration, will not be enforced in equity. I cannot understand how the certificates in question, plainly illegal and unauthorized, can be said to constitute such a consideration.

If there was an agreement between the Passaic Trust & Safe Deposit Company and the cemetery companies other than that which related to the issuance of share certificates, it is not set forth. If there was any agreement between Frank and that company, other than the receipt to which I am about to refer, the bill does not show it. The deposit company received from Frank 2,500 shares of the 13,500 issued and gave him a paper writing, called a "receipt," declaring that:

"Said shares are absolutely his property and as such subject only to a voluntarily created lien to secure the payment of certain mortgages of Herbert B. Gruber referred to in a certain declaration of trust of the Passaic Trust & Safe Deposit Company * * * in favor of the shareholders in East and West Ridgelawn Cemeteries."

The declaration of trust is not set forth. The receipt then goes on to say that the shares, or any money deposited in lieu thereof, shall not be considered subject to any other liens, except by agreement of the pledgor until the mortgages are first paid; that any shares may be withdrawn on a deposit of \$40 for each share; that moneys deposited by him under receipt shall be subject to his order when drawn for the payment in whole or in part of any existing mortgage above referred to or when drawn

in favor of or for the benefit of either cemetery. If he paid any of the mortgages in whole or in part, he was also at liberty to withdraw shares to the extent therein mentioned, as he might also do by consent of the cemetery companies.

Whether this was the private agreement of the pledgor and pledgee only, or whether, by the declaration of trust or other writing, the cemetery companies had an interest in it, we are not informed. Its terms are not shown to have been violated, and how it could be enforced, except according to its terms, is not evident. The pleader does not seem to make it the basis of any claim to relief, although he does charge generally that the trust company refuses to aid complainant by enforcing "said trust" so that the mortgage aforesaid may at least be paid and satisfied. The bill seems to proceed upon the theory, somewhat vaguely stated, that the court itself can create a lien of some sort upon the shares, both those in the trust company's hands and those in the defendant's hands, or can direct a part of them to be canceled. I can find nothing in the bill that would justify such relief, even on the assumption that the court could treat the shares as creating a legal obligation.

I think the demurrer should be allowed.

(261 Pa. 350)

KOBYLIS v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

RAILROADS \Leftrightarrow 350(25)—DEATH AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for death of plaintiff's husband at a grade crossing, contributory negligence of deceased, struck by an engine coming around a sharp curve without warning, where there was no watchman at the crossing, and the train which struck him was obscured by a passing freight train on another track, was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Louisa Kobylis against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

William Clarke Mason, of Philadelphia, for appellant. Bertram D. Rearick, of Philadelphia, for appellee.

MOSCHZISKER, J. Appellant states but one "question involved" for our consideration, namely, the alleged contributory negligence of plaintiff's deceased husband. This is correctly disposed of in the following excerpts from the opinion of Judge Wessel, who presided at the trial:

"About 2 o'clock in the afternoon of September 14, 1915, Frank Kobylis met his death by being struck by an engine belonging to defendant, while it was being operated along defendant's right of way through the town of Locust Gap, in this state. His widow brought this action * * * for the recovery of damages, which she claimed were suffered by reason of defendant's negligence. The jury returned a verdict for plaintiff. * * * Defendant moved for * * * judgment n. o. v. * * * In considering this motion plaintiff must be given the benefit of every fact and inference of fact pertinent to the issue which the jury could legitimately find from the evidence. * * * We must, therefore, consider the facts to have been as follows: Defendant operated a two-track railroad through the town of Locust Gap, crossing Bridge street at grade; they have been designated as the north and south bound tracks. At the time of the accident a trolley car was standing * * * [east of the railroad, near] Bridge street. Deceased was on his way * * * to the trolley, intending to use it to be transported to his home. * * * He had been running, and, when he reached a point in Bridge street [west of the railroad], he stopped, * * * and then proceeded on a walk, up a slight grade to about 4 feet from the first rail of the south-bound track, where he stopped again, looked and listened, and saw, coming toward him [on this south-bound, or near, track], about 200 feet away, a long freight train being drawn by four engines up a heavy grade at about 2 to 5 miles per hour. The engine which struck him was not then visible, * * * on account of 'the dead men's curve' in the railroad, some 496 feet distant from that crossing. No whistle was blown by the latter [until deceased was struck], nor [was there] any [sufficient] warning * * * of its approach; there was no signaling device, nor a watchman, at this crossing. [Deceased] continued to walk across the tracks at about 1 mile per hour. When he reached a point between the two tracks, he hesitated and then started forward, and, when he had almost reached the last rail of the second [or north-bound] track (only one more step being required to clear it), the right side of the bumper of the engine of the 'Newbury freight' train, * * * being operated on a down grade at the rate of 30 to 35 miles per hour, came in contact with his body, and he was killed. * * *

"Defendant contends that these facts clearly established deceased's contributory negligence; with that view we are unable to agree. * * * Kobylis having stopped about 4 feet from the first rail [of the south-bound track], having no knowledge of the approach of a train on the north-bound track, and seeing the heavy freight train approaching at 2 to 5 miles per hour, * * * some 200 feet distant [on the south-bound track], was justified in proceeding toward the trolley car. He had the right to rely upon the defendant's exercise of its duty in giving some warning of the approach of the 'Newbury freight' train. *Wagner v. Philadelphia Rapid Transit Co.*, 252 Pa. 354, 97 Atl. 471. But defendant contends that he must have then seen that train, if he had used his eyes; that the distance from the place where he stopped to the point where he was struck was about 20 feet; * * * that the train was traveling 30 or 35 times faster than the deceased, and therefore, during the time the deceased walked from the point where he stopped until the time he was struck, the train had traveled 35 times 20, or at most 700 feet, while the measured distance from the center of Bridge street to the curve was 810 feet. As a mathematical demonstration this is persuasive; but it fails to take into consideration the width of the rails, the curve in the railroad, the distance traveled by

the train during the period of time in which the deceased hesitated after he had [started] crossing, the fact that no person located the exact spot where deceased stopped, [or] the points between and the angle upon which the measurement was taken, and other facts. * * * *Shaffer v. Pa. R. R. Co.*, 258 Pa. 288, 101 Atl. 982. * * * After Kobylis had [entered upon] the crossing, * * * to have attempted to retrace his steps might have resulted in his being overtaken by the heavy freight train. * * * Its noise and the close proximity of the two trains probably caused Kobylis to hesitate between the tracks for just enough time to bring him to his death. The jury has concluded that Kobylis stopped at a proper place, looked, and listened, and was not guilty of contributory negligence, but that defendant's negligence was the sole cause of the accident. The evidence to the contrary is, in our opinion, not so clear and positive as to justify us in interfering with its conclusion."

To the foregoing liberal quotation from the opinion of the court below we need only add that, in view of the considerable distance the train on the near track was from the crossing which plaintiff's husband attempted to traverse in order to board the trolley on the other side of the railroad, and the slow rate of speed at which this train was approaching, it could not be ruled as a matter of law that the position of danger in which the deceased subsequently found himself was knowingly and negligently assumed by him; that issue of fact was properly submitted to the jury and determined against appellant.

The assignments of error are overruled and the judgment is affirmed.

(301 Pa. 364)

DI GRAZIO v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. RAILROADS §—350(8)—ACCIDENT AT CROSSING—NEGLIGENCE—QUESTION FOR JURY.

Where a railroad company, on a dark night, pushed freight car with engine at rear, and headlight thus obscured, along a siding and over a sidewalk, where it struck plaintiff, who could not see the car approaching, and the evidence was conflicting as to whether a signal was given and as to speed of the car, the question of defendant's negligence was for the jury.

2. RAILROADS §—350(26)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where there was evidence that deceased, struck on a dark night by a car propelled by an engine from the rear, at a point where a switch track crossed the sidewalk, stopped, looked, and listened as he approached the siding, and the evidence as to whether a warning was given was conflicting, the question of contributory negligence was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Josephine Di Grazio against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At 6:30 p. m., on January 23, 1917, plaintiff's husband, Carlo Di Grazio, was walking westwardly on the south sidewalk of Wash-

ington avenue, between Ninth and Tenth streets in the city of Philadelphia. There were two tracks on Washington avenue and a siding from the southern (east-bound) track across the south sidewalk into a coalyard.

Plaintiff introduced evidence to the effect that deceased stopped, looked, and listened as he approached the siding, that he proceeded to cross and had almost crossed the west rail when he was struck by a car which was being pushed by a locomotive into the siding, and was instantly killed. The night was very dark and there were no lights about the entrance or siding or upon the train or the car which was being pushed into the siding. There was evidence that the car which struck deceased was at the time moving at the rate of 15 miles per hour, and that no bell or other warning of its approach was sounded. There was also evidence that where shifting was necessary after dark it was customary to guard the pavement by a man with a lantern, but that at the time of the accident this precaution was not taken.

Defendant's proofs were that the car was moving slowly, that the headlight on the engine was burning, and that the car was plainly visible, and that the bell was rung as the train approached. Plaintiff's witnesses testified that if the light on the engine was burning it was obstructed by the car it was pushing into the siding and which struck deceased.

Verdict for plaintiff for \$10,000, and judgment thereon. Defendant appealed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Sharswood Brinton, of Philadelphia, for appellant. John J. McDevitt, Jr., of Philadelphia, for appellee.

PER OURIAM. [1, 2] That this case was for the jury clearly appears from the facts to be found in the reporter's statement of them, and the judgment is accordingly affirmed.

(261 Pa. 341)

SMOKER v. BALDWIN LOCOMOTIVE WORKS.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. MUNICIPAL CORPORATIONS ~~63~~706(6)—ACCIDENT IN STREET—NEGLIGENCE—QUESTION FOR JURY.

Whether defendant's truck driver, driving eastward over a bridge on the south street car track, was guilty of negligence in turning to the left on the other track to avoid a car approaching him from the rear, instead of turning to the right, where he had ample space to clear the car, so as to render his employer liable for injuries to the motorman on a west-bound street car, with which he collided head on, immediately after emerging from a cloud of smoke emitted from a train passing beneath the bridge, *Held* for the jury.

2. MUNICIPAL CORPORATIONS ~~63~~706(7)—ACCIDENT IN STREET—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a motorman on a west-bound street car passing over a bridge was negligent, precluding recovery for injuries by a head-on collision with defendant's truck on its emerging from a cloud of smoke emitted by a train passing beneath the bridge, *Held* for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William Smoker against the Baldwin Locomotive Works. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Maurice W. Sloan, of Philadelphia, for appellant. Victor Frey and Augustus Trask Ashton, both of Philadelphia, for appellee.

MOSCHZISKER, J. William Smoker sued to recover for personal injuries, alleged to be due to defendant's negligence. The verdict favored plaintiff, judgment was entered accordingly, and defendant has appealed.

At trial in the court below, defendant presented no evidence, but asked for binding instructions, and, subsequently, for judgment n. o. v. Appellant assigns the refusal of these requests as error.

[1, 2] When the testimony is viewed in the light most favorable to plaintiff, as it must be on this appeal, there is ample evidence to sustain the following statement of facts contended for by appellee: On May 29, 1917, shortly after midnight, defendant's heavy automobile truck, lighted only by two small oil lamps in front, was being operated eastwardly on the east-bound car track of Spring Garden street, Philadelphia. An east-bound street car came up behind the truck at a point 80 feet east of Thirty-First street, upon the Spring Garden street bridge over the Schuylkill river; in response to a signal from the motorman of this car, defendant's chauffeur turned his truck to the left and entered upon the west-bound track. At the point in question there was sufficient space to accommodate the truck on the right, between the east-bound track and the curb, and no necessity existed for turning in the other direction. Just as the east-bound car passed the truck, a cloud of smoke was thrown over the street railway tracks by a locomotive, which at that moment passed under the bridge; the smoke being so dense it completely concealed from the view of defendant's chauffeur the approach of a west-bound trolley car upon which plaintiff was acting as motorman, and, from the vision of the latter, the former's motor truck. Notwithstanding these conditions, the chauffeur ran directly on, in the west-bound track, for a distance of nearly 70 feet from the point where he first turned in, and, just as the truck emerged from the eastern edge of the smoke

cloud, a collision occurred between it and plaintiff's car. The truck was still coming head-on, in the west-bound track, when only 10 feet away from the car; but, judging from the position of the former after the accident, the chauffeur, immediately before the actual collision, must have attempted a quick turn to the right, too late, however, to change the situation of danger which he had created. The trolley car was running not more than 4 miles an hour, and, immediately upon seeing the automobile in the track, plaintiff threw off his power, apparently doing all he could to avoid the collision, having previously rung his bell. There was evidence to show that, under ordinary circumstances, the bridge upon which the accident happened was sufficiently illuminated to permit of seeing "a square away."

The questions of the alleged negligence of defendant's chauffeur (who admittedly was acting within the scope of his employment at the time), first, in turning at all into the path of west-bound cars when there was no necessity for that course, and, next, in traveling eastwardly for a distance of 70 feet through smoke and steam which concealed him from oncoming west-bound cars, as also the alleged contributory negligence of plaintiff in not avoiding the collision, were submitted in a charge which is not complained of. On the evidence at bar, the issues involved were for the jury, and the court below did not err in so ruling.

The judgment is affirmed.

(261 Pa. 354)

MINDLIN et al. v. SAXONY SPINNING CO.
(W. H. LORIMER SONS CO., Garnishee).

(Supreme Court of Pennsylvania. May 6, 1918.)

1. ATTACHMENT §92—FOREIGN ATTACHMENT—AFFIDAVIT.

In foreign attachment the affidavit must set out a good cause of action and such facts as give the court jurisdiction, and must not be ambiguous nor depend on conjecture or inference.

2. ATTACHMENT §113 — FOREIGN ATTACHMENT—AFFIDAVIT.

To support a writ of foreign attachment, it must be averred that defendant has property within the jurisdiction, and that he lives beyond it.

3. ATTACHMENT §102 — FOREIGN ATTACHMENT—AFFIDAVIT.

Affidavit in foreign attachment for breach of contract of sale of yarn, based on a written order, must state the acceptance of the order either in writing or by parol and a breach of the contract, and also when the goods should have been delivered, and the market price at such time.

4. ATTACHMENT §122(2) — FOREIGN ATTACHMENT—AFFIDAVIT—AMENDMENT.

Absence of averment in affidavit that property attached in a foreign attachment was owned by defendant may be supplied by amendment.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Henry Mindlin and Louis Rosen-

man, copartners as Mindlin & Rosenman, against the Saxony Spinning Company, defendant, and the William H. Lorimer Sons Company, garnishee. From an order dissolving the attachment, plaintiffs appeal. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Paul Freeman and Alfred Aarons, both of Philadelphia, for appellants. Julius C. Levi, of Philadelphia, for appellee William H. Lorimer Sons Co.

WALLING, J. This is an action of foreign attachment in assumpsit by a New York firm against a North Carolina corporation for alleged breach of contract for sale of cotton yarn. No service was had on defendant; but, when ruled by the garnishee, plaintiffs filed an affidavit of cause of action, which the court below held insufficient and dissolved the attachment, wherein we see no error.

[1] The affidavit must set out a good cause of action and such facts as give the court jurisdiction, and must not be ambiguous nor depend upon conjecture or inference. See *Hallowell v. Tenney Canning Co.*, 16 Pa. Super. Ct. 60. The object of a writ of foreign attachment is to compel the appearance of defendant; and, to authorize such writ, he must have property within the jurisdiction of the court, otherwise there is nothing to attach and no means of compelling an appearance or of securing plaintiff's claim. See *Raymond v. Leishman*, 243 Pa. 64, 89 Atl. 791, L. R. A. 1915A, 400, Ann. Cas. 1915C, 730; *Pennsylvania Railroad Co. v. Pennock*, 51 Pa. 244; also opinion of Sharswood, P. J., in *Delaware Mutual Insurance Co. v. Walker*, 1 Phila. 104. The first object of such proceeding is to seize the property of the absent debtor; when there is none the action fails.

[2] To support the writ, it is as necessary that defendant have property within the jurisdiction as that he be beyond it. Both are essential and must be averred. Where the writ has been served, it must appear in the affidavit that the property attached is that of the defendant. It is as possible to ascertain the ownership of property as the whereabouts of a defendant. It does not follow, because such writ binds property thereafter coming into the hands of the garnishee, that it can be sustained without something in the first instance to attach. The reason for the rule is well illustrated by the court below:

"Here we have a citizen of the state of New York issuing an attachment in the state of Pennsylvania against a defendant resident in the state of North Carolina, summoning as garnishee a third person who does not appear to have in his possession any property belonging to defendant. If this case be permitted to proceed upon the paper filed by plaintiffs, a judgment may

be entered against defendant for want of an appearance and damages assessed in a sum of upwards of \$12,000; that judgment will appear in the records of this court, and its effect upon defendant's credit will be the same as if a judgment had been obtained in an ordinary personal action in adverse proceedings. Thus a creditor would, to all practical purposes, be able to compel nonresidents of every state in the union to appear in our courts, even if there was not within the jurisdiction of our courts, at the time the attachment issued, any property belonging to their debtor."

[4] The absence of averment as to defendant's property may be treated as formal and supplied by amendment. *Hallowell v. Tenney Canning Co.*, supra; *Schneck v. Freeman*, 55 Pa. Super. Ct. 38.

[3] There are more serious objections. The affidavit purports to set out a claim for \$12,417.21, for damages on account of defendant's failure to deliver cotton yarn, in accordance with a certain contract based on plaintiffs' order, viz.:

"New York, Sept. 28, 1914.

"Copy.

"Saxony Spinning Co., Lincolnton, N. C.—Gentlemen: Kindly enter our order for goods mentioned below. To be delivered as follows:

"Deliveries to commence upon completion of previous order.

"Yours truly,

Mindlin & Rosenman."

Then follows a description of the goods in the language of the business, and on the margin the words, "To quantities 50,000 lbs." The affidavit avers that, "Said order was duly accepted by defendant and partial deliveries thereunder, to wit, 39,236 pounds, were made to plaintiffs and paid for by plaintiffs," but does not state when or how accepted, whether in writing or by parol, nor when the partial deliveries thereunder were made. The allegation as to due acceptance of the order is a legal conclusion. There is no averment as to when if ever the deliveries under the previous order were completed, and there is nothing to show when or in what amounts the yarn mentioned in the above-quoted order should have been delivered. The affidavit avers that on May 15, 1917, defendant finally and unequivocally refused to deliver the balance of the yarn; but that is a conclusion, and the real facts are not set out, and it does not appear whether such alleged refusal was oral or written. The measure of damages would be the difference between the market price and the contract price at the time and place of delivery. See *Hauptman v. Pa. W. Home for Blind Men*, 258 Pa. 427, 102 Atl. 142. Here there is nothing to show when the goods should have been delivered or what the market price then was; hence no basis for assessment of damages. The affidavit sets out the market price on one day only, to wit, May 15, 1917. But there is nothing to indicate that it was the time called for in the contract for the delivery of all or any of the goods in question. Plaintiffs could not change

defendant's liability by demanding a delivery at a time different from that named in the contract. The defects above mentioned, and other uncertainties in plaintiffs' affidavit of cause of action, fully warranted the order of the court below dissolving the attachment. It is not necessary to refer separately to the other contract set out in plaintiffs' claim, as it involves only \$32.45, and some of the defects to which we have called attention apply equally to that branch of the case.

The assignments of error are overruled, and the order dissolving attachment is affirmed.

(261 Pa. 359)

HAGER et al. v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. CARRIERS ~~vs~~ 308(8) — INJURY TO PASSENGER—NEGLIGENCE OF EMPLOYÉ.

A railroad company is liable for negligent acts of its employés in assisting passengers from its cars.

2. CARRIERS ~~vs~~ 320(25) — INJURY TO PASSENGER—NEGLIGENCE—QUESTION FOR JURY.

In action to recover for injuries to plaintiff when alighting from a car at a station, whether negligence of defendant's employés assisting her to alight was the cause of her injury held a question for the jury.

3. CARRIERS ~~vs~~ 347(1)—INJURY TO PASSENGER — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Where the question of contributory negligence of plaintiff in alighting from car was in doubt, it must be submitted to the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary Elizabeth Hager, by her next friend, William P. Hager, and William P. Hager in his own right, against the Philadelphia & Reading Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

William Clarke Mason, of Philadelphia, for appellant. John Weaver, of Philadelphia, for appellees.

WALLING, J. This is an action of trespass by husband and wife to recover for personal injuries to the wife. On June 19, 1915, plaintiffs took passage on one of defendant's excursion trains to go from Philadelphia to Forrest Park with a large party for an annual picnic. Where trains stop at the park, there is a gravel or cinder walk used as a platform, which is at least three feet below the bottom step of passenger cars; making a step or jump down of that distance in alighting. The evidence for plaintiffs is to the effect that the train was filled with passengers, and as it stopped the brakeman at the rear of the car in which they were riding called, "This way out"; and that Mr.

Hager was the first passenger to go out the rear door and off the car; and that he, seeing a brakeman there to assist the ladies went in search of a table and benches for the picnic dinner; also, that Mrs. Hager, coming out after several other passengers, walked down the car steps and saw a brakeman standing on the walk, who with his left hand was assisting lady passengers from said car down to the walk and with his right hand was performing a like service for ladies alighting from the next car; that he took her left hand, she released her hold from the handrail, and, just as her foot was leaving the bottom step, when she was committed to the act of alighting, he suddenly and without warning jerked his hand away, causing her to fall to the ground and strike her knee upon the rail of an adjoining track, by which she received serious and permanent injury. Mrs. Hager was then 28 years of age. Her story was corroborated by other witnesses, but was flatly contradicted by evidence for the defense, which was to the effect that no such accident happened and that Mrs. Hager's fall was the result of tripping on a rail after she had safely alighted and left the walk, and that the trainmen did not hear of the accident until the return trip that afternoon. The case was carefully submitted to the jury, who found for plaintiffs. From judgments entered thereon, the defendant brought these appeals.

[1] Mrs. Hager was a passenger and entitled to protection as such until she was landed upon the ground or platform. See *Bickley v. Philadelphia & R. Ry. Co.*, 257 Pa. 369, 376, 101 Atl. 654; *Brooks v. Philadelphia & R. Ry. Co.*, 218 Pa. 1, 66 Atl. 872. It is the duty of a common carrier of passengers to exercise the highest practical degree of care and to afford them a safe means of ingress and egress to and from the car or other vehicle of transportation. *Mack v. Pittsburgh Rys. Co.*, 247 Pa. 598, 602, 98 Atl. 618. A railroad company is liable for the negligent acts of employees while assisting passengers to or from its cars. *Gensemer v. Conestoga Traction Co.*, 237 Pa. 224, 84 Atl. 901.

[2] The rules above mentioned are not seriously controverted, but it is earnestly urged that Mrs. Hager was guilty of such contributory negligence as to prevent recovery, in that she was relying implicitly upon the brakeman and not looking out for her own safety. Her answers on cross-examination would seem to warrant such contention, and, had she stepped off the side of a platform or into a hole or stumbled upon some visible object it might be sustained. But a plaintiff's want of care will defeat his action only

when it was an inducing cause of the accident or contributed thereto. *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705; *Creed v. Pennsylvania R. Co.*, 86 Pa. 139, 145, 27 Am. Rep. 693; *McClung v. Penna. T. Cab Co.*, 252 Pa. 478, 97 Atl. 694. Whether Mrs. Hager's failure to look in advance, for the purpose of determining the distance from the car steps to the ground, contributed to the accident, was for the jury. Had she known the exact distance, would that have changed her conduct or the result of the sudden withdrawal of the brakeman's hand? It was a regular place for receiving and discharging passengers, and many were safely alighting. Here the real cause of the accident, as claimed by plaintiffs and found by the jury, was the act of the brakeman in suddenly withdrawing his hand at the critical moment; with that, her alleged want of care had no connection. The fall seemingly resulted from that act, and it is not clear that it could have been prevented by watchfulness on her part. She was looking forward, but does not recall just where, and we cannot say that any amount of looking on her part would have prevented his act or the fall which resulted. While required to exercise ordinary care, she was justified in relying upon the brakeman to assist her, for that was the duty he assumed to perform, and she was not bound to anticipate that he would be negligent.

[3] Where the question of contributory negligence is in doubt, it must be submitted to the jury. *McCracken v. Consolidated Traction Co.* (No. 1) 201 Pa. 873, 881, 50 Atl. 830, 88 Am. St. Rep. 814. It is at least doubtful whether her seeming want of care contributed to the accident. As to the duty of a passenger to ascertain in advance of alighting the distance from the car step to the station platform, defendant relies upon some expressions in the opinion of the court in *Del. Lack, etc., R. Co. v. Napheys*, 90 Pa. 135. What that case decides, however, is that, the fact that a passenger upon alighting from a car fell and hurt her knee did not of itself create a presumption of negligence against the railroad company; and also that under the evidence there presented, the questions of negligence and contributory negligence were for the jury.

As a brakeman was present to help the ladies, it cannot be affirmed as a legal conclusion that Mr. Hager was negligent in failing to wait and assist his wife in alighting. Owing to the congested traffic, it might have been difficult for him to do so; and, in any event, whether he should or not was a question of fact.

The assignments of error are overruled, and the judgments are affirmed.

(261 Pa. 235)

In re PUTERBAUGH'S ESTATE.

Appeal of ROBINS et al.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. ADOPTION \S 18 — STATUS OF ADOPTED CHILD.

While the law gives an adopted child a right to inherit, it does not change his identity, nor make him a child in fact.

2. WILLS \S 497(2) — CONSTRUCTION — BEQUEST TO "CHILDREN."

Under bequest to "children," grandchildren and other remote issue are excluded, unless an intent is shown by the will to provide for children of a deceased child, in cases where the will would otherwise remain inoperative, or the will clearly shows that the word "children" was used in a more extensive sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Children.]

3. WILLS \S 497(5) — CONSTRUCTION — "CHILD."

Where testator gave his residuary estate in trust for his son for life, and on his death absolutely to his child or children and their heirs, and the son died, leaving only a child adopted after the testator's death, the adopted child was not a "child" within the meaning of the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child.]

Appeal from Orphans' Court, Monroe County.

In the matter of the estate of Isaac T. Puterbaugh, deceased. From a decree dismissing exceptions to adjudication, H. P. Robins and Edwin Robins appeal. Reversed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Wilton A. Erdman, of Stroudsburg, for appellants. A. Mitchell Palmer and O. Raymond Bensinger, both of Stroudsburg, for appellee.

STEWART, J. Isaac T. Puterbaugh, late of Monroe county, died March 26, 1889, testate, leaving to survive him a son, Harrison S., who at that time was about 40 years of age, married, but without children. This son, Harrison S., died intestate May 26, 1916, leaving a widow, no natural-born child or children, but an adopted child Edna, who had been adopted by him under a decree of court of May 29, 1894, and is here the appellee, now Mrs. Edna Puterbaugh Marsh. By the will of Isaac T. Puterbaugh, he directed, inter alia, as follows:

"Fifth. All the rest and residue of my estate consisting of personal property, I give and bequeath to my executor hereinafter named, in trust for the following purpose, viz.: That my said executor shall keep the same invested or invest the same in good securities and shall pay the interest and income thereof to my said son, Harrison S., during his natural life, and at his death shall give, assign, and transfer the said estate absolutely to his child or children and their heirs, * * * in the event of my said son, Harrison S., dying without leaving any child or children then" over.

After the death of Harrison S., the trustee filed his account, showing a balance in the trust fund of \$7,925.66, which the auditing judge, Hon. M. F. Sando, specially presiding, awarded, after payment of costs and expenses, to Mrs. Edna Puterbaugh Marsh, the adopted child of Harrison S. To this final order exceptions were filed by H. P. Robins and Edwin Robins who claim the entire fund as residuary legatees, to whom the entire fund resulted under the will in the event of Harrison S. dying without leaving child or children. Upon the exceptions being overruled, this appeal was taken.

[1] It brings before us the single controverted question of who is entitled to the fund, whether the adopted child of Harrison S., or the residuary legatees under the will or the testator, who were to take in the event of Harrison S. dying without child or children. In this as in every other testamentary disposition which becomes the subject of judicial construction or interpretation, the first inquiry must be to ascertain, if possible, the intention of the testator as expressed in his will, which, once ascertained, must be given effect. The peculiarity here is that, while the will is entirely free from ambiguity in itself, inasmuch as the beneficiaries are not mentioned by name, owing to certain conditions and circumstances which arose subsequent to the testator's death, more or less difficulty is encountered when we come to apply it to the person or persons designated by the testator in distinction from all others. The gift here, over upon the death of Harrison S., is to "his child or children and their heirs, * * * and in the event of his dying without leaving any child or children, then" over. Whom did the testator understand to be comprehended within the words "children of Harrison S.," as he here employed them? It is proper enough to assume that he knew of existing legislation that enabled any proper person, by and with the consent of the parent or guardian of a minor child and with the approval of the court, to adopt it as his child and heir; but it is quite as fair and proper to assume that he knew at the same time of the clear distinction the law makes between natural and adopted children; for instance, that giving the latter the right to inherit does not make him a child in fact (Com. v. Nancrede, 32 Pa. 389), that one adopted has the rights of a child without being a child, and that the identity of the child is not changed (Schafer v. Eneu, 54 Pa. 304). We derive but little light from these assumptions. A circumstance which we think, however, goes very far in support of appellant's contention, is that the adoption of this appellee occurred four years after the death of the testator, and nothing is to be found in the will suggesting that, so far as testator knew, the adoption of a child was then contemplated.

Not a single extrinsic fact can be pointed to as indicating that the testator intended that any one not of his blood should share in his bounty, while the will itself may be searched in vain for any indication tending even remotely to show that he so intended.

[2, 3] To give the words of the gift to Harrison's child or children a meaning which would include adopted children would be to enlarge them beyond their natural meaning and proper import. This was declared where the effect was made to have the same words include grandchildren in *Hallowell v. Phipps*, 2 Whart. 376, a case requiring less strain, so at least it seems to the writer, than the effort to enlarge them, so as to include adopted children, since ordinarily and by common usage these words are understood to mean immediate offspring or descendants. In the case referred to Justice Rogers, delivering the opinion of the court, says:

"Under a bequest to children, grandchildren, and other remote issue are excluded, unless it be the apparent intention of the testator, disclosed by his will, to provide for the children of the deceased child. But such construction can only arise from a clear intention or necessary implication; as where there are not other children than grandchildren, or when the term 'children' is further explained by a limitation over in default of issue. The word 'children' does not ordinarily, and properly speaking, comprehend grandchildren, or issue generally. Their being included in that term is only permitted in two cases, viz. from necessity, which occurs when the will would remain inoperative, unless the sense of the word 'children' were extended beyond its natural import, and where the testator has clearly shown, by other words, that he did not intend to use the term 'children' in the proper actual meaning, but in a more extensive sense."

We cite this case, not overlooking the lack of strict analogy between the cases, the one an effort to extend the meaning of children in a will so as to include grandchildren, the other to extend it so as to include children by adoption, merely to show the disposition of the courts to confine and limit the word "children" in its application, when it occurs in a will, to its natural import, except where the testator has clearly shown by other words that he intended to use the term in a more extensive sense. No such word can be found in this will. In *Hunt's Estate*, 133 Pa. 260, 19 Atl. 548, 19 Am. St. Rep. 640, Mr. Justice Green, referring to the rule declared by Mr. Justice Rogers in the case above cited, says:

"With us it has never been departed from, but has been enforced in many instances, and never with any abatement of any of its terms. * * * It is very clear that one of the two exceptions to the operation of the rule does not exist in the present case. There are other actual children of the testator, to whom the words of the codicil do apply, and hence there is no reason or necessity for departing from the ordinary meaning of the word 'children,' as designating the legatees mentioned in the codicil. The other exception is 'where the testator has clearly shown by other words that he did not intend to use the term "children" in the proper,

actual meaning, but in a more extensive sense.' All the authorities agree that such intention must clearly appear, and, if it does not, the word 'children' must be confined to its ordinary meaning."

No reason can be suggested why this rule should not apply as well to the case of adopted children as to grandchildren, where the sole inquiry is as to testator's meaning and intention. We think it does so apply.

The case calls for no discussion of the several statutes relating to the adoption of children; these are clearly not involved, for, however construed, they could reflect no light on the one pertinent inquiry which has regard to testator's intention. It is not a question of the right of an adopted child to inherit, but simply a question of the testator's intention with respect to those who are to share in his estate. We see nothing in the will, or in the circumstances surrounding it, indicating any intention on part of the testator to include in his bequest to the child or children of his son, Harrison S., any but his immediate offspring.

The decree awarding the fund to Mrs. Edna Puterbaugh Marsh is reversed, and the record is remitted for distribution in accordance with the views here expressed; the cost to be paid out of the fund.

(261 Pa. 233)

POTTSVILLE UNION TRACTION CO. v. BOROUGH OF ST. CLAIR et al.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. INJUNCTION ¶163(1) — TEMPORARY INJUNCTION—APPREHENSION OF DANGER.

An order dissolving a preliminary injunction was properly entered, where there was no immediate or impending damage to plaintiff, but only an apprehension thereof.

2. STREET RAILROADS ¶57(5)—INJUNCTION—OBSTRUCTING STREET CAR LINE.

Equity has jurisdiction to enjoin a municipality from obstructing the tracks of a street railroad company, and otherwise interfering with the operation of its cars in the municipality.

Appeal from Court of Common Pleas, Schuylkill County.

Bill by the Pottsville Union Traction Company against the Borough of St. Clair and others. From a decree dissolving preliminary injunction, plaintiff appeals. Appeal dismissed, with leave to apply for reinstatement of injunction.

Bechtel, P. J., filed the following opinion in the common pleas:

[1] And now, October 6, 1917, we dissolve the preliminary injunction granted in this case, for the reason, first, that we do not feel that we have any jurisdiction, under the decision in the case of *Bellevue Borough, Appellant, v. Ohio Valley Water Co.*, 245 Pa. 114, 91 Atl. 236, and for the further reason that we feel that the evidence has not disclosed any immediate or impending damage to the plaintiff; it discloses rather an apprehension of danger.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

Byron A. Milner, of Philadelphia, Otto E. Farquhar, of Pottsville, M. M. Burke, of Shenandoah, and F. O. Newbourg, Jr., and Joseph De F. Junkin, both of Philadelphia, for appellant. J. Milton Boone and William Wilhelm, both of Pottsville, for appellees.

PER CURIAM. [2] The first reason given by the court below for dissolving the preliminary injunction is not good. It had undoubted jurisdiction of appellant's bill, which averred that the appellees had threatened to and were about to place and erect fences and others obstructions across the tracks and roadbed of appellant upon and along the streets and highways in the borough of St. Clair, and to otherwise interfere with, impede, and prevent the operation of the company's cars in said borough. In *Bellevue Borough v. Ohio Valley Water Company*, 245 Pa. 114, 91 Atl. 236, a very different situation was presented, and all that was there decided was that the question of the reasonableness of rates established by public service corporations must, in the first instance, be submitted to the Public Service Commission when challenged.

We have not been convinced that the court erred in dissolving the injunction for the second reason given, and the appeal is dismissed, at appellant's costs, with leave to it to apply for a reinstatement of the injunction, if appellees should actually threaten or attempt to do the things complained of.

(261 Pa. 257)

HUNT v. SNYDER.

(Supreme Court of Pennsylvania. May 6, 1913.)

1. JUDGMENT \Leftrightarrow 818(7) — FULL FAITH AND CREDIT—RES JUDICATA.

The judgment of a court of competent jurisdiction is conclusive in an action thereon in another state only in so far as it is responsive to the pleadings, and in such other action evidence may be offered to show that the subject-matter involved was not included in the original action or that the court was without jurisdiction.

2. JUDGMENT \Leftrightarrow 822(3) — RES JUDICATA—ISSUES.

A judgment in the court of Pennsylvania in a prosecution for desertion and nonsupport of defendant's wife, revoking an order allowing monthly payment for support, is not *res judicata* in action in New York to recover money paid by the wife for necessities for herself and children in New York, including a time subsequent to the decision in the desertion proceeding.

3. JUDGMENT \Leftrightarrow 822(3) — FOREIGN JUDGMENT—CONCLUSIVENESS.

Where a judgment of a court of Pennsylvania is interposed in a proceeding in New York under a plea of *res judicata*, an adverse holding on such plea is conclusive in a subsequent action in Pennsylvania on the judgment rendered in the proceeding in New York.

Appeal from Court of Common Pleas, Schuylkill County.

Action by William L. Hunt against William Snyder. Judgment for plaintiff for want of a sufficient affidavit of defense, and defendant appeals. Affirmed.

Argued before POTTER, STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

James B. Reilly, of Pottsville, M. M. Burke, of Shenandoah, and C. A. Whitehouse, of Pottsville, for appellant. J. O. Ulrich, of Tamaqua, for appellee.

FRAZER, J. Defendant appeals from a judgment entered in favor of plaintiff for want of a sufficient affidavit of defense in an action on a judgment obtained in the Supreme Court of Niagara county, N. Y. The action on which the foreign judgment was secured was instituted by defendant's wife to recover the cost of necessities she alleged were purchased by her for herself and two children and paid for out of her earnings. The answer averred plaintiff deserted defendant and, on February 1, 1912, caused his arrest in Schuylkill county, Pa., on a charge of desertion and nonsupport, and that the court of that county, after hearing, found plaintiff was not entitled to support and maintenance, because of misconduct, and dismissed her complaint. The case was tried before a jury, and a verdict for \$3,170 and costs rendered in favor of plaintiff, on which judgment was entered and subsequently assigned to William L. Hunt, the use plaintiff.

Defendant contends the judgment obtained in New York is not conclusive for the reason that court was without jurisdiction as the rights of the parties were determined by the courts of Pennsylvania previous to the institution of the New York action. In the desertion proceeding in Schuylkill county the court made an order directing defendant to pay for the support of his wife the sum of \$20 a month. This order, however, was revoked in 1914. In the meantime the sum of \$330 had been paid the wife under the order, for which sum an allowance was made against plaintiff's claim. The affidavit of defense in the present case recited the proceeding in Schuylkill county, the making of the order for payment of \$20 a month and its subsequent revocation, and averred the action of the court was conclusive of the rights of the parties, and, consequently, the New York courts were without jurisdiction of the matter in controversy. On the other hand, plaintiff relies upon the New York judgment as being conclusive of the matters adjudicated in that jurisdiction.

[1] The general rule is that a judgment of a court of competent jurisdiction is final and conclusive, and must be given full faith and credit in other jurisdictions as to all matters in controversy, or which with proper dili-

gence might have been interposed as a defense in the original action. *Marah v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131; *Bell v. Allegheny County*, 184 Pa. 296, 39 Atl. 227, 63 Am. St. Rep. 795; *Stilwell v. Smith*, 219 Pa. 38, 67 Atl. 910; *Browarsky's Estate*, 252 Pa. 35, 41, 97 Atl. 91. It is also equally well settled that a judgment is conclusive only in so far as responsive to the pleadings, and consequently, in an action brought on a judgment of another state, evidence may be offered to show the subject-matter involved was not included in the proceeding in the foreign jurisdiction, or that the latter court was without jurisdiction of the cause of action or of the party. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; *Thormann v. Frame*, 176 U. S. 350, 20 Sup. Ct. 446, 44 L. Ed. 500; *Price v. Schaeffer*, 161 Pa. 530, 29 Atl. 279, 25 L. R. A. 699, and cases cited.

[2] In applying these principles it will be noted the judgment of the New York court was not obtained in a proceeding for desertion, but the action was to recover money paid by the wife for necessities for herself and children in the state of New York, and included a period of time subsequent to the final order in the desertion proceedings in Pennsylvania. The wife resided in the state of New York and the summons was duly served on defendant in that state. The New York courts, accordingly, had jurisdiction of the parties and of the subject-matter, and, as shown by the answer filed, the defense now interposed was likewise set up as a defense in that action. So far as the record sets forth the proceeding in the New York case involved the defense now set up. The judgment of the court of Schuylkill county in revoking its earlier order of support was conclusive as to the right of the wife to support in desertion proceedings at that particular time, but would not necessarily be conclusive as to a subsequent time on a different state of facts, or in an action of assumpsit to recover money paid by the wife for necessities.

[3] The previous judgment of the court of quarter sessions of Schuylkill county as a matter of defense in the proceeding in the New York court was passed upon and determined by that court and from its decision no appeal was taken. Its judgment must therefore be considered conclusive in the present action.

The judgment is affirmed.

(261 Pa. 281)

COMMONWEALTH ex rel. SCHUYLKILL COUNTY v. SITLER et al.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. COURTS \Leftrightarrow 478—ATTACHMENT—FUNDS IN HANDS OF CLERK OF COURT.

A fund held by a clerk of court in his official capacity is in custodia legis, and is exempt

from attachment issuing out of other court; but, where held in his private capacity, the fund is attachable.

2. BAIL \Leftrightarrow 73—ATTACHMENT—CASH DEPOSIT. Under Act March 14, 1877 (P. L. 3), authorizing clerk of quarter sessions to take bail, he is not authorized to accept a deposit of money in lieu thereof, and, if he does so, the fund is attachable.

3. STIPULATIONS \Leftrightarrow 14(5)—CONSTRUCTION.

Where judgments were entered on bond of tax collector, and the court refused to open them, and an appeal was taken as to one of the judgments only, under agreement that its disposition should be conclusive as to the other judgment, the agreement did not prevent the issuing of process on the other judgment pending the appeal.

Appeal from Court of Common Pleas, Schuylkill County.

Action by the Commonwealth, on the relation of Schuylkill County, against C. B. Sitler and others. From an order quashing a writ of attachment execution, relator appeals. Reversed, and attachment reinstated.

See, also, 258 Pa. 570, 102 Atl. 272; 260 Pa. 550, 103 Atl. 925.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WAL-LING, JJ.

Arthur L. Shay, C. A. Snyder, and John F. Whalen, all of Pottsville, for appellant. J. O. Ulrich, of Tamaqua, for appellees.

BROWN, C. J. C. B. Sitler, a defaulting tax collector for the borough of Tamaqua for the years 1913, 1914, and 1915, was convicted of embezzlement and was allowed to appeal to the Superior Court from the sentence imposed upon him by the court of quarter sessions of Schuylkill county. In allowing his appeal the Superior Court ordered him to enter into a recognizance, in the sum of \$5,000, for his appearance if the judgment of the court of quarter sessions should be affirmed. It was affirmed, and application for an appeal to this court was refused. Instead of entering into a recognizance, as directed by the order allowing his appeal to the Superior Court, Sitler's father, W. A. Sitler, deposited, in lieu of it, \$5,000 in cash with the clerk of the court of quarter sessions, and this money was in the hands of the clerk when the judgment of that court was affirmed by the Superior Court. While Sitler's appeal was there pending, judgments were entered in the court of common pleas of the county upon the bonds given by him as tax collector; W. A. Sitler, his father, being a surety on each of them. One of these judgments was entered in the court below to May term, 1916, No. 328, and application to open it was refused. The refusal to open it was affirmed by this court. Commonwealth ex rel. Schuylkill County et al. v. Sitler et al., 258 Pa. 570, 102 Atl. 272. After C. B. Sitler's petition for an appeal to this court from the judgment of the Superior Court had been refused, he surrendered him-

self to the sheriff of the county, to comply with the sentence of the court of quarter sessions, and this attachment in execution thereupon was issued by the county of Schuylkill upon one of the judgments entered on the tax collector's bond. The garnishee named was the clerk of the court of quarter sessions, with whom W. A. Sitler had deposited the \$5,000 in cash in lieu of a recognizance. Upon his motion the attachment was quashed, because (1) it had been issued upon a judgment as to which there was an agreement by counsel of record that the action of this court on the appeal taken from the refusal to open the judgment to May term, 1916, No. 329, should be controlling; and (2) the money deposited with the clerk of the court of quarter sessions was in the custody of the law, and therefore not liable to attachment. From the order quashing the attachment the county has appealed.

[3] The agreement that the disposition of the appeal taken from the refusal of the court below to open the judgment entered to May term, 1916, No. 328, "should be conclusive of the facts in this judgment," though somewhat ambiguous, evidently meant that the judgment upon which this attachment issued should be opened only if, by our decree, the judgment entered to May term, 1916, No. 328, should be opened. There was no agreement that, during the pendency of the appeal to this court, process should not issue on any of the other judgments which the lower court had refused to open, and there was therefore no violation of the agreement in issuing this attachment ad lev. deb. on the judgment entered to May term, 1916, No. 329. In issuing it, the county of Schuylkill assumed the risk of a reversal by this court, which might have had the effect of rendering the attachment fruitless; but there was no such reversal. In holding that the attachment was issued in violation of the agreement, the learned court below made it broader than was warranted by its terms as brought up on this appeal.

[1] If the moneys attached in the hands of the clerk of quarter sessions were held by him in his official capacity as such officer, by virtue of some law authorizing him to so hold it, they would undoubtedly have been exempt from attachment, for they would have been in custodia legis. The test of their exemption is a very simple one. The clerk was either authorized to receive them, or he was not so authorized, and, if not, they were not in his hands as an officer of the law. No statute authorized him to receive the moneys. His only authority, when the Superior Court allowed Sitler's appeal, was to take bail or a recognizance for the defendant's appearance under the act of March 14, 1877 (P. L. 3), which is as follows:

"The clerks of the several courts of quarter sessions and over and terminer of this commonwealth shall hereafter have authority, in all cases, excepting in the case of a defendant

charged with treason, felonious homicide or voluntary manslaughter, to take bail and recognizances, and approve such bonds as may be required by law, whenever the law judge or judges, and associate judges, if there be associate judges, shall be absent from the county seat, or shall be unable on account of sickness or other cause to attend to the duties of their office."

[2] The order of the Superior Court was that Sitler should enter into a recognizance to appear, and the clerk of the court should have taken nothing else, for nothing else would have been in compliance with that order. If a practice has arisen under which clerks of the courts of quarter sessions accept cash deposits in lieu of bonds or recognizances, no such practice is authorized by law. A general power to take bail does not authorize the receipt of a deposit of money in lieu of it. *U. S. v. Faw*, 1 Cranch, C. C. 486, Fed. Cas. No. 15,078; *Butler v. Foster*, 14 Ala. 323; *Dunlap v. Patterson*, 74 N. Y. 145, 30 Am. Rep. 283. And where a clerk or other officer of the court holds funds in his private capacity, and not by statutory provision, the fund is attachable in his hands. *Weaver, Adm'r. v. Davis*, 47 Ill. 235; *Morse v. Holt*, 22 Me. 180. The deposit of the \$5,000 by W. A. Sitler with the clerk of the court was a voluntary act on his part, neither required nor authorized by law, and the receipt of the deposit by the clerk was equally unauthorized. The money was therefore to be regarded as W. A. Sitler's, and liable to attachment for his indebtedness.

The order of the court below, quashing the attachment, is reversed, and the attachment is reinstated; the costs on this appeal to be paid by the appellee.

(261 Pa. 311)

PENNSYLVANIA POWER CO. v. PUBLIC SERVICE COMMISSION.

(Supreme Court of Pennsylvania. April 22, 1918.)

1. WATERS AND WATER COURSES §=185 — WATER COMPANIES — APPLICATION FOR CHARTER.

Under Act June 7, 1907 (P. L. 455), relating to application for charter for a water company, precise location of a dam to be built need not be set forth in application.

2. WATERS AND WATER COURSES §=185 — WATER COMPANIES — APPLICATION FOR CHARTER—CHANGE OF PLAN.

Where application for charter of water company set forth name of stream in which it proposed to construct dam or dams, and application was approved by water supply commission, public service commission may subsequently approve of application, though amended plan is produced, showing a smaller number of dams and one at less height than that shown on original plan.

3. WATERS AND WATER COURSES §=185 — ERECTION OF DAMS—JURISDICTION OF WATER SUPPLY COMMISSION.

The water supply commission, and not the public service commission, has jurisdiction to

pass on the final plans of a water company after its incorporation.

4. WATERS AND WATER COURSES ¶185 — WATER COMPANIES—CHARTER—APPROVAL—REVIEW BY SUPREME COURT.

The Supreme Court will not reverse an order approving incorporation of a water company, where application had been approved by water supply commission, and public service commission had heard evidence, so as to enable it to act intelligently on the subject.

5. WATERS AND WATER COURSES ¶185 — WATER COMPANIES — CHARTER — COMPETITION.

An order of the Public Service Commission, approving application for a charter of a water company, will not be reversed at the instance of an older company because the new company would be a competitor.

6. WATERS AND WATER COURSES ¶185 — WATER COMPANIES—APPROVAL OF CHARTER —RIGHTS OF INTERVENERS.

Approval of incorporation of water company will not be reversed at instance of intervening landowner, where notice of hearing had been given, and the intervener did not appear until the testimony had been concluded, and the matters set up by intervener had been considered by the public service commission.

Appeal from Superior Court.

Application of the Connoquenessing Power Company for a charter. From an order of the Public Service Commission, approving the application, the Pennsylvania Power Company appeals. Dismissed.

Application for approval of charter. From the record it appeared that the material portions of the application were as follows:

"(1) The name of the proposed corporation is Connoquenessing Power Company.

"(2) Said corporation is formed for the purpose of the supply, storage, or transportation of water and water power for commercial and manufacturing purposes in the township of Wayne, county of Lawrence, and state of Pennsylvania.

"(3) The name of the river, stream, or other body of water from which it is proposed to take or use water and water power, and, as near as may be, the points on said river, stream, or other body of water between which said water and water power is proposed to be taken, or used, is as follows, viz.: It is proposed to take and store the waters of the Connoquenessing creek and its tributaries by means of a dam or dams across said stream located between the mouth of said Connoquenessing creek at its junction with the Beaver river and a point at or near the mouth of Slippery Rock creek, a tributary of said Connoquenessing creek, in Wayne township, Lawrence county, Pa., in a reservoir, extending up and along said Connoquenessing creek to Walker's Mill, North Sewickley township, Beaver county. It is also proposed to take and store the waters of Brush creek, a tributary of the said Connoquenessing creek, by the construction of a dam across said Brush creek, at a point $2\frac{1}{4}$ miles from its mouth in the township of Marion, Beaver county, in a reservoir extending up and along said Brush creek for a distance of 11 miles. It is also proposed to take and store the waters of the Little Connoquenessing creek, a tributary of the said Connoquenessing creek, by the construction of a dam across said Little Connoquenessing creek at a point 2 miles from its mouth in Jackson township, Butler county, in a reservoir, extending up and along said Little Connoquenessing creek, for a distance of 9 miles.

"(4) The business of said corporation is to be transacted in Pittsburgh, Pa."

The original protest of the Pennsylvania Power Company set forth that it was a hydroelectric company existing under and by virtue of the laws of Pennsylvania, and that it had a hydroelectric plant at Ellwood City, Lawrence county, Pa., where it generated electrical current for sale in the borough, cities, and townships of the state; that the service rendered by it was reasonable and adequate, and that the rates were just and reasonable; that the incorporation of the applicant would seriously interfere with the water rights, dams, power houses, and facilities of the protestant; and further that the incorporation of the applicant is neither necessary nor proper, because the protestant is already willing to offer all the prospective customers in this district a reasonable and adequate service at reasonable rates, and the incorporation of the applicant would only lead to ruinous competition. The protest ended with a prayer that the protestant be allowed to submit evidence of its contention and that no final action be taken until it had an opportunity to be heard.

The petitioner amended its application, and to the amended application the protestant filed another protest, wherein all the original reasons were reaffirmed. In addition, it was pointed out that the rules of practice had not been complied with, that the statement of the purpose of the company was not in accordance with the articles of association as certified by the secretary of the commonwealth, and in general that the application was so indefinite that the commission could not entertain the application.

After several hearings the commission handed down a pro forma report and order, in which it was stated that the Pennsylvania Power Company had appeared as a protestant and after a hearing the commission found and determined that the granting of the application is proper for the service, accommodation, convenience, and safety of the public, and a certificate of public convenience should issue, evidencing the approval of the incorporation. A certificate of public convenience was issued. From this report and order and certificate of public convenience the Pennsylvania Power Company as a protestant appealed.

Further facts appear in *Penna. Power Co. v. Public Service Commission*, 66 Pa. Super. Ct. 448, and from the following opinion of the Superior Court, by Henderson, J.:

This case comes up by appeal of the Pennsylvania Power Company from an order of the public service commission approving the incorporation of the Connoquenessing Power Company, the object of which is the supply, storage, or transportation of water and water power for commercial and manufacturing purposes in the township of Wayne in the county of Lawrence. The plan involves the construction of a dam or dams on Connoquenessing creek and the

development of electrical power by means of water power as authorized by the act of July 2, 1895 (P. L. 425). The appellant is a power company owning a dam in Connoquenessing creek at Ellwood City, at which it has a power plant for the generation of electricity which it supplies to Ellwood City and other places in the vicinity. R. C. Coleman and six other persons, owners of farms in New Sewickley township, Beaver county, through whose lands Brush creek, a tributary of Slippery Rock creek, runs, were on their petition permitted to intervene as appellants after the appeal taken by the Pennsylvania Power Company.

[1, 2] The complaint of the appellant is that the findings and determinations of the commission are not in conformity to law, and are unreasonable and based on incompetent testimony materially affecting the findings and determinations. The lack of conformity to law relied on, it is urged by the appellant, is found in the discrepancy between the project in the articles of association approved by the water supply commission and the plan presented to the public service commission. The promoters of the new company presented their plan to the water supply commission as required by the act of June 7, 1907 (P. L. 455), which body approved of the project after a protracted examination and consideration of the scheme, in the course of which there was submitted a plan for the development of the water power of Connoquenessing creek and some of its tributaries, according to which it was proposed to work in the practical operation of the company when incorporated. After the approval of the plan by the water supply commission and a more definite consideration of the subject, it was deemed advisable to change the plan, so that a smaller number of dams would be erected and a dam on the creek near its confluence with the Beaver river would be constructed of a less height than was first proposed. This amended plan the appellant contends was a different one in essential respects from that placed before the water supply commission, and their application to the public service commission was for the approval of "a more facially valid record of incorporation, so they might use it as a cloak to their unlawful actions."

The argument is based in part on the assumption that the application for such a charter should specify the exact rivers, etc., and the "precise points" thereon, where the water or water power is to be taken. The first section of the act of 1907 provides that "no application for a charter for a corporation for the supply of water for the public, or for the supply, storage and transportation of water and water power for commercial and manufacturing purposes, or for any other water or water power company shall be approved by the Governor, nor shall letters patent be issued thereon, unless said application is first submitted to, and has received the approval of, a majority of the members of the water supply commission, * * * nor unless said application shall contain, in addition to the statements now required to be made, the name of the river, stream or other body of water from which it is proposed to take or use water or water power, and, as near as may be, the points on said river, stream or other body of water, between which said water or water power is proposed to be taken." It was manifestly not the intention of the Legislature to require that the precise location of a dam should be fixed by law before the incorporation of the company. The location was only to be stated "as near as may be." It is easily seen that it might be ascertained from a test that the particular site selected was not suitable for the support of a dam wall and that a change of place would be necessary. Some leeway was therefore allowed to meet such or perhaps other contingencies.

Moreover, the act of June 25, 1913 (P. L. 555), regulates the construction of dams, and provides

that none shall be erected without the consent or permit of the water supply commission in writing previously obtained. It is further provided that the commission shall have power, not only to grant or withhold consent, but may incorporate and make a part of said consent or permit such conditions, regulations, and restrictions as may be deemed by it advisable; and no construction of such works shall be undertaken or prosecuted, except in accordance with the terms, conditions, regulations, and restrictions of such consent or permit, and such rules and regulations with regard thereto as may be prescribed by the commission. It will be seen, therefore, that the matter of definite plans for the development of the work of a water power company is subject to the control of the water supply commission, which control is to operate after the incorporation of the company and when its work is undertaken.

[3] The public service commission, in approving the charter, did not include the approval of a plan for the development of the company's business. It is not invested with authority to regulate the erection of dams or the development of the water power resources of the state. That is a subject over which the water supply commission has jurisdiction. The suggested change in the plan as to the number of dams or the height of the dams, as made to the public service commission, was not a matter of consequence, therefore, nor in any sense illegal. The authority of the water supply commission to impose regulations and conditions to be observed by a corporation proposing to develop the water power of a stream is broad, as shown by the language of the statute. It is unnecessary to here consider its extent. It has undoubted authority to attach any of the conditions necessary to carry out the purposes of the legislation on the subject, with a view to the protection of the rights of the public and of individuals or companies having vested interests.

[4] It is further objected that the order was made without evidence or against the weight of the evidence. An examination of the voluminous record does not lead us to that conclusion. The applicants for the charter had the deliberate approval of their plan by the water supply commission. Evidence was taken on the questions involved, and the commission was aided by the discussion of able counsel on the respective sides. The statute does not declare what evidence shall be sufficient to induce the commission to act; nor does it require that evidence be taken under all circumstances. Some applications may be of such character as to render that course entirely unnecessary. The geographical and topographical conditions involved in such a case may be within the knowledge of members of the commission, and it would be manifestly impracticable to declare by legislative enactment or judicial decree just how the public service commission should acquire the information which would lead it to a determination of a particular case. Section 18 of article 5 of the statute provides that "when application shall be made to the commission by any public service company for any approval under any of the provisions of this act, * * * such approval in each and every such case, or kind of application, shall be given only if and when the said commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public." P. L. 1913, p. 1414. The nineteenth section of the same article authorizes the commission to hold such hearings and to examine such witnesses and make such inquiries, physical examinations, valuations, and investigations as it may deem necessary or proper in enabling it to reach a determination. It is sufficient to say with respect to the pending controversy that there was evidence before the commission which was heard, that elaborate arguments were presented;

that the action of the water supply commission was considered, and such a presentation of the facts made as enabled the public service commission to act intelligently on the subject. It is not the function of this court on such an appeal to reverse the action taken because a different result might have been reached with greater propriety.

[5] It is further urged that the granting of the application ought not to be approved, because it does not appear in the case that it was proper for the accommodation, convenience, or safety of the public; the substance of the appellant's argument being that there is evidence of adequate service of electrical power in the district proposed to be served by the Connoquenessing Power Company, that the new company will be a competitor in a field theretofore exclusively occupied by the appellant, and that such competition is contrary to the policy of the law. With respect to this objection it may be said that it is not a matter of public policy to prohibit competition. It has not been declared by the Legislature nor decided by the courts that a public service company entering into business in a particular locality necessarily acquires an exclusive and permanent right to prosecution of a business of that kind over an area which it might consider its exclusive territory. Moreover, the matter of intrusion into the appellant's locality is a subject for consideration by the public service commission when the company shall have reached a stage in the development of its business where it proposes to supply power. It was probably apparent to that body there was a large field in that section of the state for the use of electricity and that the increase of the supply would stimulate the development of manufacturing. It was not shown in the case, and the fact probably does not exist in the commonwealth, that there is an excess of power for industrial activity. It may be, as contended, that the cost of the proposed enterprise will be such that the returns from the investment will be unprofitable. That is a matter for future determination, of course; but we think the commission cannot be expected to have a demonstration of the financial possibilities of an enterprise before it gives its approval thereto. It does not warrant the success of such a project.

[6] The complaint of the intervening appellants is that the public service commission did not open the hearing for the purpose of taking testimony in support of the allegations set forth in their petition to the public service commission and that the commission erred in entering the order of May 10, 1916, approving the incorporation of the water power company. The answer of the public service commission to the petition of the landowners to intervene sets forth that the order of the commission was made "after public hearing held upon due notice, and after careful consideration of all evidence which could in any wise affect the decision of the commission," and in reply to the complaint of the refusal of the commission to open the hearing the answer avers "that notice of the hearing on the application before it was given as required by law, that the petitioners did not avail them-

selves of the opportunity presented to appear before the commission until the testimony had been concluded, and that proof of the matter raised by the petitioners here could not have altered the decision of the commission, for the reason that the facts stated had been brought to the attention of the commission and considered by it, and were not material or relevant to the issue raised by the petition for a certificate of public convenience." It thus appears that the subject in which the interveners were interested was brought to the attention of the commission, was discussed before the commission, and that the order was made in the light of the conditions existing on the ground. It is further to be noted that the work contemplated by this power company does not include the erection of dams on Brush creek, and that any dams to be hereafter erected are to be subject to the approval of the water supply commission. The rights of the interveners as landowners are protected by the statutes authorizing the creation of the company. *Brumbaugh v. Raystown Water Power Co.*, 254 Pa. 215, 98 Atl. 1032.

There is no ground for a supposition that the action of the public service commission would have been affected by additional evidence as to the relation of the water power project to the property of the landowners on Brush creek. The notice of the application of the water power company for a charter did not conform to the rule prescribed by the public service commission, but that rule was adopted to secure uniformity in the procedure for a charter merely, and has not the effect of positive law. The commission has held the notice to be sufficient, the parties in interest have been heard, all the questions raised have been considered and on the facts presented the action of the public service commission cannot be held to be illegal. That it is unreasonable has not been made clear.

After a review of the whole case, we are of the opinion that the order of the public service commission should be approved, and the appeal dismissed, at the cost of the appellant. It is so ordered.

The Superior Court affirmed the order of the public service commission. *Pennsylvania Power Company* appealed.

Argued before BROWN, O. J., and POTTER, MOSCHZISKE, FRAZER, and WALLING, JJ.

Ralph J. Baker and Douglass D. Storey, both of Harrisburg, for appellant. J. E. B. Cunningham, Berne H. Evans, and Frank M. Eastman, all of Harrisburg, Joseph H. Thompson, of Beaver Falls, and Wm. N. Trinkle, of Philadelphia, for appellee Connoquenessing Power Co.

PER CURIAM. These two appeals were heard together. Each is dismissed, at appellant's costs, on the opinion of the Superior Court, sustaining the action of the Public Service Commission.

MORRISON v. RHODE ISLAND CO.
(No. 5078.)

(Supreme Court of Rhode Island. Oct. 18, 1918.)

APPEAL AND ERROR \Leftrightarrow 832(1)—**REARGUMENT.**

Motion for reargument will be denied by Supreme Court, where all the grounds set forth in the motion were duly considered before former opinion was filed.

On defendant's motion for reargument. Denied.

For former opinion, see 104 Atl. 71.

A. B. Crafts and Augustine H. Downing, both of Providence, for plaintiff. Clifford Whipple and G. Frederick Frost, both of Providence, for defendant.

PER CURIAM. The defendant's motion for leave to reargue the above case, filed by permission of court on the 5th day of October, 1918, is denied. All the grounds set forth in the motion were duly considered before the opinion was filed at the last term. The court finds no reason to grant a reargument.

(42 R. I. 1)

PUBLIC UTILITIES COMMISSION v. PROVIDENCE GAS CO. (two cases).
(Nos. 293, 295.)

(Supreme Court of Rhode Island. Oct. 17, 1918.)

GAS \Leftrightarrow 14(1)—**JURISDICTION AND POWERS—RIGHT OF APPEAL—INTERVENING CITY.**

Where gas company, under Pub. Laws 1912, c. 795, applied to Public Service Commission to fix rates, the city and town affected thereby, having intervened under rule 3 of the Public Utilities Commission, as authorized by section 17 of such act, had the right to appeal, notwithstanding section 34 limits the appeal to a "complainant."

Proceeding by the Providence Gas Company before the Public Utilities Commission for fixing the charges and rates for gas sold to the City of Providence, the Town of North Providence, and others, wherein the aforesaid City and Town intervened. From the order of the Public Utilities Commission, fixing the rates, said City and Town separately appeal, and the Gas Company in each case moves to dismiss the appeal. Motion denied.

Elmer S. Chace, City Sol., and Henry C. Cram and Charles P. Sisson, Asst. City Sols., all of Providence, for complainants. Swan & Keeney, of Providence, for respondent.

SWEETLAND, J. The above-entitled proceedings are respectively the appeal of the city of Providence and the appeal of the town of North Providence from a certain order of the Public Utilities Commission fixing the rates and charges of the Providence Gas Company, a corporation, for gas sold by it in the city of Providence, the town of North Providence, and certain other municipalities of the state. Said proceedings are before us

at this time upon the motion of the Providence Gas Company that each of said appeals be dismissed, on the ground that this court is without jurisdiction therein, for the reason that said city and town are not entitled by law to appeal from said order.

Chapter 795 of the Public Laws, approved April 17, 1912, is an act creating the Public Utilities Commission, prescribing its powers and duties, and providing for the regulation and control of public utilities. All the questions involved in the matter now before us are governed by the provisions of said act. It appears from the record that on July 12, 1918, the Providence Gas Company filed with the Public Utilities Commission schedules of its rates and charges for gas to be sold by it in said city and town, which rates were to become effective on September 1, 1918. Under the authority conferred by said act, after notice to said gas company and to such other interested persons as the commission deemed necessary, including the city of Providence and town of North Providence, said commission proceeded upon its own motion to investigate the reasonableness of said schedules of rates. The commission found the rates contained in the schedules filed by the gas company to be unreasonable, and by its order the commission substituted therefor rates and charges which in its judgment were just. The city of Providence and the town of North Providence, being dissatisfied with the rates and charges thus fixed in the order of the commission, have sought to appeal to this court.

Section 34 of said act regulating appeals from the orders of the commission, among other things, provides that:

"Any public utility or any complainant, aggrieved by any order of the commission fixing any rate, toll, charge, joint rate or rates * * * may appeal to the supreme court for a reversal of such order."

The act does not by its terms give the right of appeal from an order of the commission to any other person. The point of the motion of the gas company now under consideration is that neither the city of Providence nor the town of North Providence can properly be denominated a complainant in said proceeding before the commission, and hence under the act neither has the right to appeal from said order.

Sections 18, 19, 20 and 21 of said act, among other things, provide that any municipal or other corporation, or any group of persons designated in said sections, may make written complaint to said commission against any public utility, alleging that the rates and charges of said public utility are unreasonable. After notice and hearing on said complaint the commission shall make its determination and order. Under the provisions of said four sections the public utility, whose acts are under consideration, is the respondent.

ent, and the municipal or other corporation or the group of persons who institute the proceeding is clearly the complainant. It is the contention of the gas company that the right of appeal given to a complainant by section 34 is restricted to a moving party in proceedings instituted under the four sections referred to, viz. sections 18, 19, 20, and 21.

Sections 26, 27, and 28 of said act, among other things, provide that without complaint said commission may on its own motion investigate the reasonableness of rates and charges fixed by a public utility. Notice of the hearing and investigation shall be given to said public utility and to such other interested persons as the commission shall deem necessary, and thereafter the proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such hearing and investigation had been made on complaint. This was the procedure followed in the matter now under consideration. The commission undertook to make an investigation on its own motion. Notices of the hearing and investigation were given to the Providence Gas Company as respondent, and to such other persons as the commission deemed necessary, including the city of Providence and the town of North Providence, and thereafter, under the provisions of the act, the proceeding was to be conducted as though it was a complaint filed with the commission.

Section 17 of said act provides as follows:

"Sec. 17. All hearings, investigations and inquiries before the commission shall be governed by rules to be adopted and prescribed by the commission, and in such hearings and investigations and inquiries, the commission shall not be bound by the technical rules of evidence."

Acting under the authority conferred in section 17, the commission adopted rules of practice and procedure, rule 3 of which is in part as follows:

"Parties, or utilities not parties, may petition in any proceeding for leave to intervene and be heard therein. Such petition shall set forth the petitioner's interest in the proceeding. The leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding."

At the opening of the hearing and investigation now under consideration, the chairman of the commission made the following statement:

"I suggest that at this time the various cities and towns will enter their appearances officially with the stenographer, and of course such cities and towns as do enter their appearance will be given permission to intervene as parties to these proceedings."

Thereupon the city of Providence and the town of North Providence each entered its appearance, and throughout the hearing acted as parties adversary to the respondent

gas company. The solicitor for the city of Providence cross-examined at length the witnesses presented by the respondent, and introduced evidence in opposition to the claim of the respondent. At the close of the hearing the solicitor for the city of Providence and the solicitor for the town of North Providence each argued against the approval by the commission of the schedules of rates and charges filed by the respondent. The position assumed at the hearing by said city and town, respectively, was identical with that of a party instituting a complaint against the respondent gas company, attacking the justice of its rates and charges. In the circumstances of the matter we are of the opinion that, when said city and town were permitted to intervene as parties in the proceeding, which under the statute was being conducted as though it was a complaint filed with the commission, they intervened as parties complainant, with the rights of complainants, including the right to appeal from the final order afterwards made by the commission.

The motion of the respondent gas company in each of the above-entitled proceedings is denied.

(132 Md. 63)

LYON v. MAYOR AND COMMON COUNCIL OF HYATTSVILLE

(Court of Appeals of Maryland. Jan. 16, 1918.)

MUNICIPAL CORPORATIONS §—523(5)—SEWER ASSESSMENT — RECOVERY OF PAYMENT MADE.

Declaration to recover, on the ground of a sewer assessment having been wrongfully made, money paid under protest to prevent sale of property for enforcement of the assessment, stating that in suit by plaintiff and his wife, to set the assessment aside it was held valid, *held* to show plaintiff not entitled to recover.

Appeal from Circuit Court, Prince George's County; Beall, Judge.

Action by Wallace C. Lyon against the Mayor and Common Council of Hyattsville. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Clayton E. Emig, of Washington, D. C., for appellant. Vincent A. Sheehy, of Washington, D. C., for appellee.

PATTISON, J. The demurrer to the appellant's declaration having been sustained, and he having failed to amend within the time allowed him, a judgment for cost was entered against him in favor of the appellee. From that judgment this appeal is taken.

The suit was instituted to recover the sum of \$275.77 paid by plaintiff to the defendant in payment of an assessment against his wife, as the owner of a lot of land in Hyattsville, Md., to aid in the construction of a sewer.

er in Maryland avenue, in said town. The assessment was made under an ordinance passed by the defendant pursuant to an act of the General Assembly of this state. The validity of the ordinance is not assailed, but the assessment is said to have been wrongfully made thereunder, for the reason stated in the opinion in *Lyon v. Mayor and Common Council of Hyattsville*, 131 Md. 693, 132 Md. 56, 103 Atl. 104, decided at the present term of this court, which we think unnecessary to repeat here. As alleged in the declaration, the wife, at that time the alleged owner of said land, refused to pay the assessment and instituted proceedings in the court, in which this declaration was filed, to set aside and annul the assessment because, as she alleged, the assessment was null and void.

As to said proceedings the plaintiff in his brief, in stating the substance of this declaration, says:

"That his cotenant of said premises [his wife] entered proceedings in the court below to have the said assessment set aside, which proceedings were decided adversely to the appellant and his cotenant."

The declaration then states that the plaintiff paid said sum of \$275.77, the amount of said assessment and interest, under protest and coercion, after the said property had been advertised for the sale to enforce the payment of the said assessment. It is upon this statement of fact that the plaintiff attempts to recover the amount so paid by him, although at the time of the institution of this suit the proceedings referred to in the declaration as having been instituted by his wife to set aside the said assessment as null and void had been adversely decided by the lower court, and the assessment held by it to be valid, and the decision of that court affirmed by this court in *Lyon v. Mayor and Common Council of Hyattsville*, 125 Md. 306, 98 Atl. 919, Ann. Cas. 1916E, 765.

It is clear, upon the facts stated in the narr., that the plaintiff is not entitled to recover, and hence the court below committed no error in sustaining the demurrer thereto. The judgment will therefore be affirmed.

Judgment affirmed, with costs to the appellee.

(38 N. J. Eq. 571)

WEST NEW YORK IMPROVEMENT CO.
et al. v. TOWN OF WEST NEW YORK.

(Court of Errors and Appeals of New Jersey.
Jan. 31, 1918.)

(Syllabus by the Court.)

JUDGMENT §§470, 551, 564(1)—DECREE—FINALITY—COLLATERAL ATTACK—DIRECT ATTACK.

A decree of the Chancellor adjudicating the rights of parties is a final adjudication of all matters in issue and determined, and such a decree cannot be opened in a collateral proceeding, not directed to that end, simply because it stands in the way of a different result in another cause. The earlier decree settles the rights of parties as to the issues involved and

decided in the proceedings on which it is based, and, to avoid it, it must be opened by a direct assault, or by an appeal.

Appeal from Court of Chancery.

Bill to quiet title by the West New York Improvement Company and others against the Town of West New York. From a decree dismissing the bill, complainants appeal. Reversed, and record remitted to Court of Chancery.

Marshall Van Winkle and Gilbert Collins, both of Jersey City, for appellants. Mark A. Sullivan, of Jersey City, for appellee.

BERGEN, J. In 1859 William W. Niles, being the owner of a tract of land in the township of Union, in the county of Hudson, made and filed a map of the tract, showing its division into lots and streets, on which was protracted a street called Niles avenue, running east and west from Bergenline avenue, crossing the Bull's Ferry road, to the Hudson river, which is its easterly end, and where there is a high cliff, with the Hudson river far below, so that the avenue could not be opened to the extent indicated on the map. The present bill was filed to quiet the title to the lands embraced within the lines of Niles avenue, as indicated on the map, lying east of the Bull's Ferry road (now Park avenue) and the Hudson river. The Vice Chancellor advised that the bill be dismissed, and the Chancellor so decreed. From this decree the complainant has appealed.

The facts not disputed are that lots were sold on the portion of the street to which this controversy is limited, and to quiet the title to which the bill was filed, by reference to the map as filed, and that such lots are now all owned by the complainant; that previous to 1890 James H. Symes became the owner of all the lands lying east of Park avenue, formerly Bull's Ferry road, and in that year filed his bill in equity to quiet the title to the land, in which the township of Union, the municipality which the defendant succeeded, was made a party. This bill of complaint rested upon the ground that various maps had been made of the tract, some, if not all, subsequent to the original map of 1859; that these maps had protracted on them streets not consistent with the original map, and particularly inconsistent with Niles avenue, because of which, it was averred in the bill, the township claimed some interest in the land. The answer admitted the complainant's possession and claim of ownership, but disavowed any information concerning the other averments set out in the bill.

The final decree in that case adjudged, among other things, that the township of Union had no estate or interest in or incumbrance upon the lands, except the right to unpaid taxes and assessments levied against them. The lands as to which it was adjudged and decreed that the township of Union had no estate or interest in, or in-

cumbrance on, embraced that part of Niles avenue lying east of Park avenue. The taxes reserved to the township by this decree were subsequently paid. This decree finally adjudged the rights of the parties to that litigation, because the township, having been made a party, was bound to set up every claim or interest which it had antagonistic to the prayer of the bill, and if the right to accept the alleged dedication, based upon the map, then existed, not having been accepted for a period of 40 years, the township was bound to make that claim at that time, and, if it did not, the decree in the litigation to which it was a party finally determined all questions that it should have set up. *Chadwick v. Island Beach Co.*, 48 N. J. Eq. 616, 12 Atl. 890; *Board of Home Missions v. Davis*, 70 N. J. Eq. 577, 62 Atl. 447, affirmed in 71 N. J. Eq. 788, 65 Atl. 1117. Therefore by this decree it was adjudged that the township of Union had no interest in the lands, and removed any cloud from the title of Symes, the predecessor in title of the present complainant, and this decree cannot be assailed or set aside in any collateral proceeding.

Notwithstanding this adjudication, the town of West New York, the present defendant, which succeeded to the government and the rights of the township of Union, did, by resolution, on April 2, 1914, 24 years after the adjudication by the Court of Chancery that it had no estate, interest in, or incumbrance upon the lands, and while that decree was in full force and effect, accept Niles avenue, by virtue of which it claims an interest in so much of Niles avenue as lies east of Park avenue. The present bill was filed to quiet the title against this claim. In disposing of this bill the Vice Chancellor disregarded the former decree, saying that, in his opinion, the court was not authorized in 1890 in making that decree, because it was based, in part at least, upon the stipulation and agreement of counsel, who in his opinion could not make such a stipulation, and that the decree in the Court of Chancery made in 1890 should be opened. While the decree of dismissal does not in terms open that decree, it had that effect, because, manifestly, the present decree could not have been made if the former decree remained in full force and effect.

We confess a moderate degree of surprise that a Vice Chancellor should undertake to set aside the solemn decree of the Court of Chancery, which had not been appealed from, and still remained in full force and effect, simply because he thought it should never have been made. Such a proceeding amounts to the exercise by the Vice Chancellor of an appellate power to review all the decrees of the Chancellor, however ancient, which do not comport with his view, although the decree may have been partly executed, as in this case, by the payment of taxes reserved

to the same defendant in the former decree, the payment of which it had accepted. The Vice Chancellor had no power to open the original decree in the present proceeding. That decree had adjudicated between these parties the very question which is raised in the present proceedings, and the complainant was entitled to a decree as prayed for upon the ground of *res judicata*.

The notion of the Vice Chancellor that counsel for the defendant in the original suit had no authority to stipulate the facts, or to consent to the entry of the decree, is fallacious. Courts constantly accept the stipulation of counsel as a basis for their judgments and decrees, and if such consent is made without authority, it is the duty of the party for whom it is made to promptly complain, and not wait for nearly a quarter of a century, after accepting so much of the decree as is favorable, to disavow the authority of counsel. To get rid of a decree entered by consent of counsel in excess of his authority, the complaining party must act with reasonable promptness.

The decree dismissing the bill will be reversed, and the record remitted to the Court of Chancery, that it may be dealt with according to the views expressed by this court.

(261 Pa. 376)

MAYNARD v. BARRETT.

(Supreme Court of Pennsylvania. June 8, 1918.)

MUNICIPAL CORPORATIONS ~~§~~ 709(5)—USE OF STREET—INJURY TO PEDESTRIAN—EVIDENCE.
In an action by a pedestrian for injuries from being struck by defendant's motor truck, evidence held to sustain verdict for plaintiff.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Robert A. Maynard against William Barrett, president of the Adams Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, STEWART, FRAZER, and WALLING, JJ.

William A. Schnader and Thomas De Witt Cuyler, both of Philadelphia, for appellant. Henry J. Scott, of Philadelphia, for appellee.

MESTREZAT, J. This is an action of trespass brought by the plaintiff to recover damages for injuries which he alleges he sustained by reason of the defendant's negligence. It appears that on June 19, 1916, about half past 5 o'clock in the afternoon, the plaintiff was walking eastwardly on the south side of Cherry street in the city of Philadelphia, and when he reached the intersection of Seventeenth and Cherry streets he was hit by an electric truck of the defendant company and severely injured. The plaintiff alleges the driver of the truck fall-

ed to give proper signals of its approach to Cherry street as it proceeded along Seventeenth street; he did not have such control of the truck that it could be brought to a stop within a reasonable distance, and the truck was driven at such close proximity to the curb of Seventeenth street as to make it dangerous and a menace to persons on the pavement. The plaintiff testified that after making a business call at 1726 Cherry street, he proceeded east on the south side of Cherry street to Seventeenth street, which he intended to cross for the purpose of attending to a business affair farther east on Cherry street. When he arrived at Seventeenth street he looked east, south, and north, and saw no vehicle approaching. He saw a limousine car standing on the west side of Seventeenth street north of Cherry street. He stepped back about two steps, so that he could see beyond the limousine, and saw no other vehicle. He undertook to cross Seventeenth street, and when in the act of stepping off the curb, "one foot on the pavement and one foot going toward the street," he was hit by the defendant's electric truck. He was about 2 feet south of the Cherry street curb. He heard no sound of a gong or other warning. Ada Allen, plaintiff's witness, testified that she was sitting at an open window in the second or third house on Seventeenth street south of Cherry street and saw the truck north of Cherry street coming south on Seventeenth street; that it did not give any warning signal of its approach to the latter street; that after it had crossed Seventeenth street it ran very close to the west curb of Seventeenth street and hit the plaintiff as he was stepping off the pavement, and carried him between 3 and 5 feet, when the truck stopped. Virginia Allen, plaintiff's witness, testified that from a window she saw the plaintiff coming east on the south side of Cherry street, and when he was in the act of stepping from the curb into Seventeenth street the truck ran very close to the edge of the curb and caught and pinned him under it. She says that the plaintiff was struck by the front wheel of the truck, and that it gave no warning signal of its approach to the place of the accident, which was where the crossing would be if there had been any crossing stones on the street. One of the defendant's witnesses testified that she was going north on the pavement on the west side of Seventeenth street, and met the plaintiff south of Cherry street walking close to the curbstone, and that the upper part of the truck seemed to strike him on the shoulder; that he was facing south at the time he was struck; and that he fell between the front and rear wheels, and was south of the rear wheel when the truck stopped, which was about 3 feet from the point of the collision. She also testified that at the time of the accident the front wheel of the truck seemed to be almost

touching the curb of the pavement. The plaintiff was walking in the same direction in which the truck was traveling. The driver of the truck, defendant's witness, testified that, as he was driving south on Seventeenth street and was north of the house line of Cherry street, he saw the plaintiff at the southwest corner of Seventeenth and Cherry streets; that he did not see him turn the corner on Cherry street, and gave no further attention to him, and knew nothing of him until the accident occurred south of Cherry street.

The defendant claims that the accident occurred on the west side of Seventeenth street and about 40 or 50 feet south of the line of the Cherry street curb and not at the crossing of the two streets; that the plaintiff came in contact with the truck between its front and rear wheels, fell under the truck, and was carried from 3 to 5 feet, when the truck stopped. It is claimed that at the time of the collision the truck was not being operated at a negligent speed; that the plaintiff was not struck by any part of the front of the truck, nor did any part of the truck pass over him; that no part of the truck extended over the Seventeenth street curb. Several witnesses were called by defendant, and they contradicted the testimony of the plaintiff as to where and how the accident occurred, and their testimony would have justified a finding that the plaintiff was guilty of contributory negligence, and absolved the defendant from any negligent conduct in operating the truck at the time of the accident. The learned president judge of the court below submitted the case in an exhaustive charge in which he directed attention to the material parts of the testimony of the witnesses on both sides and explained fully and correctly the duties of the plaintiff and the driver of the truck as they approached the intersection of the streets. In concluding the charge on this branch of the case the court said:

"What do you think about this matter? Do you think that Nadler [the driver of the truck] handled the car as he ought to have done? Do you think that he handled it as a man of ordinary common sense would? If he did not, then, if Maynard [the plaintiff] was clear of blame in the matter himself, you may render a verdict in the plaintiff's favor. If Nadler was not guilty of negligence, if you think that he did everything that a man of ordinary common sense and intelligence would have done under the circumstances to save other people from harm, your verdict ought to be in favor of the defendant. And your verdict ought to be in favor of the defendant if you think that Mr. Maynard was careless in the way in which he attempted to leave the curb on the west side of Seventeenth street, or in the way in which he approached the curb on the west side of Seventeenth street. He was bound to give some attention to his safety, and if he neglected those reasonable precautions which any man of common sense would have taken, and in that way helped to bring this accident about, he is not entitled to one cent of damages."

The verdict was for the plaintiff, and after a careful examination of the testimony we

are not convinced that it was not sufficient to justify its submission to the jury both as to the plaintiff's and defendant's negligence. We are therefore compelled to affirm the judgment which was entered on the verdict. Judgment affirmed.

(261 Pa. 366)

ENGLANDER v. OSBORNE et al.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. CORPORATIONS ⇨156—PREFERRED STOCK—DIVIDENDS.

Holder of preferred stock; entitled to receive when and as declared a fixed annual cumulative dividend of 6 per cent. before any dividends on common stock, where a dividend of 54 per cent. for current year and arrearages for nine years was declared on preferred stock, was entitled to restrain payment of declared equal dividend on common stock.

2. CORPORATIONS ⇨156—PREFERRED STOCK—DIVIDENDS.

The general rule is that preferred stockholders are entitled to share with common stockholders to profits distributed after the latter have received in any one year an amount equal to the dividends of the preferred stock.

3. CORPORATIONS ⇨156—PREFERRED STOCK—CONTRACT.

The priority of preferred stockholders rests upon the contract, and beyond its provisions they occupy no position to the corporation different from that of the holders of common stock.

4. CORPORATIONS ⇨156—DIVIDENDS—PREFERRED STOCK.

When a dividend is declared the holders of preferred stock are entitled to first claim to the extent of their preferences for the current year, and if enough remains more than sufficient to pay similar dividends on common stock, both classes of stockholders are entitled to share it equally.

5. CORPORATIONS ⇨156—DIVIDENDS—CUMULATION.

Without an agreement, express or implied, that dividends shall be cumulative, unpaid dividends covering arrearages cannot be claimed.

6. CORPORATIONS ⇨156(2)—DIVIDENDS—COMMON STOCK.

Common stockholders are not entitled to go back of the current year and claim to be reimbursed for unearned dividends of the past years, as their status was determined when during any current year there were no profits to be divided, and as each new year begins a new dividend.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Samuel Englander, executor of the estate of Matilda De Witt, deceased, against Charles Osborne, John G. Hoffman, and others to enjoin the declaration of a dividend on the common stock of a corporation. From a decree overruling a demurrer to the bill and awarding an injunction, defendant John G. Hoffman appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKE, and FRAZER, JJ.

John G. Kaufman and V. Gilpin Robinson, both of Philadelphia, for appellant. Joseph B. Englander, of Philadelphia, for appellee.

FRAZER, J. [1-5] Plaintiff's decedent owned certain shares of the 6 per cent. cumulative preferred stock of the Hoffman, De Witt & McDonough Company, one of the defendants. No dividends were paid on either the company's preferred or common stock until 1917, a period of nine years, when a dividend of 54 per cent., covering the current year and all arrearages, was declared and paid on the preferred stock, and at the same time a dividend of equal amount was declared on its common stock. Plaintiff began these proceedings to restrain the payment of the latter dividend, contending the holders of common stock were not entitled to a dividend of more than 6 per cent. without sharing the excess equally with the preferred stockholders. Defendants demurred and claimed the holders of common stock were entitled to receive dividends to an amount sufficient to make up arrearages in past years and equalize the common and preferred stock before holders of the latter were entitled to receive an excess above the amount of their fixed dividends and arrearages. The court below overruled the demurrer and restrained the payment of the dividend on the common stock. Defendant appealed.

The certificates of the preferred stock of the company provide:

"The holders of the preferred stock shall be entitled to receive when and as declared and the company shall be bound to pay a fixed yearly cumulative dividend of six per cent. (6%) payable quarterly, before any dividend shall be set apart on the common stock."

We find nothing limiting the right of the preferred stockholders to the 6 per cent. dividend, regardless of the earnings of the company, and in absence of such limitation the general rule is that such stockholders are entitled to share with the holders of the common stock all profits distributed after the latter have received in any year an amount equal to the dividend on the preferred stock. *Fidelity Trust Co. v. Lehigh Valley R. R. Co.*, 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613; *Sternbergh v. Brock*, 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1073, 133 Am. St. Rep. 877; *Sterling v. Watson Co.*, 241 Pa. 105, 88 Atl. 297. The priority of the preferred stockholders rests upon the contract, and beyond the provisions of such contract they occupy no position toward the company different from that of the holders of common stock. When a dividend is declared the former are entitled to first claim to the extent of their preference for the current year, and if there remains a sum more than sufficient to pay a similar dividend on the common stock, both classes of stockholders are entitled to share equally in the excess. In absence of agreement, express or implied, that dividends shall be cumulative, unpaid dividends in the past cannot be claimed. 10 Cyc. 573.

(261 Pa. 239)

LANE v. HORN & HARDART BAKING CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. MASTER AND SERVANT \Leftrightarrow 371—WORKMEN'S COMPENSATION ACT—"PERSONAL INJURY."
"Personal injury," as used in Workmen's Compensation Act June 2, 1915 (P. L. 736), is confined to injuries of accidental origin and such diseases as naturally result therefrom, and includes any form of bodily harm or incapacity caused by either external violence or physical force.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Injury.]

2. MASTER AND SERVANT \Leftrightarrow 373—WORKMEN'S COMPENSATION ACT—"ACCIDENTAL INJURIES"—HEAT PROSTRATION.

Stroke from direct rays of sun, heat stroke, or prostration are "accidental injuries," within Workmen's Compensation Act June 2, 1915 (P. L. 736); it being immaterial whether prostration results from artificial heat or from sun's natural heat, directly or through heated atmosphere, if exhaustion results from heat in course of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accidental Injury.]

3. MASTER AND SERVANT \Leftrightarrow 372—WORKMEN'S COMPENSATION ACT—"ACCIDENT."

Under Workmen's Compensation Act June 2, 1915 (P. L. 736), and particularly section 301, death from accident in course of employment means death resulting from unforeseen violence to physical body in course of employment, as distinguished from ordinary or occupational diseases; "accident" being an event occurring without foresight or expectation, but casually or fortuitously.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

4. MASTER AND SERVANT \Leftrightarrow 373—WORKMEN'S COMPENSATION LAW—"ACCIDENT IN COURSE OF EMPLOYMENT"—HEAT PROSTRATION.

An employé, overcome by heat while working at his employer's lunch counter on a hot day, and who died within two hours, suffered an "accidental injury in the course of his employment," within Workmen's Compensation Act June 3, 1915 (P. L. 738) § 301, so that his widow might recover compensation.

5. MASTER AND SERVANT \Leftrightarrow 418(4)—WORKMEN'S COMPENSATION—AGREED FACTS—RECORD IN SUPREME COURT.

Under Workmen's Compensation Act June 2, 1915 (P. L. 753, 754) §§ 422, 425, facts on which claim for compensation is based, if agreed upon on appeal to common pleas, should be brought before Supreme Court upon record, on subsequent appeal to it.

6. MASTER AND SERVANT \Leftrightarrow 374—WORKMEN'S COMPENSATION ACT—INJURY WHILE ENGAGED IN EMPLOYMENT.

Under Workmen's Compensation Act June 2, 1915 (P. L. 736), giving compensation for personal injury or death of employé "by an accident in the course of his employment," compensation is not based on the theory that employment in which person "is engaged" is proximate cause of injury.

Appeal from Court of Common Pleas, Philadelphia County.

Claim for compensation under the Workmen's Compensation Act by Mary Lane against the Horn & Hardart Baking Company. From a judgment affirming the deci-

[6] Likewise there is no logical reason for holding that common stockholders are entitled to go back of the current year, and claim to be reimbursed for unearned dividends in past years. To do so would render such dividends cumulative in effect without agreement. Accordingly, when during previous years no dividends were earned this was conclusive as to the right of all stockholders, both preferred and common, except for the contractual right of the former to payment out of future profits to the extent of their preference before the latter would be entitled to participate in the earnings. So far as the holders of the common stock were concerned their status was finally determined when, during any current year, there were no profits to be divided. The profits so lost are lost forever, and each new year marks the beginning of a new dividend paying period. *Dent v. London Tramways Co.*, 16 Ch. Div. 344, 353; *Morawetz on Corp.* (2d Ed.) § 459, cited in 10 Cyc. 573.

The foregoing principles were properly applied by the learned judge of the court below. No different rule was suggested by this court in *Sternbergh v. Brock*, supra, relied upon by appellant. The statement by this court that (225 Pa. 287, 74 Atl. 169, 24 L. R. A. [N. S.] 1078, 133 Am. St. Rep. 877) "it is to be assumed that before the holders of preferred stock could claim more than the five per cent. dividends that they received, the holders of the common stock were entitled to receive a dividend of the same percentage on the par value of their shares," cannot be construed as giving the holders of the common stock the right to reimbursement for dividends unpaid in past years before the preferred stockholders are entitled to participate in the excess profits of a given year. The question there before the court was whether preferred stockholders were limited to dividends to the amount of their preference, or whether they were entitled to participate in excess profits in any year after the common stockholders had received a dividend equal to that paid on the preferred stock. There was no claim made by the holders of the common stock for reimbursement for dividends unpaid in the past, though it appears from the opinion of this court (225 Pa. 286, 287, 74 Atl. 166, 24 L. R. A. [N. S.] 1078, 133 Am. St. Rep. 877) that past dividends on common stock did not equal dividends on preferred stock. Notwithstanding this fact the preferred stockholders were permitted to participate with the common stock in an excess of dividends earned in a particular year. Aside from the fact that the question now before us was apparently not raised or discussed, the case, instead of supporting appellant's view, is authority in support of the conclusion reached by the court below.

The assignments of error are overruled and the decree of the court below affirmed.

sion of the Workmen's Compensation Board, allowing the claim, defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Alfred D. Wiler, of Philadelphia, for appellant. Louis Levinson, of Philadelphia, for appellee.

MOSCHZISKER, J. Mary Lane claimed compensation, under Act June 2, 1915 (P. L. 736), for the alleged accidental death of her husband, an employé of defendant. The claim was allowed by the Workmen's Compensation Board, and this decision was affirmed by the court below. Defendant has appealed.

Upon the facts involved, Commissioner Scott says:

"This case comes before the board on a petition for determination of compensation due the claimant under agreed facts. The statement of facts precludes any other cause of death than that of heat exhaustion or prostration, due to the heated condition of the atmosphere. The claimant's deceased husband was overcome by heat while working at the defendant's lunch counter, on a hot August day in 1917, and died within two hours. There is nothing in the statement to show that [the temperature of] the place where the employé was working was hotter than the outside atmosphere, or that he was affected by different heat conditions than prevailed in the community at large."

[1, 2] On the governing rules of law, the commissioner correctly states:

"The term 'personal injury' in our act is confined to injuries of accidental origin and such diseases as naturally result therefrom, and must be held to include any form of bodily harm or incapacity [accidentally] caused by [either] external violence or physical force. * * * A stroke by lightning, a stroke from the direct rays of the sun, a heat stroke, or heat prostration, are untoward, unexpected mishaps, and accidental injuries, within the meaning of the act. * * * It is immaterial whether the heat prostration is produced by artificial heat, or by the natural heat of the sun, directly or through the heated atmosphere, if the exhaustion comes from heat in the course of employment."

[3, 4] In cases such as the one at bar, the character and cause of the injury must be considered, in order to determine whether the results complained of are properly attributable to "accident," within the meaning of that term as used in the act of June 2, 1915 (P. L. 736), *supra*; for, wherever death is mentioned in the statute, it means death resulting only from unforeseen violence to the physical structure of the body and its resultant effects (section 801, P. L. 738), or, in other words, death from "an accident" happening in the course of the deceased person's employment, as distinguished from either ordinary or occupational disease developed during the course of such employment; these latter not being within contemplation of the act. This subject is fully discussed in *McCauley v. Imperial Woolen Co.*, 104 Atl. 617.

The learned commissioner is not without

authority in holding heat prostration, under circumstances such as those at bar, to fall within the meaning of the word "accident," as that term is employed in modern compensation legislation, and, we may add, as it is used in the law of insurance. In *Ismay, Imrie & Co. v. Williamson*, Law Rep. A. C. 1908, 437, 439, Lord Loreburn, speaking for the House of Lords, said:

"This man died from an accident. What killed him was a heat stroke, coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions, which experience, in this instance, had not taught. It was an unlooked-for mishap in the course of his employment. In common language, it was a case of accidental death."

See, also, *Maskery v. Lancashire Shipping Co.*, decided by the Court of Appeals, England, and reported in 7 Butterworth's Workmen's Compensation Cases, 428, 430, where the engineer on a steamship met his death from a heat stroke while crossing the Red Sea. The contention of defendants was that they were not liable "because the Red Sea is always very hot, and there was no special heat on that particular day more than people in the engine room going through the Red Sea would ordinarily be exposed to." In affirming an allowance of compensation, the court held that the *Ismay Case* applied, and the opinion refers to the heat stroke as "an occurrence which was in its nature fortuitous." *Andrew v. Fallsworth Industrial Society*, 90 Law Times Reports (New Series) 611, 612, involves death from a stroke of lightning; *Pack v. Prudential Casualty Co.*, 170 Ky. 47, 55, 185 S. W. 496, L. R. A. 1916E, 952, death from sunstroke; and *McGlinchey et al. v. Fidelity Casualty Co.*, 80 Me. 251, 253, 14 Atl. 13, 9 Am. St. Rep. 190, death from fright—all held to be accidental; while *N. W. Commercial Travelers' Ass'n v. London Guarantee & Accident Co.*, 10 Manitoba Rep. (Queen's Bench) 537, holds death from frost to be within the terms "bodily injuries effected through external, violent and accidental means." Finally, *N. A. Life & Accident Ins. Co. v. Burroughs*, 69 Pa. 43, 51, 8 Am. Rep. 212, a case where an assured strained himself while loading hay, defines "accident" as "an event that takes place without one's foresight or expectation; * * * an accident signifies happening by chance or unexpectedly, * * * casual [or] fortuitous." Of course, neither this last ruling nor any other of the insurance cases mentioned can be looked upon as governing the present compensation claim; but all are illustrative of the liberal views entertained by the courts as to the meaning of the term "accident" in determining liability for death or personal injury.

[5] Section 422 of the act of 1915, *supra* (P. L. 753), provides that the facts on which a claim for compensation depends may be agreed upon, and, in that event, the "petition shall contain the agreed facts and shall be

signed by all parties in interest." Section 425 (P. L. 754) provides that, on an appeal to the courts, such agreement shall be included in the transcript, or record, sent up for consideration. In the present instance, the agreement itself has not been physically brought before us, as it should be, but the commissioner's findings are that the statement of facts contained therein "precludes any other cause of death than that of heat exhaustion or prostration, due to the heated condition of the atmosphere"; hence we must take it no organic weakness or occupational disease can be accounted the proximate cause of the death of claimant's husband, but the casualty was attributable solely to the unexpected and violent effect of the heat upon the physical structure of deceased's body, and this was properly held by the Compensation Board and the court below to be an accidental death within the meaning of the act.

[8] Appellant's contention that "the whole intent of this legislation [compensation law] is based upon the theory that the employment in which the person is engaged is the proximate cause of the injury," is without merit. In this connection is is sufficient to call attention to *Dzikowska v. Superior Steel Co.*, 259 Pa. 578, 581, 108 Atl. 351. There the deceased, during an intermission in his work, while waiting for material, struck a match for the purpose of lighting a cigarette, and, as a result, his clothing ignited and he was fatally burned. We sustained an award in favor of the widow, and said, *inter alia*:

"In the compensation acts of some of the states, compensation is allowed only for injuries 'arising out of and in the course of his employment,' thus attaching two conditions to the right to recover. In the Pennsylvania statute, the words 'arising out of' do not appear; and we are therefore relieved from the necessity of considering the question whether in this case the accident arose out of, or was due to the character of, the employment. Under our statute compensation is given for personal injury or death of an employe 'by an accident in the course of his employment.'"

In the present case, the court below rightly held that claimant's husband died from an accident happening in the course of his employment, within the meaning of the act of 1915.

The assignments of error are overruled, and the judgment sustaining the allowance of compensation is affirmed.

(261 Pa. 312)

McCAULEY v. IMPERIAL WOOLEN CO.
et al.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. MASTER AND SERVANT §417(4¼)—WORKMEN'S COMPENSATION ACT — REFEREE — STATUS.

A compensation referee is an officer of Workmen's Compensation Board, with defined powers, and his records belong to files of court,

and, on appeal, are before it for review, within limitations of Workmen's Compensation Act June 2, 1915 (P. L. 736, 751, 758) §§ 409, 419-421.

2. MASTER AND SERVANT §416—WORKMEN'S COMPENSATION ACT—REFEREE'S FINDINGS—REVIEW BY COMPENSATION BOARD.

Under Workmen's Compensation Act June 2, 1915 (P. L. 736), Compensation Board, if not sustaining referee's decision, may not reverse on question of fact, but must grant a hearing de novo, and substitute its own findings and conclusions, and, on appeal on alleged error of law, must act solely on referee's record, and sustain, reverse, or modify his final order.

3. MASTER AND SERVANT §416—WORKMEN'S COMPENSATION ACT—APPEAL TO COMPENSATION BOARD.

Appeals to Workmen's Compensation Board, taken under Workmen's Compensation Act June 2, 1915 (P. L. 753) § 420, amount to a writ of error, and if taken under section 421 amount to a motion for a new trial before board, instead of referee.

4. MASTER AND SERVANT §416—WORKMEN'S COMPENSATION ACT—APPEAL TO COMPENSATION BOARD—"ERROR OF LAW."

Under Workmen's Compensation Act June 2, 1915 (P. L. 736), a referee's finding of fact without any evidence at all is an "error of law," within section 420 (P. L. 753), giving an appeal from referee's decision to Compensation Board on errors of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Error of Law.]

5. MASTER AND SERVANT §416—WORKMEN'S COMPENSATION ACT—APPEAL TO COMPENSATION BOARD—NATURE OF APPEAL.

Where referee's ultimate finding is in form of a mixed conclusion of fact and law, and classification of appeal to Compensation Board under Workmen's Compensation Act June 2, 1915 (P. L. 753) §§ 420, 421, is not made plain by appellant, the board must exercise its discretion in determining its nature.

6. MASTER AND SERVANT §416—WORKMEN'S COMPENSATION ACT—APPEAL TO COMPENSATION BOARD—QUESTION OF FACT—DETERMINATION.

Where referee's finding is attacked because testimony was insufficient to justify it, and not because there was no legal evidence whatever to warrant it, a question of fact arises, and, under Workmen's Compensation Act June 2, 1915 (P. L. 753) § 421, the board must sustain referee or grant a hearing de novo.

7. MASTER AND SERVANT §416—WORKMEN'S COMPENSATION ACT—HEARING DE NOVO BY COMPENSATION BOARD—EVIDENCE.

On Compensation Board's hearing de novo under Workmen's Compensation Act June 2, 1915 (P. L. 753) § 421, depositions taken before referee may, by agreement of parties, be accepted as proofs, either for purpose of board's finding of its own facts or its adoption of referee's findings, though on hearing under section 420, on point of law, testimony cannot be re-examined for finding of new facts, as referee's findings, not appealed from, are final under section 409 (P. L. 751).

8. APPEAL AND ERROR §1—STATUTE—"APPEAL."

"Appeal" has no conclusive meaning, and it is necessary in each instance to look to particular act giving an appeal, to determine powers to be exercised by appellate court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appeal.]

9. MASTER AND SERVANT §417(3)—WORKMEN'S COMPENSATION LAW — APPEAL FROM COMPENSATION BOARD TO COMMON PLEAS—NATURE.

Under Workmen's Compensation Act June 2, 1915 (P. L. 751, 754) §§ 409, 425, appeal from Compensation Board to common pleas is in nature of certiorari, intended to prevent appeals to courts, except for errors of law, and to hasten final determination of claims.

10. CERTIORARI §64(1)—EXTENT OF REVIEW.

Review on certiorari is usually limited to a mere inspection of record, to see whether judgment conforms therewith, or whether lower court exceeded its jurisdiction or abused its discretion, and generally the lower court's opinion is no part of record.

11. MASTER AND SERVANT §417(5)—WORKMEN'S COMPENSATION ACT—CERTIORARI TO COMMON PLEAS—REVIEW.

In proceedings under Workmen's Compensation Act June 2, 1915 (P. L. 736), the appellate court, on certiorari, may examine the opinion of the board, to see the basis on which it acted.

12. MASTER AND SERVANT §417(4½) — WORKMEN'S COMPENSATION ACT — REVIEW BY COMMON PLEAS—NOTES OF TESTIMONY.

Notes of testimony are not properly part of record sent up on appeal from Compensation Board to common pleas under Workmen's Compensation Act June 2, 1915 (P. L. 754) § 425, and, if mistakenly included in record, should not be considered.

13. MASTER AND SERVANT §418(6)—WORKMEN'S COMPENSATION ACT—REVIEW BY SUPERIOR AND SUPREME COURTS—NATURE.

Under Workmen's Compensation Act June 2, 1915 (P. L. 751, 754, 756) §§ 409, 425, 433, right of review by Supreme and Superior Courts in a compensation claim is on certiorari alone, and they may examine everything properly contained in records sent to common pleas, including findings and reasons of referee and Compensation Board, and reasons of court below.

14. EVIDENCE §14—JUDICIAL NOTICE—ANTHRAX.

It is a matter of general knowledge that anthrax is primarily a disease of animals, such as sheep, which may be transmitted to men handling infected animal materials, like wool, by the entrance of anthrax bacilli into the body and their rapid multiplication and development.

15. EVIDENCE §317(18)—MASTER AND SERVANT §404, 405(4)—WORKMEN'S COMPENSATION—HEARSAY.

In a claim for compensation under Workmen's Compensation Act June 2, 1915 (P. L. 736), what deceased said as to the cause of a mark upon his neck was hearsay, which, standing alone, was insufficient to sustain referee's findings for claimant.

16. MASTER AND SERVANT §416 — WORKMEN'S COMPENSATION ACT—DEATH FROM INJURY BY ACCIDENT IN COURSE OF EMPLOYMENT—FINDINGS.

On claim under Workmen's Compensation Act June 2, 1915 (P. L. 736), for wool sorter's death from external anthrax, referee's findings that he received a scratch on his neck in the course of his employment, and that anthrax germs then entered his body, causing his death, justified conclusion that he died as result of injury by accident in course of his employment.

17. MASTER AND SERVANT §404 — WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

Workmen's Compensation Act June 2, 1915 (P. L. 736), contemplates liberality in the admission of proof and the inferences reasonably to be drawn therefrom.

18. MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION ACT—ACCIDENT — CIRCUMSTANTIAL EVIDENCE.

The probable nature of an accident, followed by death for which compensation is claimed, under Workmen's Compensation Act June 2, 1915 (P. L. 736), may be established by circumstantial evidence.

19. MASTER AND SERVANT §415 — WORKMEN'S COMPENSATION ACT—PROOFS.

Workmen's Compensation Act June 2, 1915 (P. L. 752, 753, 755) §§ 417, 421, 428, and Act June 2, 1915 (P. L. 760) § 17, permits liberal investigation by hearing and otherwise, and after all data have been gathered, without regard to technical rules, the proofs must be examined, and irrelevant and incompetent testimony excluded, and findings must rest on relevant and competent evidence.

20. MASTER AND SERVANT §405(1)—WORKMEN'S COMPENSATION ACT — FINDINGS — HEARSAY.

Under Workmen's Compensation Act June 2, 1915 (P. L. 752, 753, 755) §§ 417, 421, 428, and Act June 2, 1915 (P. L. 760) § 17, relating to findings and procedure, neither referee nor Compensation Board has right to find material facts on hearsay alone.

21. MASTER AND SERVANT §372 — WORKMEN'S COMPENSATION ACT—OCCUPATIONAL DISEASES.

Workmen's Compensation Act June 2, 1915 (P. L. 736, 738) §§ 1, 301, defining terms and liability, contemplate injuries by accident only, and do not cover occupational diseases.

22. MASTER AND SERVANT §372 — WORKMEN'S COMPENSATION ACT — "INJURY" — "PERSONAL INJURY" — "ACCIDENT" IN COURSE OF EMPLOYMENT.

Under Workmen's Compensation Act June 2, 1915 (P. L. 738) § 301, defining "injury" and "personal injury," injury to physical structure of body need not be by external violence, and if accident causing injury is a mishap or fortuitous happening, not expected or designed, it is an "accident in course of employment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury; Personal Injury.]

23. MASTER AND SERVANT §373 — WORKMEN'S COMPENSATION ACT — ACCIDENT IN COURSE OF EMPLOYMENT.

Under Workmen's Compensation Act June 2, 1915 (P. L. 738) § 301, defining injury by accident in course of employment, death from germ infection, to be within the act, must be sudden development from some abrupt violence to physical structure of body, and not result of a gradual development from long exposure to natural dangers incident to employment.

24. MASTER AND SERVANT §416 — WORKMEN'S COMPENSATION ACT — APPEAL TO COMPENSATION BOARD.

Where Compensation Board, on appeal from referee, treated appeal as involving a question of law, within Workmen's Compensation Act June 2, 1915 (P. L. 753) § 420, it could not make separate findings of fact, so that provision of section 409 (P. L. 751), that its findings of fact should be final, did not apply.

25. CERTIORARI §66—FINDINGS — COMPETENCY OF EVIDENCE—PRESUMPTION.

On certiorari, where the testimony is not before the court, it must assume that the evidence was competent, relevant, and sufficient, in the absence of findings as to its character.

Appeal from Court of Common Pleas, Philadelphia County.

Claim under the Workmen's Compensation Act by Mary McCauley for compensation for

the death of her deceased husband, James McCauley, against the Imperial Woolen Company, employer, and the London Guarantee & Accident Company, insurer. From a judgment reversing a decision of the Workmen's Compensation Board, setting aside the referee's award of compensation, defendant appeals. Affirmed, with a procedendo.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

C. Donald Swartz and William W. Smithers, both of Philadelphia, for appellant. I. D. Levy and William Linton, both of Philadelphia, for appellee.

MOSCHZISKER, J. The plaintiff, widow of James McCauley, claimed compensation for the death of her husband. The referee found in favor of the claimant. The Workmen's Compensation Board reversed this finding. The case was removed to the common pleas of Philadelphia county, which reversed the board and affirmed the referee. The defendant employer entered the present appeal. Several interesting points of law are thus raised, which we shall pass upon separately. The first of them may be divided into three branches; i. e., the jurisdiction on appeal of (a) the Compensation Board; (b) the common pleas; and (c) this court. They will be considered in the order stated.

[1, 2] The act of June 2, 1915 (P. L. 736), in section 400 (P. L. 751), stipulates that "a referee's findings of fact shall be final, unless the board shall allow an appeal therefrom as hereinafter provided." Section 419 (P. L. 753) provides that any party in interest may appeal to the board on the ground: (1) That the referee's decision is not "in conformity with the terms of this act, or that the referee committed any other error of law"; (2) that the findings of fact and conclusion of the referee are "unwarranted by the evidence," or "because of fraud, coercion or other improper conduct by any party in interest." Section 420 (P. L. 753) provides that, when an appeal is based on alleged error of law, the board may either sustain, reverse or modify the decision of the referee. Section 421 (P. L. 753) provides that, when the appeal is taken on the ground that the referee's decision is unwarranted by the evidence, or because of improper conduct by a party in interest, the board may either sustain the referee or "grant a hearing de novo."

The referee is an officer of the board, vested with defined duties and powers. All records made by him belong to the files of that body, and, on appeal, are before it for review, within the limitations of the act. The statute contemplates and requires that if, after inspection and consideration of the adjudication and evidence, the board does not sustain the referee's final decision, before the former may reverse on a question of fact, it must grant a hearing de novo, make investigation, and substitute its own findings of

fact, and conclusions thereon, for such findings of the referee as are not adopted; but, when an appeal is based only on alleged error of law, the board must act solely upon the record of the referee, and thereon it may either sustain, reverse, or modify the latter's final order.

[3, 4] That learned jurist, President Judge Shafer, of the common pleas of Allegheny county, in *Yalch v. Jones & Laughlin Steel Company*, 65 P. L. J. 636, 637, correctly construes the act of 1915, supra, thus:

Appeals to the board "are taken under two sections of the act [420 and 421]. The first amounts to a writ of error, and the second to a motion for a new trial; the new trial to be had before the board, instead of the referee. The first of them is to redress errors of law committed by the referee, and the second to review his findings of fact, when it is claimed they are not warranted by the evidence. The finding of fact without any evidence at all is an error of law. While the appeal in this case is taken because it is alleged that the findings of fact are not supported by the evidence, this does not prevent the board from treating the appeal as taken under section 420, rather than section 421."

[5] In cases of the character of the present claim, the ultimate finding is often cast in the form of a mixed conclusion of fact and law; and under such circumstances, if the classification of an appeal is not made plain by the appellant, ex necessitate the board must exercise its discretion in determining the nature thereof. Here, admittedly, the appeal was properly treated as turning on a point of law.

[6] The real contention is an utter lack of legal evidence to sustain the referee's conclusion that the death of James McCauley was occasioned by an accident occurring in the course of his employment. In other words, the defendant employer does not controvert, as matter of fact, that McCauley's death was due to the cause set up by claimant, but denies there is any legal proof to show that this causal event, which is alleged as an accident, happened while deceased was acting in the course of his employment. This contention raises a question of law, which the board had power to determine under section 420, upon a consideration of the legal adequacy of the testimony taken before the referee. Had the attack been simply upon the ground that the testimony was insufficient in fact to justify the latter's findings, and not that there was no legal evidence whatever to warrant them, a question of fact, not of law, would have been raised, and, under section 421, the board would have been obliged either to sustain the referee or grant a new hearing.

[7] On a hearing de novo under section 421, the depositions taken before the referee might, by agreement of the parties, be accepted by the board as proofs in the case, either for the purpose of finding its own facts or formally adopting those stated by the referee; but on a hearing solely to determine a point of law, raised by appeal under

section 420, the testimony has no place in the consideration for the purpose of finding new facts, because those found by the referee, being unappealed from, are final under section 409. In a case like the one at bar, however, the board must consider the legal sufficiency of the testimony, not to find new facts, but in order to determine whether or not those relied upon by the referee may stand in law. Of course, if the appeal raises both questions of fact and law, the board may treat it accordingly. In this instance the board acted in conformity with the intent of the parties and proper procedure when it finally disposed of the point involved as one of law. The question of the correctness of its legal conclusion will be adjudged later in this opinion.

[8, 9] The next matter for our consideration concerns the rights and duties of the common pleas upon the appeal to that tribunal from the decision of the compensation board. Section 409 of the act of 1915, *supra*, provides that "the board's findings of fact shall in all cases be final, * * * [but] from any decision of the board on a question of law an appeal may be taken to the courts as hereinafter provided." Section 425 (P. L. 754) provides that, if any party in interest desires to appeal from the decision of the board "on matters of law," he must file notice in the appropriate court of common pleas, and, in such case, it shall be the duty of the Bureau of Workmen's Compensation to prepare and deliver to the prothonotary of the proper county "a transcript of the * * * finding of fact and award or disallowance of compensation, or modification thereof, involved in the appeal." As recently stated in *Franklin Film Manufacturing Corporation*, 258 Pa. 422, 426, 98 Atl. 623, 624:

"At the present time, in our law, the word 'appeal' has no conclusive meaning; * * * therefore, it is necessary in each instance to look at the particular act of assembly giving the right of appeal, to determine just what powers are to be exercised by the appellate court."

The statute here in question makes no provision for bringing up the testimony to the courts by sealing a bill, certifying the record thereof, or other known method; more than this, the act particularly prescribes what shall be sent to the common pleas—significantly, in view of its provisions as to the finality of the findings of fact, omitting reference to the evidence taken before the referee or board—all of which makes it clear that the appeal to the common pleas contemplated by this statute is in the nature of a certiorari; the purpose probably being to prevent appeals to the courts, except for errors of law, and thus to hasten the final determination of claims under the act.

It may be noted that if, on appeal to the courts, the Legislature had desired the testimony in workmen's compensation cases brought up for consideration, it knew how to accomplish this end, as shown by article

6, section 18, of the Public Service Company Law (Act July 26, 1918 [P. L. 1374, 1425]), where it is provided that, on such appeals from the Utilities Commission, the testimony shall be certified, "under seal," as part of the record for consideration. See *St. Clair Borough v. Tamaqua & P. E. Ry. Co.*, 259 Pa. 462, 467, 109 Atl. 287.

[10-12] On certiorari, judicial review is usually limited to a mere inspection of the record, to ascertain whether the judgment in question is in conformity therewith, or to see whether the tribunal which rendered such judgment either exceeded its jurisdiction or abused its discretion; and, generally speaking, the opinion of the lower tribunal is no part of the record. In statutory proceedings, such as the one at bar, however, it is now firmly established with us that, even on certiorari, an appellate court may examine the opinion of the court below "to see the basis on which it acted." *Franklin Film Mfg. Corp.*, *supra*, 253 Pa. p. 426, 98 Atl. 624.

Here, fortunately for the claimant, the material underlying, or subordinate, findings of both the referee and board, as stated in their respective adjudications, are consistent with one another and show the exact character of proof upon which their divergent conclusions rest. Hence, albeit the common pleas properly could not examine the notes of testimony mistakenly included in the record sent to it (*Carlson's License*, 127 Pa. 330, 335, 18 Atl. 8; *Rice*, P. J., in *Meenan's Appeal*, 11 Pa. Super. Ct. 579, 582), that tribunal was, and this court now is, in a position to determine the issue of the alleged lack of legal evidence to sustain the referee's allowance of compensation. Whether or not the conclusion of the court below in that regard was correct we reserve for later consideration in this opinion.

[13] As to the jurisdiction of the Supreme Court on the present appeal, section 409 of the act of 1915, already quoted, provides that from any decision of the board "on a question of law" an appeal may be taken "to the courts." The first specific mention of either the Supreme or Superior Court occurs at the end of section 425, as follows:

"Any appeal from a decision of the board to the courts of common pleas, and from them to the Supreme or Superior Court, shall take precedence over all other civil cases."

The next and only other reference to the latter courts appears in section 433 (P. L. 756), to the effect that it shall be the duty of their prothonotary "to make a monthly report to the board of the disposition of all appeals taken to such courts" in workmen's compensation cases. Thus it becomes apparent there is no actual provision contained in the act of 1915, *supra*, authorizing an appeal from the common pleas to either the Supreme or Superior Court; hence our right of review is on certiorari alone. *Gangewere's Appeal*, 61 Pa. 342; *Diamond St.*, 196 Pa. 254, 261, 46 Atl. 428.

The proceedings at bar being purely statutory, and differing from the common law, as already noted, on certiorari our jurisdiction is more analogous to that exercised upon the examination of equity proceedings than on the review of common-law actions, and in the former class of cases the opinion of the chancellor may be looked at to discover the reasons for his action. Independence Party Nomination, 208 Pa. 108, 111, 57 Atl. 344; Foy's Election, 228 Pa. 14, 16, et seq., 76 Atl. 713; Franklin Film Mfg. Corp., supra. Therefore, on the present review, this court may examine all that is properly contained (according to the provisions of the act of 1915, supra) in the record sent to the common pleas, including the findings and reasons stated in the adjudications of the referee and board, and, of course, also including the reasons given by the court below as the "basis" of its decision, but not the notes of testimony.

The foregoing considerations bring us to the controlling question in the case; i. e., whether the records referred to demonstrate either the presence or lack of legal evidence to sustain the findings of the referee to the effect that claimant's husband came to his death as the result of an accident which happened to him during the course of his employment.

[14-18] James McCauley was a "wool sorter" in the employ of defendant. The latter admitted he died "of external, and not internal, anthrax." Concededly, it is a matter of general knowledge that anthrax is primarily a disease of animals, such as sheep, which may be transmitted to men when handling infected animal materials, like wool. It is caused by the entrance into the human body of anthrax bacilli, and their rapid multiplication and development. The findings of the referee show a practical accord among the doctors, produced as experts, that, in the majority of cases, the inoculation which causes external anthrax occurs through a scratch or an abrasion of the skin; while internal anthrax is usually caused by inhaling the germ, or taking it in with food.

The findings further show that, when James McCauley went to his work on the morning of April 4, 1916, he was perfectly well and had no abrasion or mark upon his neck, but when he left defendant's plant, in the afternoon of that day, there was a "little scratch," or abrasion, "about the size of a dime," just above the "Adam's apple," which caused a swelling, and that this was the beginning of external anthrax, from which he died within three days. The findings likewise show professional medical experts testified that, in their opinion:

"If deceased was a wool sorter [as he was] when he went to work on April 4, 1916, with no marks on his neck, and sustained an abrasion about the size of a dime upon his neck, and the neck immediately began to swell, and external anthrax developed, this condition probably was

brought about by the anthrax germ entering through the abrasion."

In addition to the findings just referred to, others show that on the afternoon of April 4th, as McCauley was leaving defendant's mill, he said to his son, "I got stuck with a sticker;" also that, immediately upon his arrival home, he told his wife that one of the stickers in the wool which he was carrying had torn him in the neck. The board properly decided that what McCauley said, as to the cause of the mark upon his neck, is hearsay, and, standing alone, insufficient to sustain the findings in favor of the claimant made by the referee; but we concur in the view of the court below that the other facts in the case constitute circumstantial evidence which, together with the competent and relevant parts of the expert professional testimony already referred to, was adequate to sustain the referee's allowance of compensation. In other words, under the circumstances of this case, deceased apparently not having been where he was liable to become inoculated with external anthrax, except at his work, and he, as he left defendant's mill on the day in question, having shown symptoms of that disease by the mark upon and swelling of his neck, the inference may reasonably be drawn, in view of the nature of the work on which he was engaged, that the inoculation occurred during the course of his employment, or, as said by one of the doctors:

"In all probability "the disease was caused by the anthrax germ entering through the skin by reason of a 'sticker' from the wool which deceased handled during the day."

In reaching the conclusion just stated, we have not examined the notes of testimony, which, as herein previously decided, were not properly before the court below, and therefore are not part of the record on this appeal. For the purpose of determining the point involved, we have restricted our consideration to the reasons stated in the several adjudications before us, as the basis of the respective conclusions contained therein, and the material underlying findings of the referee and the board, which, as previously stated, are consistent with each other and sufficiently indicate the character of evidence upon which the divergent ultimate, or controlling, findings rest. While findings of the latter class cannot be sustained on review, when those of the former class show a fatal lack of legal evidence (which is not the case at bar), at the same time it is to be kept in mind that statutes of the character of the one now before us contemplate liberality in the admission of proofs and the inferences reasonably to be drawn therefrom; also that, even under the old law, the probable nature of an accident followed by death could be established by circumstantial evidence alone. *Weinschenk v. Philadelphia H. M. Bread Co.*, 258 Pa. 98, 104, 101 Atl. 926.

[19, 20] On the subject of the proofs, section 428 (P. L. 755) of the act of 1915, supra,

provides that "neither the board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation." Section 417 (P. L. 752) provides that the referee, "either before or after any hearing," may "make an investigation of the facts set forth in the petition, or cause the same to be made," and that, with the consent of the board, he may appoint impartial experts to "ascertain the facts"; while section 421 states the board shall have power to make such investigations as it may deem necessary to ascertain the facts, and to "employ physicians, surgeons, or other experts, to aid in its investigation." Section 17 of the companion act of June 2, 1915 (P. L. 758, 760), also provides that:

"The board and every referee shall have the power to conduct any investigation which may be deemed necessary to ascertain the facts of any claim, or any other matter properly before such board or referee," and "such investigations may be made by the board or referee, personally, * * * or by any other person or persons authorized by law."

These provisions do not mean, however, that either the referee or board has the right to find material facts on hearsay alone, whether such evidence is developed in the course of formal hearings or in less formal investigations; for, in the first place, the rule which forbids the making of material findings on hearsay alone, is more than a technical rule of evidence, and, next, there is nothing in the act before us which justifies the conclusion that the Legislature intended any such loose method for determining material facts. The act permits liberal investigation, by hearing and otherwise; but after all the data have been gathered without regard to technical rules, then the proofs must be examined, and that which is not evidence within the meaning of the law, must be excluded from consideration; that is to say, when all the irrelevant and incompetent testimony has been put aside, the findings must rest upon such relevant and competent evidence of sound, probative character as may be left, be this either circumstantial or direct.

Here the underlying findings show sufficient evidence of the kind just mentioned to sustain the ultimate, or controlling, findings made by the referee, to the effect that the scratch upon the neck of James McCauley occurred during the course of his employment, and at that time the anthrax germ entered the body of deceased, subsequently causing his death. On these latter findings, the referee was justified in concluding that McCauley died as the result of an injury by accident while acting in the course of his employment, and hence that claimant was entitled to compensation.

[21] Section 1 of the act of 1915, supra, provides that the statute shall apply to "all accidents" occurring within this commonwealth; this being limited by section 301 (P. L. 738) to cases where the employer and employé shall by agreement, "either express or implied," accept the provisions of the act.

The section in question provides that, in such instances, "compensation for personal injury to, or for the death of, such employé, by an accident, in the course of his employment, shall be made." It then provides that:

"The terms 'injury' and 'personal injury' * * * shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom," and, wherever death is mentioned, "it shall mean only death resulting from such violence and its resultant effects"; further, that "the term 'injury by an accident in the course of his employment' * * * shall not include an injury caused by an act of a third person intended to injure the employé because of reasons personal to him, and not directed against him as an employé or because of his employment, but shall include all other injuries sustained while the employé is actually engaged in the furtherance of the business or affairs of the employer."

It is plain from these provisions that the act before us contemplates injuries by accident only, and therefore does not cover what are termed "occupational diseases."

[22] It remains but to show that, in this case, the entry of the anthrax germ into the body of the deceased, and the disease or infection which naturally resulted therefrom, can be held properly to constitute an accident within the meaning of the act. In this connection, it is to be noted that there is nothing in the language quoted from section 301 which requires an injury to have been caused through force externally applied, or, much less, by some tangible substance of material size. The words used are "violence to the physical structure of the body," not injury to the physical structure of the body by external violence. The violence in question may originate from lifting heavy weights, or from other provable causes (for instance, intense heat operating directly on the part of the body internally affected—see *Lane v. Horn & Hardart Co.*, 104 Atl. 615, decided simultaneously herewith), which effect a sudden change in the physical structure or tissues of the body, and still be within the Compensation Act. In short, if the incident which gives rise to the injurious results complained of can be classed properly as a "mis-hap," or "fortuitous" happening—an "unforeseen event, which is not expected or designed"—it is an accident within the meaning of the Workmen's Compensation Act. See *House of Lords case of Fenton v. Thorley & Co.*, 19 T. L. R. 684, 685; *Boardman v. Scott & Whitworth*, [1902] 1 K. B. 43, 46.

[23] When, however, death results from germ infection, to bring a case of this character within the act of 1915, supra, the disease in question must be a sudden development from some such abrupt violence to the physical structure of the body as already indicated, and not the mere result of gradual development from long-continued exposure to natural dangers incident to the employment of the deceased person, as in cases of occupational diseases, the risks of which are voluntarily assumed. Here the anthrax

(261 Pa. 386)

MESSINGER v. LEHIGH VALLEY R. CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. MASTER AND SERVANT ~~§~~417(7)—WORKMEN'S COMPENSATION ACT—FINDINGS OF COMPENSATION BOARD—CONCLUSIVENESS.

germ, a distinguishable entity, came into actual contact with the deceased, thus gaining an entrance into his body, and his neck began to swell and discolor; therefore the complaint from which McCauley died can be traced to a certain time when there was a sudden or violent change in the condition of the physical structure of his body, just as though a serpent, concealed in the material upon which he was working had unexpectedly and suddenly bitten him. See *Helrs v. Hull & Co.*, 178 App. Div. 350, 352, 164 N. Y. Supp. 767.

[24, 25] In reading this opinion, one must constantly keep in mind that the Compensation Board did not treat the appeal to it as on an allegation of mistake of fact, and grant a hearing de novo, but as involving and turning upon a question of law; i. e., was there legal proof to sustain the conclusion of the referee? Under these circumstances, that body had no power to make separate findings of fact; hence the statutory rule that "the board's findings of fact shall in all cases be final" (held to be binding upon the courts in *Poluskiewicz v. P. & R. C. & I. Co.*, 257 Pa. 305, 101 Atl. 638) does not apply. The findings referred to in section 409 of the act, as just quoted, mean either those made after a hearing de novo before the board or contained in the report of the referee and affirmed by the former. In the present case, had the board considered the appeal to it as involving questions of fact, granted a hearing de novo and made its own findings, restricting them to what it considered the ultimate, or controlling, facts involved, the court below would have been powerless to interfere, so far as the question now before us is concerned, unless the record had been returned for additional findings (*Poluskiewicz v. P. & R. C. & I. Co.*, supra); for, on certiorari, the testimony not being up for review, in the absence of findings as to the character of the evidence, the courts would be obliged to assume the latter competent, relevant and sufficient (*Toole's Appeal*, 90 Pa. 376; *Di Nubles' License*, 11 Pa. Super. Ct. 571, 578; *Meenan's License*, 11 Pa. Super. Ct. 575, 578; *Meenan's Appeal*, supra). Here, however, the written opinions of both the board and referee so plainly show, by findings, the character of the evidence, as to enable the courts to adjudge the legal question involved. Therefore the case is reduced to this: We having determined that there is no lack of legal proof to sustain the findings of the referee, and there having been no appeal from these findings as matters of fact, the provision in section 409 of the act, that "a referee's findings of fact shall be final unless the board shall allow an appeal therefrom," applies and governs in favor of the appellee.

The assignments of error are overruled, and the judgment of the court below is affirmed, with a procedendo.

Section 409, Workmen's Compensation Act June 2, 1915, making Compensation Board's findings of fact final in all cases, includes all instances where board either adopts referee's findings or makes its own findings after a hearing de novo, and courts can grant no relief from its erroneous findings.

2. MASTER AND SERVANT ~~§~~417(3½)—WORKMEN'S COMPENSATION LAW—RULING OF COMPENSATION BOARD—CONCLUSIVENESS.

Where referee disallowed claim for compensation because employer and employé were engaged in interstate commerce, and Workmen's Compensation Act June 2, 1915, did not apply, the Compensation Board's affirmance thereof was final, and appeal therefrom to common pleas was properly dismissed.

Appeal from Court of Common Pleas, Philadelphia County.

Claim for compensation under the Workmen's Compensation Act by Myrtle Messinger against the Lehigh Valley Railroad Company. From a judgment dismissing an appeal from the Workmen's Compensation Board, sustaining a referee's findings of fact, claimant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Ulysses S. Koons, of Philadelphia, for appellant. Benjamin O. Frick and Prichard, Saul, Bayard & Evans, all of Philadelphia, for appellee.

MOSCHZISKER, J. Plaintiff claimed compensation for the death of her husband, who was accidentally killed in the course of his employment with defendant. The referee disallowed the claim, on the ground that, at the time of the accident, "the employer and employé were then engaged in interstate commerce," and therefore the Workmen's Compensation Act of Pennsylvania could not apply, citing *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 152, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139, and *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 172, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. An appeal was taken to the Workmen's Compensation Board, attacking the underlying findings of fact made by the referee on the ground that they were not supported by the evidence in the case, and the ultimate or controlling finding on the ground that "absolutely no evidence" had been introduced to sustain it. The board affirmed the findings and conclusion of the referee, and dismissed the appeal, whereupon the case was removed to the common pleas (of Philadelphia county), which tribunal affirmed the order of the board. Plaintiff then appealed to this court.

[1, 2] Appellant states two questions involved:

(1) "Are the findings of fact by the Workmen's Compensation Board, * * * upon appeal from the referee, final in cases where there is no testimony whatever to support said findings of fact?"

(2) "Was there any competent legal evidence before the referee to sustain his finding of fact that appellant's husband was injured while engaged in an act of interstate commerce?"

Section 409 of the act of June 2, 1915 (P. L. 736, 751), provides that "the board's findings of fact shall in all cases be final." This provision comprehends all instances where the board either adopts the findings of the referee or makes its own findings on a hearing de novo, and, as recently ruled by us in *Poluskiewicz v. P. & R. C. & I. Co.*, 257 Pa. 305, 307, 101 Atl. 638, if the board errs in its findings, the "courts can grant no relief." Here there are no subordinate underlying findings as to the character of evidence upon which the ultimate or controlling findings rest, and, since the case before us is on certiorari, the testimony taken by the referee is no part of the record; hence we are not in a position to determine the propositions stated by appellant. In *McCauley v. Imperial Woolen Co.*, 104 Atl. 617, we make a rather minute examination of the act of 1915, supra, and fully discuss the relative rights, duties, and jurisdiction of the Compensation Board and courts thereunder. It would serve no useful purpose to go over the same ground again.

The assignments of error are overruled, and the judgment of the court below is affirmed.

(261 Pa. 339)

MOONEY v. LEHIGH VALLEY R. CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. MASTER AND SERVANT §417(3½)—WORKMEN'S COMPENSATION BOARD—INTERLOCUTORY ORDER—APPEAL.

Where Workmen's Compensation Board concludes that a referee's adjudication indicated that there was no evidence before him substantiating the allegations of the claim petition, its order granting a hearing de novo is interlocutory, and no appeal lies therefrom.

2. MASTER AND SERVANT §417(7)—APPEAL TO WORKMEN'S COMPENSATION BOARD—HEARING DE NOVO.

Where referee's conclusions comprehend mixed findings of fact and law, the Workmen's Compensation Board is justified in treating the appeal to it as involving a question of fact, and in granting a hearing de novo.

Appeal from Court of Common Pleas, Philadelphia County.

Claim for compensation under the Workmen's Compensation Act by Elizabeth Mooney, widow of an employé, against the Lehigh Valley Railroad Company. The Work-

men's Compensation Board, after considering the referee's report, granted a hearing de novo; and from an order of the Court of Common Pleas quashing an appeal from the board, claimant appeals. Appeal quashed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Ulysses S. Koons and Charles F. Gerhard, both of Philadelphia, for appellant. Benjamin O. Frick and Prichard, Saul, Bayard & Evans, all of Philadelphia, for appellee.

MOSCHZISKER, J. Plaintiff claimed compensation for the death of her husband, who was accidentally killed in the course of his employment with defendant. The referee made a compensation order. Thereupon an appeal was taken to the board, on the ground "decedent was engaged in an act connected with interstate commerce at the time the accident occurred, and the Workmen's Compensation Act of June 2, 1915, (P. L. 736), is not applicable to the case." The board found that adjudication of the referee "clearly indicates there was no evidence before him that substantiated the allegation of the claim petition," and concluded it could not "sustain the findings of fact of the referee"; therefore it made an order granting "a hearing de novo." Plaintiff removed the case to the common pleas, which tribunal determined the order in question was merely interlocutory, quashed the appeal, and remanded the record. Plaintiff then appealed to this court.

[1, 2] The appellant states, *inter alia*, the following questions for our determination:

(1) "Did the Workmen's Compensation Board have the right to grant a hearing de novo in an appeal by defendant solely from the referee's conclusion of law that plaintiff's husband was not engaged in interstate commerce?"

(2) "Was the grant of a hearing de novo as aforesaid merely an interlocutory order of the board, from which there could be no appeal?"

A sufficient answer to the first of these questions is that the conclusion therein referred to comprehends a mixed finding of fact and law; hence the Compensation Board was justified in treating the appeal to it as involving a question of fact, and in granting a hearing de novo. As to the second question involved, we agree with the court below that the order in question is interlocutory. In *McCauley v. Imperial Woolen Co.*, 104 Atl. 617, we analyze the relevant parts of the act of 1915, supra, and so fully discuss the points of practice here involved that a repetition thereof in this case would serve no useful purpose.

This appeal is quashed.

(117 Me. 567)

**GRANT v. PATRONS' ANDROSCOGGIN
MUT. FIRE INS. CO.**(Supreme Judicial Court of Maine. Sept. 23,
1918.)**INSURANCE** \Leftrightarrow 685(3)—**VALIDITY OF POLICY—
INTEREST OF INSURED—CHANGE OF INTEREST
—NOTICE—EVIDENCE.**

Plaintiff, in an action to collect on an insurance policy, held to have sustained the burden of proving that the insurer had notice of the change of interest in the property made by giving a mortgage.

Report from Supreme Judicial Court, Waldo County, at Law.

Action by Geneva A. Grant against the Patrons' Androscoggin Mutual Fire Insurance Company. Case reported. Judgment for plaintiff.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, and DUNN, JJ.

Fellows & Fellows, of Bangor, for plaintiff. Tascus Atwood, of Auburn, for defendant.

PER CURIAM. The facts essential to the decision of this case are as follows: The plaintiff took of the defendant company a policy of insurance upon her real estate. She then placed a mortgage upon the insured property, and by direction of the bank to which the mortgage was given went to see the agent who procured the insurance, to get him to stamp it "or sign it." She says he told her to write on the mortgage:

"In case of fire pay with interest to the order of the Belfast Savings Bank."

This was written by her on the policy. The agent admits her coming to see him, but denies that he told her to indorse anything upon the policy, but, on the contrary, says he told her he had no authority to do so, and that she must write the secretary of the company. After this transaction she paid, and the company accepted, assessments from her in 1914, 1915, 1916, and they have never been returned.

This case comes up on report. Under our statute (Rev. St. 1916, c. 53, § 119), that "the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them," and that "the company is bound by their knowledge of the risk and of all matters connected therewith," and the interpretation, time after time, of this statute, defining the scope and effect of its meaning, it is evident that the only question before us is one of fact, involving the recollection of a transaction and the conversation regarding it, between the plaintiff and the agent of the company.

It is the opinion of the court that the plaintiff is corroborated by the circumstances surrounding the disputed transaction and conversation, and that she has fairly sustained the burden of proof.

According to the stipulation in the report, the entry must be: Judgment for the plaintiff for \$1,800 and interest from 90 days after the proof of loss.

(117 Me. 569)

MORSE CO. v. BARNES.(Supreme Judicial Court of Maine. Sept. 23,
1918.)**1. INTOXICATING LIQUORS** \Leftrightarrow 329(2)—**ACTION
FOR PURCHASE PRICE—DEFENSE OF INTEN-
TION OF ILLEGAL SALE—BURDEN OF PROOF.**

In an action for the price of intoxicating liquors, the burden rests on the defendant to prove his defense that the liquors were intended for illegal sale by a preponderance of the evidence.

2. NEW TRIAL \Leftrightarrow 168—**MOTION IN APPELLATE
COURT—GROUND.**

In an action for the purchase price of liquors, it was for the jury to place its own construction upon the testimony of defendant, who was evasive and uncertain in his testimony, and verdict will not be disturbed on motion for new trial.

3. NEW TRIAL \Leftrightarrow 168—**MOTION IN SUPREME
COURT—INSTRUCTIONS—PRESUMPTION.**

Where the charge of the presiding justice is not printed, it must be assumed to have been correct, and to have properly presented all the issues raised.

On Motion from Supreme Judicial Court, Oxford County, at Law.

Action by the Morse Company against Fred G. Barnes. Judgment for plaintiff, and defendant moved for new trial. Motion overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Albert J. Stearns, of Norway, Me., for plaintiff. Eugene F. Smith, of Norway, Me., and Alton C. Wheeler, of South Paris, for defendant.

PER CURIAM. This case comes up on motion for a new trial by the defendant. The plaintiff brought an action to recover for intoxicating liquors sold and delivered to the defendant. The amount claimed, including interest, was \$10.45. The defense set up was that the liquors were intended for illegal sale and were so disposed of. Under the well-settled law in this state, the only question presented to the jury was whether the defendant, when he purchased the intoxicating liquors in question, intended to dispose of them in a manner prohibited by law. It is claimed that the uncontradicted testimony of the defendant shows that the liquor was intended for illegal sale, although it might not have been known to the defendant that the method by which he intended to dispose of it was illegal.

[1, 2] The defendant admits the contract and the receipt of the liquors, but undertakes to avoid payment by setting up the defense in question. The burden is upon him to sustain his contention by a prepon-

derance of the evidence. The only evidence by which he undertook to do this was his own. A reading of his testimony shows that it is uncertain, and either through stupidity or intention to evade lacked frankness. It was for the jury to say what construction they would place upon this uncertain and evasive attitude of the defendant. So far as anything appears in the case, it may be that the jury disbelieved the defendant's testimony.

[3] Allusion in argument is made to the charge of the presiding justice, but as the charge is not printed it must be assumed to have been correct, and to have properly presented all the issues raised in the case. We do not feel justified in disturbing this verdict.

Motion overruled.

(117 Me. 366)

ROYAL INS. CO. v. NELKE

(Supreme Judicial Court of Maine. Sept. 23, 1918.)

APPEAL AND ERROR ~~856~~—TIME FOR PRESENTATION OF EXCEPTIONS—ALLOWANCE AND FINDING.

Where case was tried and verdict rendered April 12th, and April term adjourned April 15th, exceptions not filed or presented to presiding justice for allowance, or to opposing counsel for examination, until June 17th, and allowed only as far as discretion of presiding judge extended, will be dismissed; there being no waiver of provision of superior court rule 22 as to exceptions being presented at term or within 10 days after adjournment.

Exceptions from Superior Court, Androscoggin County.

Action by the Royal Insurance Company against Arthur W. Nelke. Defenses overruled, and defendant brings exceptions. Exceptions dismissed.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Ralph W. Crockett, of Lewiston, for plaintiff. McGillicuddy & Morey, of Lewiston, for defendant.

SPEAR, J. This is an action of replevin for the possession of an automobile. The facts are briefly as follows: Mr. William T. Ruhl of Boston was the owner of a Buick car. On the 4th day of December his sister drove the car into the city, left it in the street unlocked, and it was stolen. The car was insured against theft in the Royal Insurance Company. The company was notified, investigated, and at the time for payment paid the policy, and took from the owner a subrogation receipt, and also an absolute bill of sale of the car. This bill of sale vested the title of the car in the plaintiff company. It is contended that the failure of

Miss Ruhl to lock the car, as required by the Massachusetts statute, was an act of negligence that would have excused the company from paying the policy.

It is further contended that the car was not licensed and was a trespasser on the road.

These defenses were urged as conclusive of the plaintiff's right of recovery.

The presiding justice, however, overruled these contentions, and the defendant excepted. While the decision of the case is necessarily based upon other grounds, it is a satisfaction to observe that the verdict was warranted upon the testimony.

But the ground upon which the case must be considered involves the rule of fixing the time of presenting exceptions. The plaintiff filed a motion to dismiss the exceptions because they were not seasonably filed or presented to the presiding justice. There is no dispute about the facts stated in the motion, viz.:

"Under rule 22 of the superior court for Androscoggin county, exceptions must be presented to the presiding justice at the term at which they are taken or within 10 days after the adjournment of the term. The case was tried and verdict rendered April 12th. The April Term adjourned April 15th. The exceptions were not filed or presented to the presiding justice for allowance, or to counsel for the plaintiff for examination, until June 17th, 66 days after verdict, and 63 days after adjournment of the term. Neither does the docket show any entry of the filing of them up to June 17th. Counsel for the plaintiff expressly stated immediately after the trial that he would waive no right to object to the allowance of exceptions on account of delay. The exceptions were allowed only as far as the discretion of the presiding justice extended. This all appears as a part of the bill itself."

The rule must be regarded as controlling. The discretion of the presiding justice could not extend beyond the 10-day limitation prescribed by the rule; otherwise the rule would have no force against his unlimited discretion. It may be competent for parties to waive the provisions of the rule, as by an entry on the docket in term time, "Exceptions filed and allowed," or some other minute of agreement; but waiver is expressly negatived in the case before us, as the facts stated in the motion show.

This conclusion is supported by all the decisions which have been rendered upon a similar state of facts. *Fish v. Baker*, 74 Me. 107; *Howard v. Folger*, 15 Me. 447. The Massachusetts cases are to the same effect. *Dunn v. Motor Co.*, 92 Me. 165, 42 Atl. 389, is clearly distinguishable from the case at bar. It does not disclose a similar state of facts.

The exceptions, accordingly, were not seasonably presented and approved by the presiding justice, and the entry must be:

Exceptions dismissed.

(117 Me. 588)

LEWISTON BUICK CO. v. NELKE et al.

(Supreme Judicial Court of Maine. Sept. 23, 1918.)

Exceptions from Superior Court, Androscoggin County.

Action by the Lewiston Buick Company against Arthur W. Nelke and another. Verdict for plaintiff, and defendants bring exceptions. Exceptions dismissed.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Ralph W. Crockett, of Lewiston, for plaintiff. McGillicuddy & Morey, of Lewiston, for defendant Nelke. Pulsifer & Ludden, of Auburn, for defendant trustee.

PER CURIAM. This is an action for money had and received, to recover the amount paid the defendant for an automobile alleged to have been stolen property. The case was tried and a verdict rendered in favor of the plaintiff. It is unnecessary to recite the facts, as the decision of the case depends upon precisely the same legal principle as was involved in *Royal Insurance Co. v. Nelke*, 117 Me. 386, 104 Atl. 626. The two cases were tried at the same term of court, and the exceptions were filed and allowed at the same time. A motion was filed to dismiss the exceptions for the same reasons stated in the latter case. While we think the verdict was warranted by the evidence, yet, for the reasons stated in *Royal Insurance Company v. Nelke*, the entry must be:
Exceptions dismissed.

(117 Me. 588)

HUNTER v. MOUNTFORT.

(Supreme Judicial Court of Maine. Sept. 23, 1918.)

NEW TRIAL §—173—PROCEEDINGS—TESTIMONY AT FORMER TRIAL.

Where verdict for plaintiff was set aside and case retried, the testimony taken at the former trial was not a part of the second trial, and could not be considered in passing on motion for nonsuit at close of plaintiff's evidence.

Exceptions from Supreme Judicial Court, Cumberland County, at Law.

Action by Madeline A. Hunter, by next friend, against John H. Mountfort. Judgment of nonsuit, and plaintiff excepts. Exceptions sustained, and new trial granted.

See, also, 102 Atl. 975.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

William A. Connellan and Harry H. Cannell, both of Portland, for plaintiff. Payson & Virgin, of Portland, for defendant.

PER CURIAM. This case has been tried before, and a verdict for the plaintiff set aside.

After the plaintiff's evidence was all in upon the present trial, a motion for nonsuit was sustained, and exceptions taken. By an inadvertence it was assumed that the testimony taken at the former trial was a part of the present case, and could be con-

sidered in the exceptions before the law court.

But, such not being the fact, the only question is whether the plaintiff's undisputed evidence was sufficient to warrant her in having it presented to the jury. We think it was.

Exceptions sustained.

New trial granted.

(117 Me. 376)

FLAHERTY v. MAINE MOTOR CARRIAGE CO.

(Supreme Judicial Court of Maine. Oct. 10, 1918.)

1. SALES §—273(5)—SALE OF AUTOMOBILE—OBLIGATION OF SELLER.

Dealer in standard automobiles manufactured by others, who contracted to supply described type of motor truck, that is, a three-ton Pope-Hartford, 1912 model, was bound only to furnish truck of that pattern, with parts properly constructed and assembled, a marketable machine; there being no warranty of suitability to buyer's business.

2. APPEAL AND ERROR §—1066—PREJUDICIAL ERROR—INSTRUCTIONS.

Where, on question of breach of warranty in sale of motor truck, fitness for purpose intended was not involved, it was prejudicial error to include that issue in instruction submitting issue of proper construction of machine.

Exceptions from Supreme Judicial Court, Cumberland County, at Law.

Action by Patrick J. Flaherty against the Maine Motor Carriage Company. There was verdict for plaintiff, and defendant moved for new trial and excepts. Exceptions sustained.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

D. A. Meaher, of Portland, for plaintiff. P. F. Chapman and Ralph O. Brewster, both of Portland, for defendant.

CORNISH, C. J. The plaintiff, who carried on a trucking business in the city of Portland under the name of the Portland Trucking Company, on March 2, 1912, ordered of the defendant corporation, a dealer in motor vehicles, a three-ton Pope-Hartford truck. The order was in writing, and by its terms the truck was to be of the model of 1912, with demountable rims, gas headlights, and a body of certain dimensions, with adjustable sides. The agreed price was \$3,400 f. o. b. factory, of which \$1,000 was to be in cash when the vehicle was ready for delivery, and the balance in a note for \$2,400, payable \$200 each month; the truck to remain the property of the defendant until the note was fully paid.

There were no other specifications, and there were no express representations or guaranties of any kind. At the end of the order was this statement:

"Note.—No verbal agreement or promise not specified in this order will be recognized."

It is not claimed, however, that any oral guaranty was made. The order was signed by both parties, and by it their rights must be governed.

The truck arrived from the factory and was delivered to the plaintiff on April 4, 1912. The cash payment of \$1,000 was then made and the note for \$2,400 was given. Soon after the employes of the plaintiff began to use the vehicle they discovered various defects in it, and these were remedied more or less satisfactorily by the defendant. At one time a machinist came from the plant of the Pope-Hartford Company and sought to correct the difficulties; but the plaintiff claims that it at no time operated properly, especially on country roads, and that it was not adapted to the purpose for which he purchased it. The plaintiff, in addition to the \$1,000 initial payment, made certain other payments in cash and rendered service to the defendant in trucking, which was credited as cash, to the amount of \$810, during the summer and early fall, as found by the auditor, and he drove the truck in his business about 4,500 miles during that time.

On October 24, 1912, the defendant began foreclosure proceedings for default of the amount due on the note installment, and the foreclosure was completed without redemption.

Two years later, in September, 1914, the plaintiff brought this action for money had and received, to recover the amount paid toward the consideration, claiming a breach of implied warranty on the part of the defendant in the sale of the truck and a valid rescission on his own part. The jury returned a verdict in the sum of \$1,692.99, and the case is before the law court on defendant's motion and exceptions.

We need consider only the exceptions. In the course of the charge, the jury were explicitly instructed, in various forms of expression, that there was an implied warranty on the part of the seller that this auto truck was suitable for the business and adapted to the purpose for which it was purchased by the plaintiff. This instruction went farther than the law warrants, under the facts of this case.

[1] The rules of law governing warranties accompanying the sale of manufactured articles are well settled in this state, and the rights of the parties are clearly defined. The defendant here was not a manufacturer to whom application had been made for the construction of a particular machine for a special and designated purpose, but he was a dealer in machines of standard and well-known types manufactured by others. Under the contract he was bound to supply a certain described and defined type of truck well known in the general market, to wit, a three-ton Pope-Hartford, of the model of 1912. Of course, it must be of that pattern,

with its parts properly constructed and assembled, so as to meet the requirement of a merchantable or marketable machine. Further than that he was not bound. The contract carried with it no guaranty or warranty or representation of suitability, nor of adaptability to the plaintiff's business. The plaintiff had made his own selection as to type, and the responsibility for the wisdom of the choice rested on him, not on the seller. *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Lombard Water Wheel Co. v. Great Northern Paper Co.*, 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180 and note; *Philbrick v. Kendall*, 111 Me. 198, 88 Atl. 540; *Armour Fertilizer Works v. Logan*, 118 Me. 83, 99 Atl. 768.

[2] The grounds on which the plaintiff based his claim for breach of warranty were two: First, that the machine was not properly constructed; and, second, that it was not adapted to his work, especially in the sand and mud of country roads. The first element was involved in this action; the second was not. The jury, however, were instructed to consider both propositions on the question of breach of warranty. This was reversible error, as it related to a vital point in the case.

Exceptions sustained.

(117 Me. 569)

SHEPHERD v. S. L. CROSBY CO.

(Supreme Judicial Court of Maine. Oct. 15, 1918.)

DAMAGES \Leftarrow 208(1)—BREACH OF CONTRACT.

Question of damages for breach of contract held for the jury.

On Motion from Supreme Judicial Court, Penobscot County, at Law.

Action by Edwin A. Shepherd against the S. L. Crosby Company. Judgment on verdict for plaintiff. On defendant's motion for new trial. Motion overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Charles W. Hayes, of Foxcroft, for plaintiff. Myer W. Epstein and George H. Worsster, both of Bangor, for defendant.

PER CURIAM. This is an action brought to recover damages for an alleged breach of a contract to deliver automobiles. The jury returned a verdict for the plaintiff for \$909.73, and the case is before us on general motion for a new trial.

The plaintiff ordered 15 Maxwell touring cars, and the defendant agreed in writing to deliver to the plaintiff 15 cars as follows: Five in October, 1916, 3 in March, 1917, 3 in May, 1917, and 4 in June, 1917. The defendant delivered the first lot of 5 cars, but before the time for delivery of the March allotment the price of the touring cars was advanced by the manufacturers, and the de-

defendant refused to deliver the cars at the contract price, the plaintiff refused to pay the advanced price, and this suit followed. It will serve no useful purpose to recite the evidence. It clearly appears that the defendant broke its contract, and the remaining questions as to damages presented questions for the jury, under proper instructions, which we must assume were given.

The testimony justifies the verdict, and it is so manifestly right as to conclusion and damage that it must stand.

Motion overruled:

(117 Me. 299)

ZANONI v. CYR et al.

(Supreme Judicial Court of Maine. Oct. 15, 1918.)

1. SEARCHES AND SEIZURES \S 8—RETURN OF SEARCH WARRANT—STATUTORY PROVISIONS—CONSTRUCTION—"OTHER WARRANTS."

The words of Rev. St. c. 134, § 15, relating to search warrants, "and be made returnable like other warrants," in view of section 8, authorizing "other warrants," apply to the form of the warrant and duty of the justice, and not to the duty or liability of the searching officer.

2. SHERIFFS AND CONSTABLES \S 28(1)—ACTION AGAINST—SEARCH WARRANT—JUSTIFICATION—WARRANT NOT RETURNED TO COURT.

A search warrant reciting the essential facts of a complaint, as enumerated in Rev. St. c. 134, § 14, and otherwise complying with section 15, requiring return where person or thing searched for is found, and bearing the return statement, "Nothing found," although not returned into court, is sufficient to protect the officers executing it from liability for trespass.

3. SEARCHES AND SEIZURES \S 8—SEARCH WARRANTS—EXECUTION—NECESSITY OF RETURN—WHEN NOTHING FOUND.

Rev. St. c. 134, § 15, does not require a search warrant to be returned in any event, but only in case the person or thing searched for is found.

Exceptions from Supreme Judicial Court, Oxford County, at Law.

Action by Tersella Zanoni against William F. Cyr and another for trespass. Hearing upon exceptions to report of referee. Exceptions overruled, and judgment entered for defendants in accordance with referee's report.

Argued before CORNISH, O. J., and BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Bernard A. Bove and Jacob H. Berman, both of Portland, for plaintiff. George A. Hutchins and Blaise & Parker, all of Rumford, for defendants.

HANSON, J. This was an action of trespass, heard by a referee, who made the following report:

"Judgment for the defendants, with the right of exceptions to the plaintiff upon the grounds stated in the rescript and hereto attached."

The rescript states the case fully, as follows:

"This is an action of trespass against the defendants for the alleged making of an illegal search of the dwelling house of Zanoni, and while so doing insulting and exciting his wife, so that she fell into a state of nervous prostration and suffered much pain and injury. The plaintiff claims first that the search was unreasonable. I find as a matter of fact that it was not. Nor do I find that there was any abuse of process. The plaintiffs further claim, however, as a matter of law, that the defendants are guilty as trespassers ab initio. This contention arises upon this state of facts: The warrant was issued and served on the 29th day of September, 1916. The warrant was fair on its face, authorized the defendants as duly qualified officers to make the search commanded, and was executed in a reasonable manner. A proper return was made upon the warrant of the date of September 29, 1916, signed by Lewis B. Small, deputy, naming William F. Cyr as aid. The return contains this statement: 'Nothing found'—and a notation of the officer's fees and court fees. The warrant was never returned to the court that issued it, nor to the sheriff, but was retained in the possession of Deputy Small, the defendant who procured and served it, from September 29, 1916, until October 6, 1917, when he produced it at the reference as a justification. Upon this state of facts I rule as a matter of law, that the failure of the defendant Small, to return the warrant to the court issuing it, having found nothing in his search, and having made no arrest, does not deprive him of the right of protection under the warrant, but affords him, and his aid, Cyr, the other defendant, full justification for making the search complained of. To this ruling I reserve the right of exceptions to the plaintiff."

[1-3] But one question arises: Did the warrant require the defendants forthwith to make a return under the circumstances? We think not. The law authorizing search and seizure process provides that search warrants can be issued only according to the following provisions (R. S. c. 134, § 14): The complaint for a warrant to search must be made in writing, sworn to and signed by the complainant, must specifically designate the place to be searched, the owner or occupant thereof, and the person or thing to be searched for, and allege substantially the offense in relation thereto, and that the complainant has probable cause to suspect and does suspect, that the same is there concealed. Section 15. Search warrants shall recite, by reference to the complaint annexed or otherwise, all the essential facts alleged in the complaint, be directed to a proper officer or to a person therein named, and be made returnable like other warrants, and the person or thing searched for, if found, and the person in whose possession or custody the same was found, shall be returned with the warrant before a proper magistrate.

The plaintiff contends that the words "and be made returnable like other warrants" have peculiar significance, and apply to this case supporting his contention, and asks in his brief, "What does the Legislature mean by the words 'like other warrants'?" Counsel concludes that recourse to the common law is the only avenue open, and quotes

Cutting, J., in *Patterson v. Oreghton*, 42 Me. 378:

"At common law, all warrants issuing from the proper authorities are to be executed and returned by the officer to whom they are directed and received, with his doings thereon, and his return, as to other parties, is conclusive."

As to the first contention, we think the words "and be made returnable like other warrants" are fully explained, and their purpose indicated, by a reference to the statute authorizing "other warrants." Section 8 of chapter 134, R. S., provides that—

"Warrants issued by trial justices shall be made returnable before any trial justice in the county, and such warrants may be returned before any municipal or police court in the same county and the same proceedings had thereon as if said warrants had originally issued from said municipal [court] or police court; and the justice, for issuing one not so returnable, shall be imprisoned for six months and pay the costs of prosecution."

These words plainly relate to the form of the warrant and the duty of the justice, and not to the duty or liability of the officer. Again, section 15 does not require a return to be made to the justice issuing the warrant in any event, but only in case the person or thing searched for "is found." The return shows that nothing was found, and such return, now used in this case as a justification, must be held to have been properly used, and the warrant may be returned to the proper magistrate within a reasonable time after final disposition of this case. The warrant did not in terms require the officer to make a return, and it seems that it has not been the custom in this state to have in such warrant a command to make return if there was "nothing found." No other case has arisen, a fact which may or may not justify continuance of the present form of warrant, as the Legislature may determine.

Exceptions overruled.

Judgment for defendants in accordance with the report of referee.

(117 Me. 396)

Appeal of PEMBROKE

(Supreme Judicial Court of Maine. Oct. 15, 1913.)

1. EXECUTORS AND ADMINISTRATORS §20 (7)—CREDITOR OF ESTATE—EVIDENCE.

Upon issue whether seller of piano was creditor, entitled to petition for administration, piano having been sold to deceased's son, who had assigned contract to deceased, evidence that deceased exercised ownership with consent of seller, made payments on piano, and promised to pay balance, was admissible.

2. APPEAL AND ERROR §1010(1)—SUPREME JUDICIAL COURT — FINDINGS OF FACT OF PRESIDING JUSTICE—REVIEW.

Exceptions do not lie to findings of fact of presiding justice, and such findings are final, if there is any evidence to sustain them.

3. FRAUDS, STATUTE OF §23(3)—PROMISE TO ANSWER FOR DEBT OF ANOTHER.

Where purchaser of piano with knowledge of seller assigned all his right and title in contract of purchaser to his mother, and she acknowledged liability and made certain payments in her behalf, the obligation was her own, and not within the statute of frauds.

Appeal from Supreme Judicial Court, Piscataquis County, at Law.

Petition by Hughes & Son Piano Manufacturing Company for administration of the estate of Mary Pembroke, deceased. Administration was granted, and Patrick B. Pembroke, husband of deceased, appealed. The presiding judge dismissed the appeal, and affirmed the decree, and appellant excepts. Exceptions overruled.

Argued before BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Harry L. Smith, of Dover, and John S. Williams, of Guilford, for appellant. Charles W. Hayes, of Foxcroft, for appellee.

HANSON, J. This was an appeal by Patrick B. Pembroke, husband of Mary Pembroke, deceased, from a decree of the judge of probate for the county of Piscataquis, granting administration of the estate of said Mary Pembroke to Charles W. Hayes, on the petition of Hughes & Son Piano Manufacturing Company, claiming to be a creditor of said estate. The following reasons of appeal were alleged:

First. That said Charles W. Hayes is not an heir at law or next of kin of said Mary Pembroke.

Second. That your appellant, Patrick B. Pembroke, is the widower of the said Mary Pembroke, and is a suitable person for administrator of her estate.

Third. That Hughes & Son Manufacturing Company was not a creditor of the said Mary Pembroke during her lifetime, and is not a creditor of her said estate.

Fourth. That said Charles W. Hayes is not a creditor of the estate of said Mary Pembroke.

At the hearing the first, second, and fourth reasons of appeal were admitted; the issue was upon the third reason, and involved the ownership of a piano.

A statement of the case, so far as material here, may be taken from the exceptions, which were to the admission of certain testimony filed by the appellant:

"John Pembroke, son of the late Mary Pembroke, hired and received of the petitioning corporation a certain piano, known as 'Hughes & Son Mfg. Co. Style Hook, No. 22308,' agreeing to pay certain instalments until the full sum of \$300 had been paid. John Pembroke signed a certain writing or contract, commonly called a lease, November 29, 1913, and on the same day delivered to said corporation an organ, for which he was allowed \$35 by said corporation, which was applied to the purchase price of said piano, and in said lease agreed to pay \$7 per month thereafter until the full sum of \$300 had been paid. John Pembroke, with the knowledge of Hughes & Son Company, assigned all his right and title in said lease to his mother, Mary Pembroke, in February, 1916. Mary

Pembroke died in June following, and, her husband failing to seek administration of her estate, the petition herein was filed and allowed. The appellant claimed 'that the assignment of said lease from John Pembroke to his mother was a conditional assignment; that it was made in anticipation of his going to the Mexican border; that any interest he might have in said lease should go to his said mother, in case he should not return home, but to be null and void should he return alive.' And appellant further claims that said assignment was, in its nature, and the nature of the lease, asking said Mary Pembroke to assume the obligation of another, and clearly within the statute of frauds; that Mary Pembroke was not indebted to said Hughes & Son Manufacturing Company during her lifetime, consequently her estate is not indebted to said company."

[1] Appellant excepted to the admission of testimony which tended to show that Mary Pembroke, in her lifetime, acquired and exercised ownership over said piano, with the consent of Hughes & Son Company, and that certain payments were made on the amount due them, in her behalf and upon her account; that she acknowledged her liability and promised to pay the balance due. The testimony came from disinterested parties, having full knowledge, and in part relating to documents belonging to Mary Pembroke, and was clearly admissible. The exceptions presented these questions: Was the lease or contract between John and Mary Pembroke within the statute of frauds? Was the undertaking of Mary Pembroke simply to pay the debt of her son, and not her individual undertaking?

The presiding justice, upon hearing the evidence, found for the appellee, and entered his decree as follows:

"This case was heard by me on the 17th day of October, 1917. After a careful consideration of the law and the evidence, my conclusion is that the appeal should be dismissed, and the decree of the judge of probate affirmed. I therefore direct the clerk of court to make the entry: 'Appeal dismissed, with costs. Decree of judge of probate affirmed.'"

"As a part of my finding, I also file the evidence with decree."

[2, 3] The testimony authorizes the finding of the sitting justice. There is nothing before us to justify varying the rule that exceptions do not lie to the findings of fact by the presiding justice, and such findings are final, binding, and conclusive, if there is any evidence to sustain such finding. *Palmer's Appeal*, 110 Me. 441, 86 Atl. 919; *In re Gower*, 118 Me. 153, 93 Atl. 64. It clearly appears that Mary Pembroke owned the piano, that she was indebted to Hughes & Son Company for the balance due them thereon, and that she promised to pay them that amount. The obligation was her own, and not within the statute of frauds. *Colbath v. Seed Co.*, 112 Me. 277, 91 Atl. 1007.

The entry will be:

Exceptions overruled.

Appeal dismissed, with costs.

Decree of judge of probate affirmed.

(117 Me. 572)

ILSLEY et al. v. KELLEY.

SEAVEY v. SAME.

(Supreme Judicial Court of Maine. Oct. 17, 1918.)

NEW TRIAL \S 78(1)—GENERAL MOTION—VERDICT MANIFESTLY WRONG.

The case having been tried before with a similar result, the issue being the same and the case a close one, it will not be held that verdict is so manifestly wrong as to require granting of general motion for new trial.

On Motion from Supreme Judicial Court, York County, at Law.

Actions by Harry L. Ilsley and others and by Asa M. Seavey against John Kelley. The cases were tried together, and, the jury having found for defendant, plaintiffs move for new trial. Motions overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Elias Smith, of Limington, and Emery & Waterhouse, of Biddeford, for plaintiffs. Hiram Willard, of Sanford, and J. Merrill Lord, of Kezar Falls, for defendant.

PER CURIAM. Two actions of trespass *quare clausum* for cutting and removing timber. The cases were tried together, and are before the court on the plaintiffs' general motion for a new trial.

The land in suit is in range D, in the town of Limerick. Range D is divided into 16 lots. The defendant admits the cutting and removing the timber, but says he owns the land on which it was cut. There was but one question involved, namely: Where is the division or check line running north and south between lots 14 and 15? Two lines were set up—the plaintiffs claiming the westerly line as the true one; the defendant claiming the easterly line to be the true original line between lots 14 and 15. The strip of land lying in the disputed limit is 175½ feet wide at the north end, and 173 feet at the south end.

These cases were tried before, with a similar result. The issue was the same. The case is a close one, and, the jury having found for the defendant, we are not authorized to say that the verdict is so manifestly wrong as to require interference.

The entry will be:

Motions overruled.

(117 Me. 570)

CHARLES LAWRENCE CO. v. BUZZELL et al.

(Supreme Judicial Court of Maine. Oct. 17, 1918.)

PRINCIPAL AND SURETY \S 161—LIABILITY OF SURETIES—SUFFICIENCY OF EVIDENCE.

In suit against sureties on traveling salesman's bond, defendants claiming plaintiff had known of its agent's default and had not notified them, etc., evidence held to justify verdict for plaintiff.

Exceptions from Supreme Judicial Court, Aroostook County, at Law.

Action by the Charles Lawrence Company against W. F. Buzzell and another. A nonsuit was directed, and plaintiff excepts. Judgment ordered for plaintiff under stipulation.

Argued before CORNISH, C. J., and HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Andrews & Nelson, of Augusta, for plaintiff. Pierce & Madigan and Shaw & Thornton, all of Houlton, for defendants.

PER CURIAM. This is an action of debt, brought by Charles Lawrence Company, a Massachusetts corporation, doing a wholesale grocery business in Boston, against W. F. Buzzell and George Q. Nickerson, both of Houlton, Me., sureties on a bond given the plaintiff company by Fred H. Harmon, plaintiff's traveling salesman in Aroostook county, conditioned on the said Harmon's accounting to said company for any and all money, checks, securities, etc., received by him from any of the debtors of said company. The cause was heard before a jury at the November term, 1917, of said court. At the conclusion of plaintiff's evidence the presiding justice directed a nonsuit, with the stipulation on the part of the defendants that, if the law court overrules the order of nonsuit, the law court is authorized to assess such damages as the law and the evidence requires. The case is before the court on exceptions to such order.

The said Fred H. Harmon, as traveling salesman of plaintiff company, had been in its employ about eight years. In addition to selling goods, he collected about \$20,000 a year. His territory comprised the whole of Aroostook county, where there are many small towns with no banking facilities. For this reason Harmon was a little slow, or slack, in making remittances of these collected accounts. The plaintiff company wrote Harmon, stating that it would be necessary for them to stamp his accounts "Pay no money to salesmen." In reply Mr. Harmon offered to furnish a bond for \$1,000, to secure the payment to the company of any sums collected by him. Harmon sent the bond voluntarily upon which suit is brought. The bond was accepted by plaintiff company, after it had made some inquiries as to the financial responsibility of the sureties. Mr. Harmon continued to make collections as before, being occasionally short in his remittances, as he had formerly been, for about a year. At the end of that time, after reporting collections of about \$500 without remittances therefor, he disappeared. It then developed that, shortly before his disappearance, he had collected an additional amount of \$667.85, for which he had made no returns whatever. The penal sum of the bond was \$1,000, of which sum \$350 had already been paid to said company by one of the sureties. Plaintiff company claimed in

said action the balance of \$650 and interest thereon from May 27, 1915.

The defendants' claim is stated in the brief statement:

"That prior to the alleged execution of the bond in suit the principal had defaulted criminally as employé of the plaintiff corporation to a large amount, which defalcation the said plaintiff in the exercise of due care should have known, and in fact did know; that the said plaintiff knew that the said principal was not honest and trustworthy, and should and did anticipate that he might default again; that the said plaintiff, anticipating future defaults, demanded a bond from the said principal as a condition of his further employment by it; that said bond was not in the usual course of business, but was especially required from this principal; that the said defendants, the sureties on said bond, were ignorant of all of the foregoing, as was well known to the plaintiff; that the defendants, if they had been aware of the aforesaid facts, would not have signed the same, as the plaintiff well knew; that before the acceptance of said bond by the plaintiff it was informed of the names and addresses of the defendants, the sureties thereon, and had ample opportunity to disclose the facts aforesaid to them, as legally bound to do, yet notwithstanding which the plaintiff fraudulently and willfully concealed and withheld all said information from the defendants, by reason of which willful and fraudulent concealment the said defendants, relying upon the representation of the said plaintiff that the said principal was worthy of trust and confidence, signed said bond.

"And the said defendants further say that, prior to the time that the larger portion of the defalcation complained of occurred, the said plaintiff discovered that the said principal was in default, but, notwithstanding its plain duty in the premises, did not remove the said principal, but continued in its employ, made no attempt to collect the shortage from him, and gave no notice to the said defendants until after the principal had absconded; that one of the defendants, in ignorance of the foregoing, paid to the plaintiff a sum largely in excess of the amount in default when first discovered by the plaintiff before the date of this writ, to wit, \$350.

"And the said defendants further allege that if on the said discovery proper steps had been taken by the plaintiff, and the principal removed from its employ, and they, the defendants, as sureties, notified, any further defalcation by the principal might have been avoided."

The defendants contend that they are not liable upon the bond for two reasons:

First. That it was the duty of the plaintiff to make known all facts, of which they had knowledge, that were material for the defendants to know, before signing such an instrument; that they did not inform the defendants that the agent of the plaintiff was a criminal defaulter, which fact was material to the defendant; and that they had ample opportunity to notify them. On the contrary, they fraudulently concealed this fact from the defendants, and that therefore the bond was never valid, and the defendants are not bound by it.

Second. Assuming the bond was valid at its inception, it was the duty of the plaintiff to make known to the defendants any default on the part of the principal which occurred after signing the bond; that the principal did default, and that these defaults were

never disclosed to the sureties; and that therefore the bond was avoided at the time the first default occurred, which was not disclosed to the defendants. The amount already paid, \$350, would be more than enough to discharge all defaults occurring prior to the plaintiff's learning of Harmon's default.

The pleadings present issues of fact, and the plaintiff's testimony was directed to meeting the allegations in the defendants' brief statement, while proceeding in the usual way in the attempt to make out a prima facie case. We think the plaintiff succeeded, and that there was much evidence which from its very nature, being part oral and part documentary, tended to support the plaintiff's claim, and which, if believed by the jury, would have justified a verdict for the plaintiff. We are of the opinion that the case should have been submitted to a jury, but under the stipulation on page 26 of the case we are authorized to find; and do find, that the plaintiff is entitled to judgment for \$650, and interest from May 27, 1915.

So ordered.

(117 Me. 573)

MORRISSETTE v. GRAND TRUNK R. CO.

(Supreme Judicial Court of Maine. Oct. 22, 1918.)

MASTER AND SERVANT §276(8)—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.

In an action for injuries to a brakeman while coupling cars, resulting in death, evidence as to the cause of the accident held insufficient to sustain a verdict for plaintiff.

On Motion and Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Action by Olivene Morrisette, as administratrix, against the Grand Trunk Railroad Company. Verdict for plaintiff. On defendant's motion and exceptions. Motion sustained, and new trial granted.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, and MORRILL, JJ.

McGillcuddy & Morey, of Lewiston, for plaintiff. H. P. Sweetser, of Portland, and Dana S. Williams, of Lewiston, for defendant.

PER CURIAM. This case comes up on motion and exceptions. As the motion is decisive of the case, the exceptions need not be considered.

The plaintiff's intestate was a brakeman on the Grand Trunk Railroad. On the 1st day of May, 1917, he received injuries while coupling cars to the tender of an engine from which shortly after he died. The case was tried, and a verdict rendered for the plaintiff. The only question upon the motion is whether there was any evidence upon which the verdict can be sustained. We are unable to find any. Nor, in view of the undisputed

evidence as to where the decedent was found after the accident, are we able to form a satisfactory conjecture as to how the accident happened.

The car was coupled to the tender. The pin was in the coupling. He was sitting astride the coupling on top of the pin, with one leg, between the hip and knee, jammed between the jaws of the bumpers, and the other leg on the other side of the coupling. The way he was caught, shows he could not have been standing on the ground and guiding the apparatus for making the coupling. The undisputed evidence also shows this to be the fact. The engineer says he went between the cars to adjust the coupling, stepped back, gave him the signal to back up, and he did back the engine to the car, and the coupling caught. The engineer further said that Morrisette had completed his duties for coupling when he signaled to back up, and had no occasion to go between the tender and the car after he had given the signal. The plaintiff furnishes no evidence as to how the accident occurred. She claims that the inference may be properly drawn that the decedent went in between the tender and the car to further adjust the coupling, but we are unable to see how either the way Morrisette was caught or the evidence has any tendency to warrant the inference. So far as the evidence goes, the negligence of the defendant has not been shown to have contributed to the accident and injury for which the plaintiff seeks to recover.

Motion sustained. New trial granted.

(117 Me. 572)

FOSS v. FOSS.

(Supreme Judicial Court of Maine. Oct. 22, 1918.)

NEW TRIAL §168—MOTION IN SUPREME COURT—GROUNDS—CONFLICTING EVIDENCE.

Where plaintiff and defendant are the sole witnesses, and the evidence is conflicting, the court will not interfere, in the absence of a showing that the verdict is inherently wrong, or so evidently influenced by bias, prejudice, or misunderstanding as to work a wrong.

On Motion from Supreme Judicial Court, Aroostook County, at Law.

Action by Gertrude Foss against John O. Foss. Judgment for defendant. On plaintiff's motion for new trial. Motion overruled.

Argued before SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Shaw & Thornton, of Houlton, for plaintiff. W. S. Lewin, of Houlton, for defendant.

PER CURIAM. This case comes up on a motion for new trial by the plaintiff. The only witnesses were the plaintiff and defendant. The testimony was squarely conflicting. It was for the jury to settle the conflict. They did it in favor of the defend-

ant. Whatever might be the opinion of the court upon the evidence, they cannot intervene, unless it appears that the verdict is inherently wrong or so evidently influenced by bias, prejudice, or misunderstanding as to work a wrong. This is not a case where we can interfere.

Motion overruled.

(42 R. I. 5)

RHODE ISLAND CO. v. SUPERIOR COURT. (No. 292.)

(Supreme Court of Rhode Island. Oct. 22, 1918.)

1. COSTS §=254(5)—COST OF TRANSCRIPT — DISCRETION OF COURT.

Where transcript of testimony filed by plaintiff after setting aside of verdict as against evidence and as awarding excessive damages was used in proceedings subsequent both to trial and to delivery of transcript to plaintiff, allowance of cost of transcript as part of taxed costs is discretionary with superior court.

2. COSTS §=264 — APPLICATION FOR ALLOWANCE—NOTICE.

Statutes do not require that notice be given to opposing party of plaintiff's application to justice of superior court for allowance of cost of transcript of testimony filed by plaintiff, and failure to give notice does not render invalid action of trial justice in allowing cost.

3. COSTS §=264—APPLICATION FOR ALLOWANCE—NOTICE.

It is better practice to give notice to opposing party of application for allowance of cost of transcript of testimony, particularly where made to a judge who did not preside at trial.

4. COURTS §=99(1)—LAW OF CASE — REVIEW OF DECISION BY ANOTHER JUSTICE—ALLOWANCE OF COSTS.

Where plaintiff's motion for allowance of cost of transcript of testimony as part of taxed costs was addressed to discretion of first justice of superior court who had jurisdiction in matter, though he had not presided on trial of case, his decision was not subject to review by another justice of superior court.

Petition for writ of certiorari by the Rhode Island Company against the Superior Court to quash its record as contained in an order in a case wherein petitioner was defendant. Writ dismissed, and record sent up by the Superior Court remitted to it.

Oliford Whipple, Earl A. Sweeney, and G. Frederick Frost, all of Providence, for petitioner. John P. Brennan, of Providence, for respondent.

STEARNS, J. This is a petition for writ of certiorari for the purpose of quashing the record of the superior court as contained in the order of that court entered July 29, 1918, in the case of John W. Hanley v. Rhode Island Company, the effect of which order was to allow the cost of a certain transcript of testimony to remain as part of the plaintiff's costs in said case. The Hanley Case was an action for negligence in which three trials were had before a jury. In the first trial, owing to misconduct by the jury, the case was taken from the jury and passed.

In the second trial before Mr. Justice Sweeney, the plaintiff recovered a verdict for \$5,000, which was later set aside by the trial justice on motion of the defendant, on the ground that the verdict was against the evidence and that the damages awarded were excessive. To this decision the plaintiff duly took exception, filed a transcript of the testimony which was allowed by the court, and his bill of exceptions as required by law, and upon hearing of the bill of exceptions before this court the plaintiff's exceptions were overruled and the case was remitted to the superior court for further proceedings. The case was again tried before Mr. Justice Sweeney and another jury, and resulted in a verdict for the plaintiff for \$1,500, which was sustained by the trial court, and to this decision of the trial court no exception was taken by either party. In due course the costs of the suit were taxed by the clerk of the superior court, and included therein was an item for the cost of the transcript of testimony in the second trial which had been allowed by one of the justices of the superior court. The application for the allowance of the cost of this transcript of the second trial was made by the attorney for the plaintiff in the regular course of proceedings to the particular judge of the superior court who was assigned for duty during that period of the vacation of the superior court. The justice who allowed the cost of the transcript had not presided at any of the trials referred to, and no notice of the application was given to the defendant. The defendant then filed in the superior court a motion to revise costs in several particulars, including the allowance of the cost of transcript aforesaid. This motion was heard by Mr. Justice Doran, who granted said motion in part and refused to interfere in regard to the matter of the allowance of the cost of the transcript. The defendant now petitions this court for a writ of certiorari, and the particular error of law alleged is the action of Mr. Justice Doran in regard to the matter of the allowance of the cost of the transcript, and this is the only question now raised in this proceeding.

[1-4] We find no error in the action of Mr. Justice Doran in this respect. The transcript in question was used in proceedings in said cause subsequent both to the trial and to the delivery of the transcript to the plaintiff, and in such circumstances the allowance of the cost of the transcript as part of the taxed costs is discretionary with the superior court. *N. Y., N. H. & H. R. R. Co. v. Superior Court*, 39 R. I. 560, 99 Atl. 582. The application to the justice of the superior court in the first instance for the allowance of the cost of this transcript was one which was addressed to his discretion. The statutes do not require that notice of this application shall be given to the opposing party, and the failure to give notice to the defendant in

this particular case does not render invalid the action of the trial justice. We think that it is better practice to give notice to the opposing party in an application of this kind, particularly in a case where the application is made to a judge who did not preside at the trial. The fact that no notice or opportunity to be heard had been given, in some circumstances, might be sufficient to warrant the finding by this court that there had been an abuse of the discretion in granting the motion. In this particular case the record was such, however, as to present a fairly complete history of the case. Inasmuch as this motion was addressed to the discretion of the first justice who had jurisdiction in the matter, we do not consider that the decision thereon was subject to review by another justice of the superior court, and the action of Mr. Justice Doran in refusing to review this decision was without error.

The writ of certiorari is dismissed, and the record in the cause entitled John W. Hanley v. Rhode Island Company sent to us by the superior court is remitted to said court.

SHEPARD et al. v. SPRINGFIELD FIRE & MARINE INS. CO. et al. (No. 419.)

(Supreme Court of Rhode Island. Oct. 21, 1918.)

On motion for leave to reargue. Denied in part, and granted in part.

For former opinion, see 104 Atl. 18.

Wilson, Gardner & Churchill, of Providence, for complainants. Mumford, Huddy & Emerson, of Providence (E. Butler Moulton and Charles C. Mumford, both of Providence, of counsel), for respondents.

PER CURIAM. On respondents' motion for leave to reargue the above cause, filed by leave of court July 9, 1918, in vacation, and now considered after the opening of the present term (October, 1918):

1. As to that portion of the motion which relates to the weight and effect of the testimony before this court upon complainants' appeal, the matters stated and referred to in the motion were all argued before this court and were fully considered by the court in framing its opinion filed at the last term (July 1, 1918), and the court finds no reason for a reargument of the cause upon such matters; that portion of the motion is therefore denied.

2. It appears from the transcript that, at the conclusion of complainants' testimony, the cause was dismissed upon motion of the respondents upon two grounds, one of which is not urged in the present motion, and was fully disposed of in the opinion, in favor of the complainants. The other ground was that upon all the complainants' testimony the allegations of the bill were not sustained

and no case was made for setting aside the award. The trial court took that view of the testimony and ordered the bill dismissed. This court took a contrary view of that testimony and found that the complainants had sufficiently supported the material allegations of the bill and were entitled to have the award set aside, and thereupon reversed the decree of the lower court and ordered the cause to be remanded to the superior court sitting in Washington county, with direction to enter its decree setting aside the award.

The respondents now urge that since the bill was dismissed after the testimony for the complainants was heard, and without hearing any of the testimony which the respondents now say that they were prepared to offer in defense, if their motion to dismiss had not been granted, this court ought not to order the bill to be dismissed upon the record as it stands, and seem to imply that respondents should have an opportunity to offer their testimony in defense before the cause is finally determined.

The court will hear the parties upon this branch of the cause, upon the question whether the respondents should be allowed to present such evidence in defense, and, if so, in what court, and in what manner, and subject to what conditions, such evidence should be presented. The cause may be assigned for hearing upon this question by agreement or on motion in due course.

(7 Boyce, 135)

HELDMYER v. CLEAVER.

(Superior Court of Delaware. New Castle. April 8, 1918.)

1. EVIDENCE §183(18)—LOST CONTRACT—SECONDARY EVIDENCE.

Testimony of witness that, according to his best recollection, he had given duplicate copy of contract involved to B., that he had learned that B. would make a search, and if he could find the copy would mail it in time for trial, and that neither copy nor any communication had been received from B., was insufficient to make secondary evidence admissible.

2. EVIDENCE §17(1)—HEARSAY—SEARCH FOR MISSING PAPER.

Plaintiff having testified that he had, during noon recess, communicated with B. over the telephone as to a missing paper, question as to what B. said about search held not objectionable as hearsay.

3. EVIDENCE §183(18)—LOST CONTRACT—SEARCH—EVIDENCE.

Testimony of witness held to show that a reasonable search had been made for lost contract, so that secondary evidence was admissible.

4. MASTER AND SERVANT §70(1)—WORK AND LABOR §11—RECOVERY FOR SERVICES—AMOUNT.

Employé, who performs work according to terms of employment, is entitled to recover stipulated price, or, if there is no stipulated price, such sum as the work is reasonably worth.

5. BROKERS \S 52—COMMISSION—COMPLETION OF SALE.

To be entitled to compensation from seller of real estate, broker must have been seller's agent, and must have effected the sale, or conducted the negotiations to such stage as to complete the bargain for the sale, so far as it depended upon his action or efforts.

6. BROKERS \S 64(1)—COMMISSION—COMPLETION OF SALE.

If plaintiff, as agent of defendant, brought defendant and another together, and they came to an agreement for the sale and purchase of the defendant's farm, plaintiff's right to compensation for his services, in the absence of any misrepresentations as to ability of purchaser, would be established, though the purchaser subsequently refused to comply with the terms of the sale.

7. BROKERS \S 88(3)—MISREPRESENTATIONS—QUESTIONS FOR JURY.

Question of purchaser's ability to comply with terms of sale, and whether any misrepresentations were made by plaintiff, real estate broker, as to his ability, held, under the evidence, for the determination of the jury.

Action by John Heldmyer, Jr., against Henry Cleaver. Trial by jury. Verdict for plaintiff.

BOYCE and CONRAD, JJ., sitting.

Levin Irving Handy, of Wilmington, for plaintiff. Richard S. Rodney, of Wilmington, for defendant.

The action of the plaintiff was to recover for services which, as a real estate broker, he had rendered the defendant in the sale of a certain farm.

The declaration, in assumpsit, contained a special count on an alleged agreement entered into between the plaintiff and the defendant for the sale of a certain farm, on the basis of 3 per cent. commission on \$15,000, the price the defendant asked for the farm, and also the common counts.

It was proved that the plaintiff, on or about the _____ day of _____, A. D. 1916, brought to the defendant one Morgan, of the state of Maryland, as a purchaser for the farm, and to whom, on the same day the defendant sold the farm for \$15,000, \$500 being paid down by check and the balance was to be paid on or before July 1st following. And in confirmation of the sale the defendant and M. entered into written agreements in duplicate—one of which was retained by the defendant and the other was delivered to M., who, on the following day, stopped payment of the said check, and testified at the trial, in answer to the question, "Why was it you did not finally comply?" "Well, I just thought it was a little too much more than I was able to shoulder, and I just stopped right there."

The defendant afterwards sued M. on the said check, in the courts in Maryland, and had a recovery for the full amount thereof, and waiting until after July 1st sold the farm to another.

Pursuant to previous notice, Mr. Handy

for plaintiff, called upon Mr. Rodney, for defendant, to produce the said agreement of sale. Mr. Rodney not being able to do so, Mr. Handy sought to prove the terms of the agreement by M.

Objection was made on the ground that, when an instrument in writing is executed in duplicate, the loss of each must be shown in order to let in secondary evidence. The objection was sustained. M. then testified that he did not have the duplicate copy of the contract, but according to his best recollection he had given the same to Mr. Barrall, his attorney in Maryland. The plaintiff, being recalled, testified that he had a few days before conversed with Mr. Barrall over the telephone, in Mr. Hendy's office, and learned from Mr. Barrall that he would make a search for the contract, and if he could find it he would mail it to Mr. Handy in time for use at this trial, and that neither the contract nor any communication had been received from Mr. Barrall. It was again sought to prove the contents of said agreement by M. Objection was made on the ground that reasonable diligence of search for the paper had not been shown.

BOYCE, J. [1] The inquiry made of Mr. Barrall, and the reply received, do not show any search made by him for the paper in question, or that it is not in his possession. Proof of search or loss of the paper has not been made. The objection is sustained.

At the afternoon session, the plaintiff was recalled, and asked by his counsel whether he had, during the noon recess, at the request of M., communicated with Mr. Barrall over the telephone as to the missing paper, and, answering that he had, he was asked:

"What did Mr. Barrall say to you in that conversation which you had for Mr. Morgan at the recess of the court about any search, if any, he had made for the contract between Mr. Morgan and Mr. Cleaver?"

The question was objected to as hearsay.

BOYCE, J. [2] The reply in instances of this kind is not used as hearsay testimony to the loss of the paper in question, but merely as indicating that reasonable search has been made for the missing paper. 1 Greenleaf on Evidence (16th Ed.) § 568B., note 9. For this purpose, we overrule the objection. The witness may answer the question.

"A. I told Mr. Barrall I was calling up about the paper Mr. Handy referred to last week in his office, and he said he had made a very careful search for it, but could not find it; that he did not write Mr. Handy, because he told him that if he found it he would send it to him, and not being able to find it he did not write; but if they wanted him he would come and testify.

"Q. You say you wrote the contract yourself for Mr. Morgan and Mr. Cleaver? A. Yes, sir.

"Q. What were the contents of it?"

Objection was made on the ground that sufficient diligence had not been shown in

searching for the lost paper to admit secondary evidence.

BOYCE, J. [3] The court is of the opinion that a reasonable search has been shown. The objection is overruled. Take the answer of the witness.

"A. The agreement was drawn up by me between Mr. Morgan and Mr. Cleaver, and the purchase price for the farm was \$15,000. Mr. Morgan paid \$500 by check upon the signing of the agreement and the balance was to be paid at a certain time—I don't recall the date. It was satisfactory to both of them, and they both signed it, and Mr. White signed it as a witness to their signatures."

The defendant admitted that he agreed to pay the plaintiff 3 per cent. commission on the purchase price, if he succeeded in selling the farm; but he understood the agreement between them to mean that he would pay the commission when he had received the purchase price. He also stated that he accepted Mr. Morgan as the purchaser of the farm and as financially able to comply with the terms of the contract of sale.

BOYCE, J., charging the jury:

[4, 5] This action is brought by John Heldmyer, Jr., a real estate broker, against Henry Cleaver for the recovery of compensation for services alleged to have been rendered by the plaintiff for the defendant in the sale of a certain farm. The plaintiff demands the sum of \$450, or 3 per cent. of the price for which he claims he effected the sale of the farm. When one employs another to do work for him, and the employé performs the work in accordance with the terms of the employment, the employé is entitled to receive the stipulated price, if such was agreed upon by the parties, or, if no stipulated price was agreed on, then he is entitled to recover such sum as the work is reasonably worth. To entitle a real estate broker to recover compensation for the sale of real estate of another, he must have been the agent of the seller, and he must have effected the sale or conducted the negotiations to such a stage as to complete the bargain for the sale so far as it depended upon his action or efforts to accomplish the sale.

[6] If, in this case, the plaintiff as the agent of the defendant brought Morgan and the defendant together, and if they came to an agreement for the sale and purchase of the farm, the right of the plaintiff to compensation for his services, in the absence of any misrepresentations as to the ability of the purchaser to comply with the terms of sale agreed upon, became established, though the purchaser subsequently refused to comply with the terms of the sale; for when the plaintiff brought to the defendant a purchaser willing and able to purchase the farm at the price authorized and agreed upon between the seller and the purchaser, the plaintiff's work was done and he became entitled

to his compensation. And the purchaser's refusal to complete the purchase, without the fault of the plaintiff, will not prevent the latter from recovery of his compensation.

[7] In respect to the question of the purchaser's ability to comply with the terms of sale, and whether any misrepresentations were, in fact, made by the plaintiff, are matters for the determination of the jury under the evidence before them.

If you should be satisfied from a preponderance of the evidence that the plaintiff did perform the services which he had agreed to do for the defendant, then your verdict should be for the plaintiff for such sum as the defendant agreed to pay, or, if there was no specific sum agreed upon between the parties, then for such amount as you may find such services were reasonably worth. Tebo v. Mitchell, 5 Pennewill, 356, 63 Atl. 327.

Verdict for plaintiff.

(7 Boyce, 140)

STATE v. GRECO.

(Court of General Sessions of Delaware. New Castle. March 13, 1918.)

1. RAPE \S 16(1)—ASSAULT WITH INTENT.

The element of intent is an essential ingredient of the crime of assault with intent to rape.

2. RAPE \S 53(3)—ASSAULT WITH INTENT — EVIDENCE.

In a prosecution for assault with intent to rape, the particular intent with which the assault is made may be shown either by direct or circumstantial evidence; that is, by the express declarations or confession of accused, or by his acts and conduct, from which the intent reasonably and naturally may be inferred.

3. CRIMINAL LAW \S 369(1), 371(1) — EVIDENCE—PROOF OF OTHER OFFENSE—GUILTY KNOWLEDGE.

Proof of a distinct independent offense, other than that in issue, though embracing acts of the same general kind as those surrounding the offense charged, is not admissible to establish the latter, a rule subject to certain exceptions, as when it is necessary to show a particular intent to prove guilty knowledge.

4. CRIMINAL LAW \S 370, 371(9)—ASSAULT TO RAPE—GUILTY KNOWLEDGE—OTHER OFFENSE.

In prosecution for assault to rape, testimony of female witness, other than prosecutrix, as to defendant's like assault upon her in the same vicinity three days before that upon prosecutrix, was inadmissible to show guilty knowledge or intent.

5. RAPE \S 16(1)—ASSAULT WITH INTENT—PROOF OF ELEMENTS OF OFFENSE.

The offense of assault with intent to rape embraces not only assault with violence, but also intent to rape.

6. ASSAULT AND BATTERY \S 48 — "ASSAULT."

An "assault" is an unlawful attempt by force or violence to do injury to the person of another, with the present ability to accomplish the attempt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assault.]

Peter Greco was tried on an indictment charging him with an assault with intent to rape. Verdict of guilty, defendant suing out writ of error, which was dismissed for failure to prosecute.

BOYCE and CONRAD, JJ., sitting.

David J. Reinhardt, Atty. Gen., and Percy Warren Green, Deputy Atty. Gen., for the State. J. Frank Ball, of Wilmington, for defendant.

The prosecuting witness testified that on the morning of November 27, 1917, at about 7:15 o'clock, while she was proceeding on Clayton street, in the city of Wilmington, towards her home, and just as she came out from underneath the bridge under which Clayton street passes as it runs into Brandywine Park, she heard a voice and rustling of leaves and turned around and saw the accused, who at that time put his hands in his pockets and walked with his head down; that, however, she did not think he was after her, and proceeded on her way towards the Brandywine to a point about 10 or 12 feet from the path where she was walking; that at about that time she felt a hand going across her mouth, with something in the hand that felt like a sponge and tasted sweet and smelled sweet; that she was then thrown to the ground and a terrific struggle ensued, which the witness described in detail, and which was finally terminated by the approach of two men, one of whom gave chase to the accused, while the other assisted the prosecuting witness to her home. The prosecuting witness testified that during the struggle she had every opportunity to, and did, identify the accused as the person making the assault upon her. After she had given her testimony, the Attorney General, in the presence of counsel for defendant and not in the hearing of the jury, informed the court that he desired to call a female witness for the purpose of proving by her that a similar assault was committed upon her by the accused, four days before, and eight squares from the place where the assault was committed upon Mary Lapsley.

The jury was directed to retire to their room, and the proposed witness was called to the stand and permitted to detail the facts and circumstances of the assault made upon her, the means employed in making the assault being similar to those made upon the prosecuting witness, and she identified the accused as the person who made it.

Mr. Ball insisted that the testimony disclosed a distinct, separate offense, and that it was inadmissible in the case on trial. The Attorney General contended that the testimony was admissible for the purpose of proving (1) identity; (2) similarity of plan or scheme; and (3) motive or intent. 1 Wharton's Crim. Ev. (10th Ed.) 165; 2 Wharton's Crim. Ev. (10th Ed.) 1659 (1667); State v.

Brown, 8 Boyce, 499, 85 Atl. 797; Effler v. State, 4 Boyce, 69, 85 Atl. 731.

BOYCE, J., delivering the opinion of the court:

[1-3] The indictment in this case charges that the accused did with violence assault the prosecuting witness with intent to commit rape. The element of intent is an essential ingredient of the crime charged. The particular intent with which an assault is made may be shown either by direct or circumstantial evidence; that is, by the express declarations or confession of the accused, or by his acts and conduct from which the intent may be reasonably and naturally inferred. Ordinarily evidence must be confined to the issue, so that it is a general rule that on the trial of a person for crime, proof of a distinct, independent offense, though it embraces acts of the same general kind as those surrounding the offense charged, is not admissible to establish the latter offense. This rule is subject to certain exceptions, as when it is necessary to show a particular intent for the purpose of proving guilty knowledge.

In State v. Brown, 3 Boyce, 499, 83 Atl. 797, this court, after recognizing the principle that where the element of intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain (People v. Seaman, 107 Mich. 357, 65 N. W. 203, 61 Am. St. Rep. 326), said:

"Where, however, the intent is not required to be specifically proved, or from the nature of the offense under investigation proof of its commission as charged necessarily establishes the criminal intent, or the intent is a necessary conclusion from the act done, evidence of the perpetration, or attempted perpetration, of other like offenses, should not be admitted."

In Effler v. State, 4 Boyce, 62, 85 Atl. 731, the Supreme Court said:

"* * * It appears, to prove identity, that there must be some connection between the two offenses, and it is not sufficient that they be similar offenses committed by the same person. Almost if not quite the same stringency of proof is required to prove identity of party by this kind of testimony as is required to show system or plan. We do not find the two offenses to be connected in such a manner as would make competent and relevant the proof of the similar offense to prove identity of the accused."

[4] There is in the case now before the court, a separation as to the time of the commission of the offense charged and the

offense concerning which the witness has given testimony to the court in the absence of the jury. And there is not disclosed by her testimony any connection between the two offenses beyond that of proximity as to the time of their commission (three days), similarity of means employed in making the two assaults, and the identity of the person making them. In the application of the principle of the exception invoked, the limitation placed upon it by the court in the *Effer Case* is, we think, controlling in this case. We are constrained to hold that proof of a similar assault upon the witness, now before the court, is not admissible to show guilty knowledge or intent in the commission of the offense for which the accused is being tried. We decline to allow the testimony to be given to the jury.

The court directed that the jury return to the courtroom.

At the conclusion of the testimony and arguments of counsel,

BOYCE, J., charged the jury in part:

The indictment in this case charges that Peter Greco, with violence, did assault Mary Lapsley against her will with intent her to ravish and carnally know, in Wilmington hundred, this county, on the 27th day of November, 1917. The offense charged is commonly known as an assault with the intent to commit rape. Rape is defined to be the carnal knowledge of a woman, above the age of 10 years, by force and against her will.

It is provided by Rev. Code 1915, § 4707, that if any person shall, with violence, assault any female with intent to commit rape, such person shall be deemed guilty of felony, etc.

[5, 6] The offense embraces not only an assault with violence, but also an intent to commit rape. It is incumbent upon the state to sustain the charge by satisfactory proof with respect to both ingredients of the crime before there can be a conviction of the accused in manner and form as he stands indicted. An assault is an unlawful attempt by force or violence to do injury to the person of another, with the present ability to accomplish the attempt.

If you find that the accused made an assault upon the prosecuting witness, then your inquiry will be with what intent was the assault made, was it made with the intent to commit rape? The particular intent with which an assault is made may be proved by positive or circumstantial evidence, that is, by the declarations or confession of the accused that he committed the assault with the intent charged, or by the acts and conduct of the accused, and other circumstances from which such intent may reasonably and naturally be inferred.

It is not denied that a violent assault was

made upon the prosecuting witness at the time and place as laid in the indictment, but the accused denies generally that he committed the crime charged against him. He also relies upon an alibi; that is, he claims that he was at another place at the time the offense was committed.

If you find beyond a reasonable doubt that the accused with violence, committed an assault upon Mary Lapsley, against her will, with intent her to ravish and carnally know, your verdict should be guilty in manner and form as he stands indicted.

If you find that the accused committed the alleged assault, but without intent to commit rape, your verdict should be guilty of assault. If you find that he did not commit the crime charged, or if you entertain a reasonable doubt as to his guilt, your verdict should be not guilty.

Verdict, guilty with recommendation to mercy.

Motion for new trial based on usual grounds was refused, and sentence being imposed, counsel for accused thereupon filed a *præcipe* for writ of error with the clerk of the Supreme Court, and a supersedeas bond, duly approved, with the clerk of the peace for New Castle county. At the following June term, 1918, of the Supreme Court, on motion of the Attorney General, the writ of error was dismissed because the convict had failed to prosecute his writ of error according to law and the rules of the Supreme Court, and he was subsequently resentenced and committed by the trial court.

(7 Boyce, 146)

KEMP v. McNEILL COOPERAGE CO.
(Superior Court of Delaware. Kent. April 28, 1918.)

1. NEGLIGENCE — 1, 121(1) — BURDEN OF PROOF.

In actions based on negligence, the burden of proof is on plaintiff; "negligence," which is the want of due care, or such care as an ordinarily prudent man would exercise under like circumstances, being never presumed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

2. NEGLIGENCE — 80 — CONTRIBUTORY NEGLIGENCE.

A plaintiff's own negligence, proximately contributing to his injuries, constitutes a defense in an action for such injuries.

3. NEGLIGENCE — 122(1), 135 — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.

Contributory negligence must be proved by a preponderance of evidence, and the burden of proof rests on defendant, unless it appears from plaintiff's testimony.

4. MASTER AND SERVANT — 150(1) — INJURIES TO SERVANT — WARNING.

It is the duty of an employer to warn his servant of any danger with which the servant may come in contact in the course of his employment, if not known to the servant and not discoverable by due care.

5. MASTER AND SERVANT — 153(3) — INJURIES TO SERVANT — WARNING.

Whether a danger is or is not apparent to a servant 17 years old, as affecting duty to warn him, depends on whether it would have

been apparent to the average youth of the same age, intelligence, and experience.

6. MASTER AND SERVANT ¶284(2) — INJURIES TO SERVANT—KNOWLEDGE OF DANGER.

The knowledge of the existence of the thing that causes a personal injury to a servant is not necessarily a knowledge of the danger arising therefrom.

7. MASTER AND SERVANT ¶217(1) — INJURIES TO SERVANT—ASSUMPTION OF RISK.

If a servant knows of a danger, or by the ordinary use of his senses could have known thereof, he assumes the risk of injury therefrom.

8. MASTER AND SERVANT ¶89(1) — INJURIES TO SERVANT—SCOPE OF EMPLOYMENT.

A servant, injured while acting outside the scope of his employment, without the order of his employer, cannot recover for personal injuries, even though resulting from dangerous and defective appliances.

9. DAMAGES ¶80 — PERSONAL INJURIES—MEASURE OF DAMAGES.

Where a servant 17 years old was injured by being caught in a set screw on a shaft, recovery might be had for such a sum as would reasonably compensate plaintiff for his injuries, including his pain and suffering in the past, and such as might come to him in the future, and for permanent injuries received, resulting from the accident.

Foreign attachment by Roy Kemp, an infant, by his next friend, Robert J. Kemp, against the McNeill Cooperage Company. The defendant appeared by giving the required security. The case was pleaded to issue. Trial by jury. Verdict for plaintiff.

PENNEWILL, C. J., and BOYCE, J., sitting.

Henry Ridgely and George M. Fisher, Jr., both of Dover, and T. Alan Goldsborough, of Denton, Md., for plaintiff. George M. Jones, of Dover, for defendant.

Plaintiff's evidence, by several witnesses, showed that the accident occurred on December 8, 1915, in a stove mill which defendant was operating near Sandtown, Kent county, Delaware; that on the day of the accident the mill was closed down for a short time in order that the saws might be filed, during which time the employes, including the plaintiff, a youth of 17 years of age, went outside. The plaintiff testified that he was employed to run a crozing machine in the mill, and to do whatever else he was told to do; that when the mill started up again he, being ordered by the superintendent or boss to put the belt on the pulley of a countershaft, went inside to do so; and while so engaged an uncovered set screw which protruded from one-half to three-quarters of an inch from the collar of the countershaft, caught in the side of his overalls and carried him around with the shaft as it revolved.

The superintendent or boss in charge of the mill on the day of the accident was the only witness for the defendant. He testified that the plaintiff's duty was to run a crozing machine on the second floor of the mill; that the belt in question was on the ground floor; that he did not order the plaintiff to

put the belt on; that he was, in fact, on the second floor at the time of the accident, and did not know that the belt was off the pulley.

Plaintiff's Prayers.

1. That it is the duty of the master to warn the servant of any danger which the servant may come into contact with in the course of his employment, and which would not be apparent to the servant.

2. That the question whether a danger is apparent or not will depend upon the age and experience of the servant.

3. That in the case of a servant, who is a boy under the age of 21 years, the test as to whether a danger is or is not apparent will depend upon whether it would have been apparent to the average boy of the same age and experience, and not whether the danger would have been apparent to a person of maturer years and experience.

4. That knowledge of the existence of the set screw is not necessarily knowledge of the danger from the set screw; knowledge that a thing exists not being knowledge that the thing is dangerous.

5. That even if the jury shall believe that Roy Kemp might have seen the set screw, yet that this will not prevent a verdict for the plaintiff, unless the jury shall also believe that the average boy of his age and experience would have realized that the said set screw constituted a danger.

6. If the verdict should be for the plaintiff, it should be for such a sum as will reasonably compensate the plaintiff for his injuries, including therein his pain and suffering in the past, and such as may come to him in the future, and for permanent injuries received, if any, resulting from the accident. *Travers v. Hartmann*, 5 *Boyce*, 302, 310, 92 *Atl.* 855.

Counsel for the defendant was content to have the court charge the jury in accordance with the principles announced in the case of *Selninski v. Wilmington Leather Co.*, 3 *Boyce*, 288, 83 *Atl.* 20.

BOYCE, J., charged the jury in part:

This is an action by Roy Kemp, an infant, by his next friend, Robert J. Kemp, against McNeill Cooperage Company, a corporation existing under the laws of the state of New Jersey.

The first count in the declaration, which contains two other counts, substantially the same as the first, charges that the defendant carelessly and negligently, on the 8th day of December, 1915, ordered the plaintiff to put a belt upon the pulley of a shaft in the defendant's mill without warning or instructing him, the plaintiff, of the existence of the protruding set screw in the collar of the shaft and of the danger of being caught in the clothes by the protruding set screw, and

that in obedience to the order of the defendant, the plaintiff, on that day, in this county, then and there being a minor and unskilled in machinery and ignorant of the danger thereof, undertook to put the belt on the pulley of the shaft, and in so doing, and while in the exercise of due care and caution on his part, the protruding set screw caught in the clothes of the plaintiff, by reason whereof he, the plaintiff, was carried around by the shaft, which was then and there revolving with great speed, and was brought into violent contact with one of the sills upon which the said shaft was attached, and with the floor of said mill, and thereby the face and head of the plaintiff were bruised, wounded and lacerated, some of his teeth knocked out, the roof of his mouth, his jaw and his arm, shoulder and leg injured, and was otherwise badly cut, bruised and wounded, etc.

The defendant denies that it was negligent and claims that the plaintiff, on his own volition, without any direction of his employer put the belt upon the pulley of the shaft, and that he did so outside of the scope of his employment, and that his injuries were wholly caused by his own negligence.

[1] This action is based on negligence, and the burden of proving the negligence charged to the satisfaction of the jury is cast upon the plaintiff. Negligence is never presumed; it must be proved. Whether there was any negligence at the time of the accident, and whose, must be determined by the jury from the evidence. Negligence in a legal sense is the want of due care; that is, such care as an ordinarily prudent man would exercise under like circumstances. It is the failure to observe for the protection of another that degree of care and vigilance which the circumstances justly demand.

[2, 3] In order for the plaintiff to recover, he must satisfy you by the weight or preponderance of the evidence that the defendant was guilty of one or more of the negligent acts averred in his declaration. He must satisfy you not only that the injuries complained of resulted from the negligence of the defendant, but also that at the time of the accident he was himself without fault or negligence which proximately contributed to his injuries; for if his own negligence did proximately contribute to his injuries, the defendant is not liable, even if it was also negligent. Where contributory negligence of the plaintiff is relied on as a defense, it must be proved by a preponderance of the evidence, and the burden of proving it rests upon the defendant, unless it should appear from the testimony produced by the plaintiff.

[4-8] It is the duty of the employer to warn the servant of any danger with which the servant may come into contact in the course of his employment, if the same was unknown to the servant and could not be seen or known by the reasonable use of his senses and the exercise of due care. In the case of a servant of 17 years of age, the test as to whether a danger is or is not apparent will depend upon whether it would have been apparent to the average youth of the same age, intelligence and experience. The knowledge of the existence of the thing that causes the injury is not necessarily the knowledge of the danger arising therefrom. Whether the plaintiff in this action saw, or by the exercise of due care might have seen, the set screw in the shaft and have avoided the accident, is a question for your determination, and in determining such question you should consider whether an average youth of the age, intelligence and experience of the plaintiff would have realized, in the absence of warning, that the set screw was dangerous. If the plaintiff, from his experience gained in the defendant's factory or elsewhere, knew how to place the belt upon the shaft with safety, whether he did it of his own volition or under the direction of his employer, the defendant would not be liable on account of his failure to give the plaintiff instruction and warning. If he knew the danger, or by the ordinary use of his senses could have known thereof, he assumed the risks and may not recover therefor. If the plaintiff, at the time of the accident, was acting outside the scope of his employment, without the order of his employer, he cannot recover even though the machinery and appliances were defective and dangerous.

[9] In conclusion we will say that if you believe from the preponderance of the evidence that the plaintiff's injuries were caused by the negligence of the defendant, as we have instructed you, and further believe that the plaintiff's own negligence did not proximately contribute thereto, your verdict should be in favor of the plaintiff, and it should be for such a sum as will reasonably compensate the plaintiff for his injuries, including therein his pain and suffering in the past, and such as may come to him in the future, and for permanent injuries received, if any, resulting from the accident. If, however, you are not satisfied that the plaintiff's injuries were caused by the negligence of the defendant, or if you believe that the plaintiff's own negligence contributed proximately to his injuries, your verdict should be for the defendant.

Verdict for plaintiff.

(89 N. J. Eq. 242)

**DEUTSCHE PRESBYTERISCHE KIRCHE
v. TRUSTEES OF PRESBYTERY OF
ELIZABETH et al. (No. 44/728.)**

(Court of Chancery of New Jersey. Aug. 22, 1918.)

1. TRUSTS \S 63 $\frac{1}{2}$ —CONVEYANCE OF CHURCH PROPERTY.

Where a church congregation agreed to deed church property to trustees of presbytery in consideration of assumption of mortgage, with the privilege of redemption and the use of the church by the grantor congregation, but the deed did not specify the assumption, and the agreement for the use of the church was not executed, the holding by the grantee was a resulting trust; an unqualified gift not having been contemplated.

2. TRUSTS \S 357(3)—CONVEYANCE OF TRUST PROPERTY—GRANTEE AS TRUSTEE.

Ordinarily, if a trustee transfer to another, without getting an equivalent, property that he holds in trust, that other will hold on the same trust.

3. CORPORATIONS \S 404(1)—TRANSFERS—AUTHORITY OF MANAGERS TO MAKE GIFT.

Managers of a corporation cannot give away its property.

Bill by the Deutsche Presbyterische Kirche against the trustees of the Presbytery of Elizabeth and others, to enjoin a sale of church property. Injunction issued.

Charles J. Stamler, of Rahway, for complainant. Conover English, of Newark, for defendants. Orlando H. Dey, of Rahway, for Greek Church.

STEVENS, V. C. This is a controversy over the equitable ownership of a church property in Rahway. Prior to May 15, 1909, the title was vested in complainant. On that day, by warranty deed, it, by certain of its trustees, conveyed or attempted to convey it to the trustees of the Presbytery of Elizabeth. The church now claims that it still has an equitable interest. The trustees of the Presbytery contend that they are the absolute owners. As such they have agreed to sell to St. John's Greek Catholic Church of Rahway, one of the defendants. The bill is filed, primarily, to enjoin them from so doing.

The church was organized as a Presbyterian congregation on April 10, 1884, under the Religious Corporations Act (3 Comp. St. 1910, p. 4389). A year thereafter it acquired the property in controversy from the Rahway Savings Institution, for the consideration of \$2,400. It gave back a mortgage to secure \$1,000 of the purchase money. The membership was small from the beginning, and as time went on it diminished. Between 1885 and 1909 it had paid only \$200 on its mortgage indebtedness. On January 19, 1909, as appears from the minutes of the Elizabeth Presbytery, the following resolution was passed by that body:

"Resolved that the matter be referred to the Standing Committee of the Board of Church Election and the Trustees of Presbytery, and to give the Trustees of Presbytery power to negotiate a loan of \$800 during the interval of

Presbytery, if such a course should be found necessary.

These boards, after consideration, reported to the Presbytery, which thereupon adopted the following resolutions:

"1. That Presbytery hereby approves the action of its committee * * * in proposing to the German Presbyterian Church of Rahway to transfer its property by deed to the Trustees of Presbytery, in return for the assumption by the Trustees of Presbytery of the mortgage of \$800 now lying against the property.

"2. That Presbytery hereby authorizes the Trustees of Presbytery to accept title to the German Presbyterian Church, provided it be offered, upon the terms above named, to enter into such agreement with the said congregation, as will secure the German Presbyterian Church of Rahway the free use of the property as long as it exists in connection with the Presbytery, and to do all that may be necessary to complete the transaction both as respects the transference of the title and the replacing of the mortgage."

By this resolution certain members of the Presbytery (including the Rev. Dr. Kerr) were appointed to represent Presbytery at the congregational meeting of the German Presbyterian Church to be held on the next Monday evening. This meeting took place, and Mr. Helms, one of the members of the congregation, offered the following resolution:

"Whereas, the church is incumbered with a mortgage for \$800.00 which has existed for twenty-four years and the congregation seems unable to pay the same, and payment thereof has been demanded;

"And whereas the congregation has with difficulty sustained regular religious services and seems unable to do more under existing conditions;

"And whereas the Presbytery of Elizabeth, its members and subordinate committees to a large extent provided the funds for the acquisition of the church property, and it is desired that the property continue to be devoted to religious uses under direction of the Presbytery and be not lost by foreclosure or otherwise; and the Trustees of the Presbytery of Elizabeth have offered to assume said mortgage:

"Resolved, that the trustees of this church be directed to convey the church property consisting of a lot 50 feet wide fronting on Irving street, Rahway, and the church edifice thereon to the Trustees of the Presbytery of Elizabeth, their successors and assigns.

"Resolved, further that the Presbytery of Elizabeth be respectfully requested to still allow us to occupy and use the church for religious services so long as we may be able to sustain stated religious worship therein and to keep the property in proper order and repair.

"Resolved, further that the Presbytery of Elizabeth be requested to enter into agreement with the church to return the title to the property whenever the church pays the amount of the mortgage above referred to and that the church has the privilege of paying the amounts in installments of \$100 or more."

The minutes show that a vote was taken by ballot. Ten votes were cast—all in favor of the preambles and resolutions—being (so the minutes state) "more than two-thirds of all the votes cast." The minutes do not show whether other members of the congregation were present.

On May 15, 1909, the German Church made a deed to the Trustees of the Presbytery of

Elizabeth, in consideration, so the deed states, of "one dollar and other valuable consideration." The deed contains, unreservedly, covenants of seisin, warranty, and against incumbrances. It does not declare that the property is conveyed subject to the mortgage. Although the resolution of Presbytery provided that the Trustees of the Presbytery should assume payment; it, the grantor, by its covenant against incumbrances undertook to do so. The Presbytery furthermore directed its committee to enter into an agreement to secure the free use of the property as long as it (the church) existed in connection with the Presbytery. They made no such agreement, and nothing was done about the resolution of the congregation that provided that the Presbytery should be requested to enter into an agreement to return the title whenever the church paid the mortgage.

On May 27, 1909, the Trustees of the Presbytery paid off the mortgage to the savings institution with the proceeds of a \$900 mortgage made by them to the Union County Savings Bank of Elizabeth. They paid the interest on this mortgage until 1916, when they received an offer to purchase from a Hebrew Church. The German Church had held its customary services from the time of the transfer to the time when this offer was made. Hearing of it, it objected to the proposed sale, and Mr. Schneider, one of its members, agreed thereafter to pay the interest on the mortgage and to discharge a municipal assessment, which he did. In consequence of the attitude of the congregation, and, as it is said, the inadequate price, the offer was declined.

In April of the present year, an offer of \$5,348 was received from the defendant the Greek Church, and this offer was accepted by the Trustees of Presbytery, and \$200 paid on account of the price. This suit was brought before the delivery of a deed or the payment of the balance of the purchase money.

It was proved that between the years 1885 and 1909 the German Church received about \$8,400, not from the Trustees of the Presbytery, but from the Synod, a body having a more extensive jurisdiction. It was made up, almost entirely, of an annual contribution of \$300 to the pastor's salary, and was a pure donation. Its payment is without effect upon the present controversy.

[1, 2] Counsel for defendants lay stress upon a line of cases in which it is held that a trust in land will not result to the grantor, if the conveyance purport to be given for a valuable consideration, upon parol proof that nothing was in fact paid and that the conveyance was wholly voluntary. *Aller v. Cronter*, 64 N. J. Eq. 381, 54 Atl. 426; *Holton v. Holton*, 72 N. J. Eq. 312, 65 Atl. 481; *Coffey v. Sullivan*, 63 N. J. Eq. 296, 49 Atl. 520. These cases have no application here. The controversy is not one between individ-

uals, each claiming in his own right, but between two corporate trustees, each vested with authority to hold in trust for specific objects. Ordinarily, if a trustee transfer to another, without getting an equivalent, property that he holds in trust, that other will hold on the same trust. In the case in hand, I should say that, prima facie, if the grantor-trustee have made a conveyance, without valuable consideration and without specifying any other trust that it was competent for the two bodies to create, the grantee-trustee would take, charged with the same trust. It would lie upon the grantee-trustee to show that in some way or other a different trust was created, and this would not be shown by proof merely that the trusts which it was capable of executing covered a wider range of objects. It will not be disputed that the Trustees of Presbytery could have agreed to hold the property on the trust upon which the trustees of the church had held. Such agreement would have been within the scope of its power; and so the case comes down to this: What is there to show that it took on a different trust—assuming, of course, that the church trustees had power to authorize such a trust or to make a gift of the property. On this question, we are not left without light, for we have the corporate action of the congregation, on the one hand, and of the Presbytery, on the other. The Presbytery, as we have seen, took action first. The question before them was whether it was expedient to protect the church from a threatened foreclosure. They resolved that it would be well to propose to the church that it transfer its property "in return for the assumption by the Trustees of Presbytery of the mortgage." In this, we have the suggestion of a valuable consideration; but, as has been shown, such consideration was not in fact given. The warranty deed actually taken continued the burden on the church. If the Trustees of Presbytery paid off the old mortgage with the proceeds of the new, given by themselves, they could recover what they paid by suing on the covenant against incumbrances. The Presbytery also resolved that the trustees be authorized to accept title to the German Presbyterian Church of Rahway provided it be offered, upon the terms above named, to enter into such agreement with the said congregation as would secure the German Presbyterian Church of Rahway the free use of the property as long as it existed in connection with the Presbytery.

The body charged with the carrying out of these resolutions was composed of gentlemen of the highest character, and not the slightest reflection upon their conduct, viewed from an ethical standpoint, is here intended. But it is evident that their action did not accord with their instructions. They did not, probably through oversight, assume the mortgage, and they did not, as called for by the second resolution, enter into an agree-

ment to secure to the church the free use of the property as long as it existed in connection with the Presbytery. It is needless to say that, had they made such an agreement, they would not have attempted, as they are now doing, to sell.

Let us next look at the action of the Rahway Congregation. They were doubtless advised of the action of the Presbytery. The Rev. Dr. Kerr, who was one of its members and one of the members of its trustees, was present at the meeting and, as he himself states, was the one who, on behalf of the church, drew the resolution requesting the Presbytery to enter into an agreement to return the title to the property "whenever the church pays the amount of the mortgage." If this resolution had been afterwards approved by the Presbytery, the complainant would be, without more, entitled to a return of its property; for it has tendered payment. What I desire here to emphasize is that what the congregation contemplated was, not an unqualified gift, but a trust terminable on payment of the mortgage. Whether, therefore, we consider the action of the Presbytery or the action of the church, we reach the same conclusion, viz. that an out and out gift was not intended. What was contemplated was the transfer on a somewhat different trust of a property worth then and now upwards of \$5,000 to a body which was, from a financial standpoint, better able to take care of it. The subsequent conduct of the parties accords with their resolutions. The Trustees of the Presbytery allowed the congregation to use and control the property as before. When, in 1916, the Hebrew Society made its offer to purchase, and the congregation objected, the trustees permitted Mr. Schneider to pay an assessment and to take upon himself the payment of the interest on the mortgage.

[3] It is a well-known rule that the managers of a corporation cannot give away its property. Here it is argued that the congregation—the *cestui que trust*—authorized the gift. If we assume that the authorization, notwithstanding their resolutions, was absolute, still it does not appear that all the members of the congregation—the entire body of *cestui que trust*—assented. What is proved is that ten members voted. It is not proved that these were all the members.

It seems plain that an injunction should issue restraining the sale to St. John's Church.

It is not quite as apparent what other relief should be given. The minds of the parties, so to speak, did not meet to the extent of concluding a definite arrangement. The proposition, on the one hand, was that the church should have the free use of the property as long as it existed in connection with the Presbytery. The proposition, on the other

hand, was that the title should be reconveyed when the church paid the mortgage. The language of the clause adopted by the congregation and drawn, as I have said, by Rev. Dr. Kerr, is highly significant. It proves that further action defining the trust was contemplated and that the transfer of the legal title was a step merely toward the ultimate settlement. As the trust agreement has been left undefined, it seems to me that the equity of the church now is to have a reconveyance, on payment of all the money given or advanced by the Presbytery or its trustees since the mortgage was made, including, of course, the money for which the trustees have obligated themselves on their bond.

WURTH v. WURTH. (No. 43/666.)

(Court of Chancery of New Jersey. Aug. 16, 1918.)

DIVORCE —100—DESERTION—JUSTIFICATION —BURDEN OF PROOF.

Law does not call upon husband seeking divorce on ground of desertion to exclude hypothesis of justifiable cause; burden to justify separation by clear proof of matrimonial offense, supported by corroborating evidence, being cast on wife, as though made basis of application for divorce.

Petition for divorce on the ground of desertion by Louis J. Wurth against Elizabeth E. Wurth. On exception to the master's report that the material allegations of the petition were not proved. Exception sustained, and decree advised for petitioner.

W. Heit Apgar, of Trenton, for exceptions.

BACKES, V. C. The master reported that the material allegations of the petition are not proved. The evidence establishes beyond peradventure that the defendant willfully deserted her husband, that the desertion was continuous for more than two years before the filing of the petition, and that it was obstinate. The testimony of the petitioner supports the allegations of the petition, and the corroborating oral and written proof convinces me that it is true. To the master, the separation and its continuation appeared "to be the determined and considerate act of the defendant"; but he evidently entertained the view that a willful and obstinate desertion was not made out because the petitioner failed to establish affirmatively that the wife's course was without justification. In a bill for maintenance which she filed, and immediately abandoned some years ago, she charged him with offenses that, if true, would have warranted her in separating from him. Of the truth of these charges, there is no proof. The law does not call upon the petitioner to exclude the hypothesis of a justifiable cause. The burden is cast upon the defendant to justify the separation by clear and satisfactory proof of a

matrimonial offense, supported by corroborating evidence, the same as though it were made the basis of an application for divorce. *Rogers v. Rogers*, 81 N. J. Eq. 479, 86 Atl. 935, 46 L. R. A. (N. S.) 711.

The exception will be sustained, and a decree advised.

(89 N. J. Eq. 497)

IN RE VANDERBILT'S ESTATE.

Appeal of UNITED STATES FIDELITY & GUARANTY CO.

(Prerogative Court of New Jersey. Aug. 21, 1918.)

GUARDIAN AND WARD \Leftrightarrow 160—DECREE SETTLING ACCOUNT—INTERMEDIATE CHARACTER—OPENING.

Where orphans' court, settling guardian's account, granted the substituted guardian and ward herself leave to take proceedings against original guardian's estate or his surety, the court, after time for appeal had passed, was authorized, on petition of the ward, to open the decree for exceptions; account being merely "intermediate account."

Appeal from Orphans' Court, Essex County.

In the matter of the estate of Mabel Vanderbilt, a minor. From an order opening a decree, the United States Fidelity & Guaranty Company appeals. Order affirmed.

McDermott & Enright, of Jersey City, for appellant. Collins & Corbin, of Jersey City, for respondent Mabel Vanderbilt. Daniel L. Campbell, of Paterson, for respondent Fidelity Trust Co. Edward A. Markley, of Jersey City, for respondent William S. Woodhull.

LEWIS, Vice Ordinary. Nellie Black Vanderbilt, the mother of the respondent Mabel Vanderbilt, died February 11, 1907, leaving a will by which, after making certain specific gifts, she gave to her daughter, Mabel, one-half of the balance of money, bonds, and investments of which she might die seised, and appointed, as executors of her will, her husband, De Witt Clinton Vanderbilt, and Emma Littell Black. Mabel Vanderbilt was born August 29, 1894, and consequently was a minor at the time of the death of her mother. Her father, De Witt Clinton Vanderbilt, was accordingly appointed by the surrogate of Essex county, July 14, 1908, guardian of her estate, and the United States Fidelity & Guaranty Company became surety upon his bond as such guardian. On August 13, 1908, De Witt Clinton Vanderbilt, as guardian, received from himself as executor under the will of Nellie Black Vanderbilt certain money and securities representing the one-half share bequeathed to Mabel Vanderbilt by her mother. Included in these securities were 32 shares of the capital stock of the Pennsylvania Railroad and 30 shares of the capital stock of the American Express Company.

De Witt Clinton Vanderbilt died on the

31st of December, 1914, nearly a year before his daughter and ward, Mabel Vanderbilt, became of age, and thereafter one William S. Woodhull was appointed administrator of his estate and filed in the Essex county orphans' court what purported to be the final account of De Witt Clinton Vanderbilt as guardian of the estate of Mabel Vanderbilt. This account was noticed for settlement August 25, 1915, the notice being dated July 14, 1915. In the meantime, on January 26, 1915, the Fidelity Trust Company had been appointed by the surrogate of Essex county substituted guardian of the estate of Mabel Vanderbilt. It will be noted that Mabel Vanderbilt did not become of age until August 29, 1915, so that she was a minor when the notice of settlement was first given, and continued to be a minor on August 25, 1915, the date for which the settlement was noticed. The settlement of the account was adjourned by the orphans' court until October 22, 1915, and upon that date the account was settled and a decree made charging the estate of De Witt Clinton Vanderbilt with the sum of \$632.84 as the portion of the estate of Mabel Vanderbilt for which the accountant was unable to account, as shown by the account itself. The parties represented by appearance upon the making of this decree were the accountant, the Fidelity Trust Company, substituted guardian of Mabel Vanderbilt, and the United States Fidelity & Guaranty Company, bondsman of De Witt Clinton Vanderbilt as guardian. Mabel Vanderbilt herself had no notice of the proceedings for settlement. The balance of \$632.84 with which the estate of De Witt Clinton Vanderbilt was charged by this decree of settlement was obtained by including amongst the items for which the accountant prayed allowance the 32 shares of the capital stock of the Pennsylvania Railroad Company at the sum of \$2,104, and the 30 shares of the American Express Company at the sum of \$7,050; these stocks being in the hands of the accountant. The sums thus allowed on account of these stocks were greatly in excess of their actual market value at the time of the death of De Witt Clinton Vanderbilt and at the time of the settlement of the account. The decree of settlement, after directing that these shares, together with the other securities and moneys of the estate, be turned over to the Fidelity Trust Company, as substituted guardian for Mabel Vanderbilt, further ordered:

"That the Fidelity Trust Company, substituted guardian of said Mabel Vanderbilt, and the said Mabel Vanderbilt have leave to take such proceedings against the estate of De Witt C. Vanderbilt or against the United States Fidelity & Guaranty Company, bondsman of the said De Witt C. Vanderbilt as aforesaid, as it or she may be advised."

In May, 1916, Mabel Vanderbilt, who had then attained her majority, filed a duly verified petition in the Essex county orphans'

court, setting forth the foregoing facts and charging that De Witt Clinton Vanderbilt, as guardian of her estate, failed in his duty and committed a breach of his trust in failing to dispose of the Pennsylvania Railroad stock and the American Express Company stock at a time when he might have obtained a favorable price for the same, and that, as a result of such neglect of duty and breach of trust, the petitioner's estate had suffered a depreciation of about \$4,000, for which William S. Woodhull, as administrator of the estate of De Witt Clinton Vanderbilt, should have been charged upon the settling of his account. The petition then prayed that the decree of the orphans' court made October 22, 1915, settling the account in question, might be opened, vacated, and set aside, and that the petitioner might have leave to file exceptions to the account in the particulars named. To this petition, the United States Fidelity & Guaranty Company, surety on the guardianship bond of De Witt Clinton Vanderbilt, filed an answer admitting the facts set forth in the petition, but denying the charge thereof. After hearing and argument, the Essex county orphans' court ordered that the decree of October 22d be opened for the purpose of permitting Mabel Vanderbilt to file exceptions to the account of De Witt Clinton Vanderbilt, guardian, as filed by William S. Woodhull, administrator of the estate of De Witt Clinton Vanderbilt, deceased, in a form annexed to and made part of the order. The exceptions thus permitted to be filed attacked the account: First, because the accountant asked allowance for the 32 shares of Pennsylvania Railroad Company stock at \$2,104, whereas the same were worth, at the time of the death of accountant's intestate, only \$1,776; and, secondly, because the accountant asked allowance for 30 shares of the stock of the American Express Company at the sum of \$7,050, whereas the same were worth, at the time of the death of accountant's intestate, only \$3,720. (Page 23.) The depreciation thus claimed by the exceptions amounted to \$3,658, in an estate of approximately \$15,000; in other words, about a quarter of the value of the entire estate. From the order of the Essex county orphans' court opening its own decree and permitting these exceptions to be filed, the United States Fidelity & Guaranty Company has appealed to the Prerogative Court.

The only question presented by this appeal concerns the power of the orphans' court to open its own decree settling the account of the guardian, the time for an appeal from the decree in question having passed.

At the time the account was noticed for settlement and on the day for which the settlement was appointed, Mabel Vanderbilt was still a minor and had no notice of the proceedings; nor did she appear to the same

subsequently on the day when the decree was actually made, October 22, 1915, by which time she had attained her majority. In the very nature of the case, therefore, the account and the decree thereon could have been only intermediate in character, although the accountant referred to and entitled his account "final." But the orphans' court, so far from regarding the account or decree as final, incorporated in the decree an express reservation granting to the Fidelity Trust Company, substituted guardian of Mabel Vanderbilt, and to Mabel Vanderbilt herself, leave to take such proceedings against the estate of De Witt Clinton Vanderbilt, or against the United States Fidelity & Guaranty Company as they might be advised. In opening the decree, the orphans' court was careful to recite, as a ground for so doing, the express reservation referred to, and also the fact that the account in question was in reality an intermediate account. The nature of the decree and its express reservations are therefore such as amply to justify the orphans' court in permitting a further inquiry into the items of the account. Indeed, the orphans' court, in making the reservation in the decree, must have contemplated such further inquiry, and left it open to the respondent to take such action for the instituting of such an inquiry as she might be advised. It now clearly appears that the proper practice in such a case is that adopted by the respondent. The propriety and correctness of the order complained of may therefore rest upon the language of the original decree itself reserving to the respondent the very right that the appellant now seeks to deny. In opening its own decree to permit exceptions to be filed, the orphans' court was, in reality, but taking steps for disposing of a matter which, on the very face of the original decree, was left unsettled.

The order of the orphans' court opening the decree of October 22, 1915, and permitting the respondent Mabel Vanderbilt to file certain specific exceptions, should be affirmed, with costs to the respondent.

(89 N. J. Eq. 536)

In re DODGE'S WILL.

(Prerogative Court of New Jersey. Sept. 27, 1918.)

(Syllabus by the Court.)

WILLS §249—EXECUTION—DOMICILE—PROBATE BY ORDINARY.

Notwithstanding that a will executed by a person domiciled elsewhere at the time of his death, at a time when he was domiciled here with the formalities necessary under the laws of this state, but not with those required under the laws of the place of domicile at the time of death, and which will cannot be probated at the place of domicile, may be a valid disposition of immovables within this state, it cannot be probated by the Ordinary under the

rule laid down in Chadwick's Case, 80 N. J. Eq. 471, 85 Atl. 266.

"To be officially reported."

Application for probate of the will of George H. Dodge, deceased. Probate denied.

Pitney, Hardin & Skinner, of Newark, for the probate.

LANE, Vice Ordinary. The application is to probate a will of a deceased who, at the time of his death, was and had been for 20 years domiciled in Georgia. Prior to his removal to Georgia, the deceased had been domiciled in this state, and his will was executed here, while he was so domiciled. He left real property within this jurisdiction. The will was executed with the formalities necessary under the laws of this state, but not those required under the laws of Georgia. Application has been made to the Georgia probate court for probate, and probate has been denied.

Counsel insist that, the will having been executed in accordance with the *lex rei sitae* and with the *lex loci actus*, it is a valid testamentary disposition of immovable property within this state, and they rely upon 1 Story on Conflict of Law, § 474, and subsequent sections. 40 Cyc. tit. Wills, p. 1074; Nelson v. Potter, 50 N. J. Law, 324, 15 Atl. 375; Van Wickle v. Van Wickle, 59 N. J. Eq. 317, 44 Atl. 877; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049.

Whatever the fact may be, this court is precluded by the broad language used in Chadwick's Case, 80 N. J. Eq. 471, 85 Atl. 266, from granting probate. That court said:

"The plain, common sense meaning to be given to the act is that the ordinary was limited to the probating of wills of those domiciled within the state, which was the limit of his jurisdiction."

And the court affirmed the decree of the Vice Ordinary denying probate upon the ground that neither the Prerogative Court nor the Surrogate of any of the counties of this state have general jurisdiction to admit to probate the last will and testament of a nonresident having a domicile at the date of his death in another state, although such nonresident left property within this state, except as ancillary to a probate by the courts of the locality of such domicile. The present Ordinary, in *Re Geisler's Will*, 82 N. J. Eq. 311, 87 Atl. 623, said:

"The power of this court to admit to probate the will in question must rest exclusively upon the deceased having been domiciled in this state at the time of her death; and, if she were not, probate must be denied."

The result is that, until there is additional legislation, there is no way by which a permanent record can be made of a will of a nonresident not entitled to probate at the

place of domicile, but valid, if in fact it be, for the purpose of passing real property in this state.

Probate must be denied.

(89 N. J. Eq. 136)

ATWATER v. BASKERVILLE et al.

(Court of Chancery of New Jersey. Oct. 14, 1918.)

Supplemental opinion.

For former opinion, see 104 Atl. 310.

Foster M. Voorhees, of Elizabeth, for the motion. Clarke McK. Whittemore, of Elizabeth, and Abram H. Cornish, of Newark, opposed.

LANE, V. C. Since filing the opinion in this case, my attention has been called to the case of John Agnew Co. v. Board of Education of City of Paterson et al., 83 N. J. Eq. 49, 89 Atl. 1046. Vice Chancellor Stevenson there said:

"A foreign corporation, under the principle of comity, comes into New Jersey to do business and makes large contracts for the construction of buildings in New Jersey, in which business it acquires property in New Jersey, and also contracts debts. It would be a most extraordinary result, indeed, if when this foreign corporation becomes insolvent it could still transfer its New Jersey assets acquired in its New Jersey business so as to make preferences among its New Jersey creditors, necessarily disadvantageous to some of them, in defiance of the law which prevents New Jersey corporations from doing this thing. Our statute expressly provides that 'foreign corporations doing business in this state shall be subject to the provisions of this act so far as the same can be applied to foreign corporations.' Section 96. There is not the slightest difficulty in applying the prohibition upon preferences contained in section 64 of the Corporation Act to a foreign corporation and its assets, of the character and in the situation presented in this case. If the Glen Company had not been put in bankruptcy, the statutory action, based on insolvency, etc., provided for in section 65 of our statute, might have been brought, and the receiver appointed in such an action would have taken possession of all the New Jersey assets, including the right to collect this money from the city of Paterson, and would have administered the same precisely as they would have been administered in case the corporation had been created under our New Jersey statute." (*Italics mine.*)

The case was unanimously affirmed by the Court of Errors and Appeals, 83 N. J. Eq. 339, 90 Atl. 1135, for the reasons stated by Vice Chancellor Stevenson. The language used by the Vice Chancellor must have been present in the minds of the Court of Errors and Appeals, for the appeal was on the claim of the First National Bank of the Town of Union, and the remarks made by the Vice Chancellor were apposite to the disposition of that claim.

This case is in direct conflict with the construction sought to be put on McDermott v. Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375, by counsel for the respondents.

My attention has also been called to the case of Boehme v. Ball, 51 N. J. Eq. 541, 26

Atl. 832. In that case it appeared that extensive litigation was conducted by a receiver appointed of a foreign corporation under the statute upon the ground of insolvency, and it never seems to have occurred either to Vice Chancellor Green or to counsel involved in the case that there was any doubt of the power of the Court of Chancery to appoint such a receiver.

(92 N. J. Law, 129)

McELIGOT & CHENOWETH CO. et al. v. TOWN OF NUTLEY.

(Supreme Court of New Jersey. Sept. 17, 1918.)

JUDGMENT \hookrightarrow 713(2)—**RES JUDICATA—MATTERS PROVABLE.**

In a contractor's action against a town for a balance due on sewer construction, a judgment for defendant based on a holding that a certificate of acceptance had not been issued by the proper town official as alleged was *res judicata* in a subsequent case on the same cause of action, wherein plaintiff alleged that such certificate had been fraudulently withheld by defendant; such fraudulent withholding being within plaintiff's knowledge and provable by him in the first suit.

Certiorari to Circuit Court, Essex County.

Action by McEligot & Chenoweth Company, a corporation, and another, against the Town of Nutley, in the county of Essex. On case certified. Questions answered.

Argued June term, 1918, before BERGEN, KALISCH, and BLACK, JJ.

John A. Matthews and Reed & Reynolds, all of Newark, for plaintiffs. J. Harry Hull, of Nutley, for defendant.

KALISCH, J. The plaintiff, McEligot & Chenoweth Company, a corporation brought an action against the defendant, in this court, on the 4th day of December, 1916, to recover a balance of \$9,850.39 alleged to be due it on a contract and a supplemental one for extra work, entered into by them, whereby the plaintiff agreed to construct a main trunk vitrified pipe sanitary sewer through certain streets in the town of Nutley, according to plan and specifications prepared by the town engineer. The contract contained a stipulation that the evidence of the completion of the work shall be a written certificate of the town engineer and a favorable report of the director of the department of streets and public improvements of the town to that effect; and the town was to pay the amount that may become due under the contract, as follows:

"Ninety-five per cent. of the entire cost when the work was completed according to specifications and the engineer's certificate and the director of the department of streets and public improvements of the town, thereto rendered."

The complainant alleged in its complaint that the director of streets and public improvements had certified the payments of the

balance due under the original contract and the supplemental contract for extra work.

The defendant, in its answer, denied that there was any balance due to the plaintiff, either under the contract, or for extra work, labor, or materials; denied making or authorizing any contract to be made with plaintiff for extra work; denied that the town engineer or the director of public improvements ordered the plaintiff to perform any extra work or labor or to furnish extra materials as claimed by the plaintiff in its complaint; denied that the plaintiff had fully performed and completed the work under the contract; denied that the work was done in a proper and workmanlike manner and that the former engineer of the town and the director of streets and public improvements had certified the payments of any alleged balance due from the defendant to the plaintiff. As a defense to the plaintiff's action, the defendant set forth in its answer that the work set out in the contract was not completed in good and workmanlike manner, and that the work was still incomplete and unfinished, and that the contract provides "that the evidence of the completion of the said work shall be a written certificate of the engineer appointed by the town and the favorable report of the director of the department of streets and public improvements of the town of Nutley to that effect," and that no favorable report of the director of the department of streets and public improvements had been obtained by the plaintiff as required by the contract before the action was brought. The defendant also set up three counterclaims aggregating in amount \$23,000. These counterclaims were founded upon damages alleged to have been sustained by the defendant by reason of alleged improper construction of the sewer and the negligent and unworkmanlike manner in which the work was done, and the general inefficiency of the sewer to accomplish the purpose of its construction, by reason of careless and improper workmanship. The cause came on for trial before Judge Adams, sitting with a jury, who, at the close of the case, directed a verdict in favor of the defendant upon the plaintiffs' cause of action, and the counterclaim was submitted to the jury, who returned a verdict on the counterclaim in favor of the plaintiff.

The trial judge certifies to this court the record of the former case, designated as "Exhibit D 1," and asks for an advisory opinion, in the present case, on the following stated facts:

"The plaintiff, in a former suit of which Exhibit D 1 is the record, alleged that the favorable report of the director of streets and public improvements provided for in the contract sued on had been given; a verdict was directed therein for defendant because no such certificate had actually been given upon which verdict judgment was duly entered and costs taxed and paid and said judgment canceled;

the plaintiffs in this suit are seeking to recover the same amount claimed in the former suit under the same contract, but allege that such certificate of the director of streets and public improvements is fraudulently withheld; that no new fact has intervened between the last suit and the present suit upon the question of fraud, except that a new demand has been made upon the present director of streets and public improvements, who is a person who was in office at the time of the alleged completion of the contract, but who is not the man who held the office of director of streets and public improvements during the time when the greater part of the work under the contract was done and who supervised such work as was done during his incumbency of the office."

The question raised by these facts, and upon which the advisory opinion of this court is requested, is whether or not the judgment in the former suit is *res adjudicata* of the issues involved in this present action.

In the first action the plaintiff averred in its complaint that the director of streets and public improvements had certified the payments of the balance due from defendant to plaintiff under the original contract and the supplemental contract for extra work, and that, nevertheless, the defendant refused and still refuses to pay; and in the present action the plaintiffs aver that the director of streets and public improvements willfully, maliciously, and fraudulently withheld and withholds such certificate, and this latter averment marks the only difference between the two actions.

The record shows that one of the issues presented at the first trial was whether or not the director of streets and public improvements had certified the payments due, and that that issue was tried out and disposed of adversely to the plaintiff's claim. The plaintiff was aware that it was incumbent upon it to prove, before it was entitled to a recovery against the defendant, that such certificate had been issued or was withheld fraudulently by the director of streets and public improvements. It must have known that no such certificate was issued, and therefore, in proceeding to trial under the state of the pleadings, it did so at its peril. Besides it was open to the plaintiff, at the first trial, to amend its complaint to conform with the facts or to submit to a nonsuit; but this, apparently, it did not see fit to do.

A plaintiff is required to present all the facts existing at the time of the commencement of his action and which relate to the subject-matter of such action and are essential to his right of a recovery, or be forever barred from doing so, after the issues presented have been tried out and final judgment given upon the merits of the case. All the facts which are now set out in the complaint filed in the present case were known to the plaintiff at the time it commenced its first action, and no new fact has intervened between the first and the present action that tends to change the original situation. It is

clear that the plaintiff might have presented the ground which it now alleges as a basis for recovery in the first action. The legal rule is well settled that a judgment in a former case between the same parties relating to the same subject-matter settles all matters which came before the court under the pleadings, and also every other ground which might have been presented. *Cromwell v. Sac*, 94 U. S. 352, 24 L. Ed. 195; *Roney v. Westlake*, 216 Pa. 374, 65 Atl. 807, 116 Am. St. Rep. 772, 9 Ann. Cas. 184; *Dickinson v. D., L. & W. R. Co.*, 90 N. J. Law, 158, 100 Atl. 203.

The plaintiff in the present case is in no position to properly complain of any hardship imposed upon it, since, if any hardship there be, it is clearly the result of its own act.

It is not out of place to mention here that the plaintiff was under no legal obligation to accept the fruits of the judgment rendered in its favor upon the defenses set up and the counterclaims, and might have applied to the court for a rule to show cause why the judgment should not be vacated and the verdict of the jury set aside, and upon the hearing of the rule it would have been free to present such facts which the court could properly consider and deal with, in the exercise of a sound discretion, whether or not a new trial should be granted.

As the matter now stands, there is a judgment record in the same cause of action in which the present issue tendered by the pleading was known to the plaintiff, at the first trial, and might have been presented but was not, and, that being so, the trial judge is advised that such judgment is *res adjudicata* of the question now raised by the present pleading.

(30 N. J. Eq. 239)

In re BROWN. (No. 43/363.)

(Court of Chancery of New Jersey. Sept. 12, 1918.)

(Syllabus by the Court.)

1. INSANE PERSONS §71—MARRIED WOMAN'S PETITION TO SELL PROPERTY—PRACTICES—STATUTE.

When a married woman owning lands in this state desires to sell them, but is unable to do so by reason of the lunacy or other incapacity of her husband to join her in the execution of a proper deed of conveyance, and petitions the Court of Chancery to direct her to convey such lands without her husband joining her, under 3 Comp. St. 1910, p. 8233, § 8q, and for the conservation of so much of the purchase money as shall represent the interest of the husband in the lands sold, under section 8r, the husband, whose rights are affected, must be made a party to the proceedings.

2. INSANE PERSONS §71—MARRIED WOMAN'S PETITION TO SELL LAND—PRACTICE.

The practice to be observed in such cases pointed out.

On petition of Agnes Brown, a married woman, to sell real estate as a *feme sole*.

Conclusions of advisory master adopted, and order directed.

This matter was referred to Bayard Stockton, Esq., advisory master, who filed the following conclusions:

On petition of a married woman to sell real estate as a feme sole. The petitioner alleges in her petition that her husband, John O. Brown, has been a feeble-minded person since 1907, and since that date has been confined in various hospitals for the insane, and that he was on September 9, 1914, committed to the Camden County Hospital for the Insane as a private patient by the judge of the Camden county common pleas, and that he is still confined in that hospital; that on March 8, 1916, and on May 14, 1917, the petitioner purchased with her own money certain lands in Haddonfield, Camden county, particularly described in the petition; that she is desirous of conveying said lands; and prays that the merits of her application may be inquired into and that she may be permitted to sell said premises and to execute proper deeds or conveyances therefor. It does not appear from the petition whether or not the petitioner and her said husband had issue, the fruit of their marriage; but this is not material for the purpose of this application. The petitioner applies for an order of reference on filing the petition.

[1] The statute invoked is found in Comp. Stat. p. 3233, §§ 84, 8r. Section 84 provides that in case any married woman owning lands situate within this state shall desire to convey the same, but shall not be able to do so by reason of the lunacy or other mental incapacity of her husband to join with her in the execution of proper deeds or conveyances therefor, it shall be lawful for the Court of Chancery, upon petition filed for that purpose, to direct that such married woman may convey the said lands by deed or deeds executed by herself without concurrence of her husband, which deeds shall convey the lands free from any claim, estate, or right of the husband, and shall be an absolute bar to any right of curtesy therein. Section 8r provides that the Court of Chancery may, in a summary manner, inquire into the merits of the application by reference to a master or otherwise, and, in case the court permits such deed to be made, said court shall ascertain the actual value of the estate or interest of the husband, and that the value thereof shall be paid out of the purchase money to the committee or guardian of the lunatic or incapacitated husband, or, if there be no such guardian, to the clerk of the court.

The husband of a married woman has an actual estate or interest in the lands of his wife, capable of being estimated and valued. *Doremus v. Paterson*, 69 N. J. Eq. 188, 57 Atl. 548, affd. 69 N. J. Eq. 775, 61 Atl. 396; *Hackensack Trust Co. v. Tracy*, 86 N. J. Eq. 301, 99 Atl. 846. The interest of the husband in the wife's lands does not depend on the birth of issue. His interest is that of a contingent estate in remainder before issue born. *Hackensack Trust Co. v. Tracy*, supra.

The petition alleges that the husband is now non compos mentis. As his rights are to be affected by this proceeding, he must be made a party thereto and have an opportunity of making a defense. In *Re Martin*, 86 N. J. Eq. 265, 98 Atl. 510. He should be served with process, and brought into court, not necessarily by writ of subpoena or other writ.

[2] The proper practice in this case is that an order be made on John O. Brown to show cause why the prayer of the petition should not be granted, and a certified copy of the petition and affidavits and of the order be served upon him in the presence of some competent person.

If upon the return of the order Mr. Brown does not appear, the clerk of the court will be assigned and appointed guardian ad litem to appear and answer for him. An order of reference will then be made to a special master, and the matter may be brought on for a summary hearing. This is in conformity to the practice adopted in *Re Martin*, supra, where the incapacitated party was a widow entitled to an estate in dower.

Edwin F. Crane, of Camden, for petitioner.

WALKER, Ch. An order will be made in conformity with the advice contained in the conclusions of Advisory Master Stockton, which are hereby adopted as the opinion of the court.

(92 N. J. Law, 114)

DRANOW et al. v. KOLMAR.

(Supreme Court of New Jersey. Sept. 23, 1918.)

1. ANIMALS —70—ACTION FOR INJURIES BY DOGS—NOTICE OF VICIOUS PROPENSITIES.

That the dog that bit plaintiff had to defendant's knowledge previously bitten another boy on being teased constituted notice to defendant that the dog had vicious propensities.

2. ANIMALS —68—PERSONAL INJURIES—LIABILITY OF OWNER.

Where a ten year old boy was bitten on the cheek by a dog, the owner of the dog was liable for the injuries sustained, where he had knowledge that his dog would bite whether in play or in anger.

3. ANIMALS —70—NOTICE OF VICIOUS PROPENSITIES.

To maintain the claim that a dog that has previously bitten a person did not at that time manifest mischievous propensities, it must appear that the biting was in self-defense or by invitation and under such circumstances that the ordinary well-behaved dog of a kind and gentle disposition would have acted in a similar manner in a similar situation.

4. ANIMALS —74(7)—PERSONAL INJURIES—ACTIONS—INSTRUCTIONS.

In an action for damages through being bitten by a dog, it was error to refuse to instruct that defendant would be liable if he knew that the dog had a mischievous propensity to bite people in play.

5. ANIMALS —74(7)—PERSONAL INJURIES—INSTRUCTIONS.

In an action for damages through being bitten by a dog, a requested instruction, that it was not a defense that the dog was in the habit of biting people when patted or teased if defendant had knowledge thereof, was properly refused as being too broad.

6. TRIAL —253(9)—INSTRUCTIONS—IGNORING FACTS.

In an action for injuries through being bitten by a dog, an instruction, that knowledge of the owner that the dog had bitten a person as the result of being teased was not such knowledge of the mischievous propensity of the dog as would make the owner liable to a person subsequently bitten, was erroneous as disregarding the circumstances under which the biting occurred.

Action by Harry Dranow, by Louis Dranow, his next friend, and Louis Dranow, against Adolph Kolmar. On plaintiff's rule to show cause why the verdict should not be set aside and a new trial granted. Verdict set aside, and new trial ordered.

Argued February term, 1918, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Queen & Stout, of Jersey City, for plaintiffs. Voigt & Otto, of Newark, for defendant.

KALISCH, J. The plaintiff, a lad ten years of age, was bitten in the cheek by defendant's dog. He brought an action, by his father, as next friend, against the defendant to recover damages for the injury sustained from the dog bite, in which action his father also joined, as a plaintiff, to recover the sums of money expended by him for medical attendance upon and for medicines furnished his son. The jury rendered a verdict for the defendant. The case is now before us on the plaintiff's rule to show cause why the verdict should not be set aside and a new trial granted, as being against the clear weight of the evidence, contrary to law, errors in the charge of the court, and because of the refusal of the trial judge to charge certain requests submitted to be charged by plaintiffs' counsel.

The undisputed facts in the case appear to be: (1) That the defendant's dog, a fox terrier, bit Harry, the plaintiff, without any provocation; (2) that the defendant's dog had bitten another boy previously, and defendant knew it.

[1] The defendant claimed that he was not chargeable with knowledge of any vicious propensity in the dog to bite mankind, by reason of the information which he possessed, that his dog had on a prior occasion bitten a boy, because his information was that at the time when the biting occurred his dog was sitting on the front stoop of a house when the boy, in passing by, said "gr-r-r," and put his hand out toward the dog, whereupon the dog leaped to the ground and then jumped upon the boy and bit him in the cheek, and that this conduct of the animal was not a manifestation of a vicious propensity to bite, but a natural act under the then existing circumstances. Even conceding that it was a natural act, it was no less an exhibition of a mischievous propensity, and was notice to the owner of that evil trait. Therefore the admission of the defendant that he possessed the information of the behavior of the animal on that occasion was, in substance, an admission of knowledge of the dog's mischievous propensity.

In *Evans v. McDermott*, 49 N. J. Law, 163, 6 Atl. 653, 60 Am. Rep. 602, the defense relied on was that, though the dog had bitten several persons of which the owner had information, yet, since it appeared that in every instance the biting occurred while the dog was in a playful mood, therefore no damages could be recovered where it is shown that the dog had a propensity to bite only in play; but that to justify a re-

covery it must appear that the dog was in the habit of biting mankind while in angry mood, actuated by a ferocious spirit. Mr. Justice Joel Parker, speaking for the court, in an opinion replete with sound sense and observation, at page 164 of 49 N. J. Law, at page 654 of 6 Atl. (60 Am. Rep. 602), says:

"This is not the law. An action can be maintained against the owner by a party injured upon evidence that a dog, with the knowledge of the owner, had a mischievous propensity to bite mankind, whether in anger or not. In either case, the person bitten would suffer injury. A 'mischievous propensity' is a propensity from which injury is the natural result."

[2] Applying this doctrine to the facts of the present case, we are unable to perceive upon what principle of law or fact the jury could have properly found a verdict for the defendant. The verdict is clearly against the evidence and contrary to law.

[3] We are not to be understood, however, as declaring that there can be no circumstance which would justify a dog to bite a person, without subjecting the animal to the imputation of having a mischievous propensity to bite. A dog may be obliged to bite in self-defense. A dog's teeth and firmness and strength of jaw are the only means with which nature has supplied him for protection against the attacks of man and beast. Therefore, in order to properly say that a dog which has bitten a person did not at the time manifest a mischievous propensity, it must necessarily appear that the biting was done in self-defense, or by invitation and under such circumstances that the ordinary well behaved dog, of a kind and gentle disposition, would have acted in a similar manner in a similar situation.

[4] The trial judge was requested by the plaintiff, but refused, to charge the following request:

"If the jury finds by a preponderance of the evidence that the dog, with the knowledge of the defendant, had a mischievous propensity to bite people in play, defendant is liable."

The plaintiffs were entitled to have the court charge this request, and it was error to refuse it for the reasons above stated.

[5] The trial judge was also requested to charge, but refused, the following:

"It is not a defense to the action that the dog was in the habit of biting people when patted or teased, if the defendant has knowledge of the habit."

This request was too broad. A dog who will bite merely because he dislikes to be patted upon the head or body displays, decidedly, a mischievous propensity. And the same may be properly said of a dog who will not stand a moderate amount of teasing. But teasing may go to such an extent as to be equivalent to cruelty sufficient to incite a dog of the most gentle and kind disposition to take a bite out of his tormentor, in self-defense. The request, as a whole, in the respect pointed out, was faulty, and therefore the court was under no legal duty to charge it.

[8] Upon this phase of the case, however, the trial jury instructed the jury as follows:

"Of course, gentlemen, if a usually docile, gentle, good-natured dog, without vicious or mischievous propensity, is provoked or goaded by teasing to do an injury which it would not otherwise do, the owner would not be liable for such injury; nor would knowledge of such fact be sufficient to charge him with knowledge of viciousness, or a vicious or mischievous propensity."

This instruction is erroneous, in that it, in substance, unqualifiedly declares that knowledge of the owner of a dog that the animal has bitten a person, as a result of being teased, is not such knowledge of the owner of the mischievous propensity in his dog, as would make the owner liable to a person subsequently bitten by the animal. The doctrine of *Evans v. McDermott*, supra, is to the contrary.

It is not to be understood that, because the owner of a dog has knowledge of the mischievous propensity of the animal to bite, he will be conclusively held answerable in damages to a person subsequently bitten, irrespective of the circumstances under which the second biting occurred. It must always remain a question for a jury to decide whether the plaintiff, who is suing, did an act which ordinarily would induce an ordinarily good-natured, kind, and gentle dog to bite. In the present case it was not pretended that the plaintiff had been guilty of any such conduct.

For the reasons stated, the verdict is set aside, and a new trial ordered.

(89 N. J. Eq. 536)

In re POST.

(Prerogative Court of New Jersey. Sept. 27, 1918.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS — 22(2)
— APPOINTMENT OF ADMINISTRATOR AD PROSEQUENDAM — JURISDICTION OF ORDINARY.

The Ordinary may, under his general jurisdiction, appoint an administrator ad prosequendam to prosecute a cause of action under the Death Act, 2 Comp. St. 1910, p. 1907, as supplemented by chapter 180 of the Laws of 1917, P. L. 1917, p. 531, where the deceased was nonresident.

2. CASE DISTINGUISHED.

Lothrop's Case, 83 N. J. Eq. 246, followed; *Chadwick's Case*, 80 N. J. Eq. 471, 85 Atl. 266, distinguished.

"To be officially reported."

Application for the appointment of a special administrator or administrator ad prosequendam to prosecute a suit alleged to have accrued for wrongful death of Joseph Post, deceased. Appointment ordered.

Milton M. Unger, of Newark, for application.

LANE, Vice Ordinary. This is an application for the appointment of a special ad-

ministrator or administrator ad prosequendam for the purpose of instituting a suit under the provisions of "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," 2 C. S. of N. J. p. 1907, as supplemented by chapter 180 of the Laws of 1917, P. L. 1917, p. 531. The deceased was a nonresident.

There has been no general administration in this state or elsewhere. Section 2 of the act, 2 C. S. p. 1908, provides that every action under it "shall be brought by and in the name of the personal representative of such deceased person." Section 1 of the supplement, P. L. 1917, p. 531, provides that "every action, proceeding or claim brought, instituted or made under and by virtue of the remedy given by the act to which this is a supplement shall be brought, instituted or made in the name of an administrator ad prosequendam." The Legislature has not seen fit to either amend or repeal section 2 directly. If the word "shall" in chapter 180 of the laws of 1917 is to be given its natural meaning, then a general administrator no longer may bring the suit, but it must be instituted by an administrator ad prosequendam. By chapter 181 of the Laws of 1917 the surrogates are given power to grant letters of administration ad prosequendam upon the estates of those who die resident in their counties. The surrogates are without power to appoint such administrators in cases of non-residents.

Application is made to this court for the appointment under its ordinary jurisdiction.

In *Lothrop's Case*, 83 N. J. Eq. 246, the Ordinary (Runyon) appointed an administrator ad prosequendam where the deceased was nonresident resting his power upon the practice of the ecclesiastical courts in England and upon the case of *Coursen's Will*, 4 N. J. Eq. 408, holding that the powers of this court in granting letters of administration are not special or limited, but full and general. To the report of *Lothrop's Case* an interesting note is attached. *Lothrop's Case* has been cited in the Supreme Court in *Benson v. Wolf*, 43 N. J. Law, 78, and with approval by the Court of Errors and Appeals in *Davenport v. Davenport*, 68 N. J. Eq. at page 615, 60 Atl. 379, 6 Ann. Cas. 261, and by the Court of Chancery (Garrison, V. C.) *Babbitt v. Fidelity Trust Co.*, 70 N. J. Eq. at page 658, 63 Atl. 18. *Coursen's Case* was considered by the Court of Errors and Appeals in *Chadwick's Case*, 80 N. J. Eq. 471, 85 Atl. 266, and it was there held that the jurisdiction of the Ordinary was subject to legislative regulation, and construing together the legislation which now appears as sections 1 and 2 of "An act respecting the Prerogative Court and the power and authority of the Ordinary," 2 C. S. of N. J. p. 1722, the court held that the authority of the Ordinary did not

extend to the probate of wills of those dying domiciled elsewhere. Except as specifically regulated by the Legislature, the jurisdiction of the Ordinary is full and general and extends to the exercise of the powers (in testate and intestate matters) of the English ecclesiastical courts. The question is whether the reasoning of the Chadwick Case applies to the grant of letters of administration. I think not. Administration of some nature may and must be taken out in every jurisdiction in which there is property. Story's Conflict of Law, vol. 1, §§ 513, 514, etc.; 11 Ruling Case Law, § 67.

While it has been said that administration taken out in a place other than that of the domicile of the deceased is ancillary to administration in the forum of the domicile, and that the foreign administrator must account to the administrator of the domicile of the deceased, this is subject to the qualification that debts in the locality of the foreign administrator must be provided for. *Pisano v. Shanley Co.*, 66 N. J. Law, 6, 48 Atl. 618; 1 Story on Conflict of Law, § 525. It has never been held, to my knowledge, that administration cannot be taken out in the foreign jurisdiction until administration has been taken out in the place of the domicile. Such a holding would, in case administration never was taken out in the place of the domicile, as might be, deprive creditors in the locality of their rights. By statute surrogates are given jurisdiction to appoint, after a certain length of time, an administrator for the estate of a deceased intestate where there is property of the deceased within their counties. There is no statutory grant of power to the Ordinary, unless it be included in the general language of section 1 of the act respecting the Prerogative Court and the power and authority of the Ordinary, Revision of 1900, 2 C. S. p. 1722. By that section, the authority of the Ordinary is extended only to the granting of probate of wills, letters of administration, letters of guardianship, etc.

As I have pointed out, the Court of Errors and Appeals in Chadwick's Case held that, so far as probate of wills is concerned, the authority of the Ordinary extends only to the wills of residence. But the court reached the conclusion it did because of the language used in section 2 which required that, before probate should be granted by the Ordinary, proof should be made to the satisfaction of the Ordinary that no caveat against proving such will had been filed in the office of the surrogate of the county where the testator resided at the time of his death which indicated that the Legislature intended the jurisdiction to extend only to the probate of wills of residents. There is no similar language with respect to letters of administration. The Ordinary had, prior to the passage of the legislation, full and general au-

thority to grant letters of administration upon the estate of deceased nonresident intestates, general or special, and I think there is nothing in the legislation which indicates an intent on the part of the Legislature to cut down the jurisdiction, nor can I conceive of any good reason why the jurisdiction should be cut down. The rule of comity referred to in the Chadwick Case does not, I think, apply. It has been generally held that a right of action for negligently killing a person is an asset of his estate, sufficient to warrant the appointment of an administrator, although there are no assets in the state and the deceased was a nonresident. 11 Ruling Case Law, § 69.

I am of the opinion that the Ordinary may appoint an administrator ad prosequendam to prosecute a cause of action under the so-called Death Act where the deceased was a nonresident, upon the authority of *Lothrop's Case*, 33 N. J. Eq. 246.

Such an appointment will be made.

(38 Conn. 3)

STATE v. CAMPBELL.

(Supreme Court of Errors of Connecticut.
July 23, 1918.)

1. PERJURY § 82(5)—EVIDENCE—MATERIALITY OF TESTIMONY.

To show materiality of testimony charged to have been perjured, other testimony, given on the trial, on which it was given, may be shown.

2. PERJURY § 82(6)—EVIDENCE—MATERIALITY OF TESTIMONY.

To show materiality of alleged perjured testimony given on prosecution for conspiracy, other testimony from trial on which it was given need not be confined to the subordinate issue on which the charged perjured testimony was given.

3. CRIMINAL LAW § 675—TRIAL—CUMULATIVE EVIDENCE.

That for the purpose of showing materiality of alleged perjured testimony more than enough other testimony from the trial on which it was given is admitted is not error.

4. CRIMINAL LAW § 661—TRIAL—EVIDENCE ON ADMITTED FACT.

Admission, to show materiality of testimony, of other testimony given on the same trial, is not error, though prior to its admission defendant admitted such materiality.

5. CRIMINAL LAW § 678(1)—TRIAL—EVIDENCE ADMISSIBLE FOR CERTAIN PURPOSE.

It is no ground for exclusion of testimony, admissible on the question of materiality of alleged perjured testimony, and limited by the judge to that purpose, that it may be misused by the jury.

6. CRIMINAL LAW § 377—CHARACTER OF DEFENDANT—EVIDENCE—PERJURY.

Evidence of good character to be relevant, and so admissible on behalf of accused, should be restricted to the trait involved in the issue, and so in perjury to truth and veracity.

7. WITNESSES § 830(1)—CROSS-EXAMINATION—MANNER OF TESTIFYING.

The state on cross-examination of witness for defendant in perjury, who has testified substantially as he testified in the case in which the perjury is charged to have been committed,

may show how he bore himself; how feebly and hesitatingly he testified, when confronted in that case with indignant outburst from the woman whose character he had assailed by his testimony.

8. CRIMINAL LAW §1169(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The rehearsal, on cross-examination of witness for defendant in perjury, of the denial in another case of the truth of witness' testimony there given by the woman against whose character he was then testifying, could not be harmful; she being a state's witness in the perjury case, and it being certain she there testified as to the truth of the matter.

9. PERJURY §34(1)—EVIDENCE—NUMBER OF WITNESSES—CORROBORATION.

One may be convicted of perjury on the testimony of a single witness with corroborative proof through independent and material facts and circumstances of such character that, with all the other testimony, guilt is established beyond a reasonable doubt.

Wheeler, J., dissenting.

Appeal from Superior Court, New Haven County; Donald T. Warner, Judge.

Thomas J. Campbell was convicted of perjury, and appeals. Affirmed.

The case, upon the trial of which the defendant is charged with having given perjured testimony, is *State v. Triplett*, reported in 92 Conn. 47, 101 Atl. 496. In that case Triplett was informed against in three counts, to wit; (1) A conspiracy to commit an assault upon the person of Dorothy A. Triplett; (2) a conspiracy to commit rape upon her; and (3) an assault upon her with intent to commit rape. The circumstances attending that case and its trial are quite fully detailed in the report of it. The present defendant's testimony given upon that trial was confined to incidents connected with the scene in the bedroom in the Garde Hotel where it was claimed by the state that the conspiracies charged culminated, and the assault charged was committed by one known in that case by the name of Wilson. The particular portion of Campbell's testimony which the state in the present information charges was willfully false was that in which he testified, in substance, that upon the occasion, and in the room referred to, he saw Dorothy A. Triplett undressed and in bed with a man who was then and there undressed and in bed with her.

Among the witnesses produced by the accused was one Donahue. Upon the former trial he had testified in confirmation of the evidence of Triplett and Campbell that he accompanied them in their visit to the bedroom, and that he there saw Mrs. Triplett undressed and in bed with a man who was likewise undressed and in bed with her. This evidence he had substantially repeated on his direct examination in the present case. Upon cross-examination the following ensued:

"Q. Mr. Donahue, you testified here on the last trial, did you not? A. Yes, sir. Q. And do you recall upon that occasion when you were

testifying that Mrs. Triplett was present in court? A. Yes, sir. Q. And do you recall that the counsel for Mrs. Triplett requested Mrs. Triplett to step to the front of the witness box while you were testifying so you could identify her? A. Yes, sir. Q. And then she denounced your statement that she had been, that you were in that bedroom, did she not? Mr. Goodhart: That's objected to as improper; grossly improper. The Court: Admitted. Mr. Goodhart: Exception, please. The Court: Exception noted. Witness: She did. Q. She did? A. Yes, sir. Q. And then you replied, after the court had interrupted, to the following question, 'Is that the woman?' and you said, 'I guess that's the woman all right.' Is that right? A. Yes, sir."

In the course of its instructions the court charged the jury as follows:

"Upon all the questions arising in the case, except the one of the falsity of the testimony of the accused, a single witness, if his testimony satisfies you beyond a reasonable doubt, will be sufficient; but upon the question of the truth or falsity of the testimony of the accused, if there was no other testimony but that of one witness against the testimony of the accused, a conviction would not be justified, for there would be merely one oath against another. But the testimony of one credible witness accompanied with proof of independent and material facts and circumstances tending directly to corroborate the testimony of the one credible witness, however, justifies a conviction, if the jury be thereby satisfied beyond a reasonable doubt of the falsity of the testimony of the accused, and if the jury be also satisfied beyond a reasonable doubt in relation to the truth of all the essential elements of the offense charged, as I have just outlined them to you."

Robert O. Stoddard, of New Haven, for appellant. Arnon A. Alling, State's Atty., and Walter M. Pickett, Asst. State's Atty., both of New Haven, for the State.

PRENTICE, C. J. (after stating the facts as above). [1] Several of the reasons of appeal relate to the same general subject and involve the same general question. They grow out of the admission, over the defendant's objection, of portions of the testimony given upon the former trial which the state offered for the sole purpose of showing the materiality of the testimony given upon that trial by this accused and charged to have been perjured. The objections made to the admission of this testimony were that it was irrelevant and immaterial. That these objections—in so far, at least, as any of the former testimony was concerned which tended in any degree to establish the materiality of the claimed false testimony to the issues involved in the former case—were not well taken, is fully established by *State v. Vandemark*, 77 Conn. 201, 206, 58 Atl. 715, 1 Ann. Cas. 161, where it was held that, in a prosecution for perjury committed in court upon a former trial, evidence of the testimony given upon that former trial, offered for the sole purpose of showing the materiality of the alleged false testimony, was properly admissible if carefully limited by the trial judge to the purpose for which it was offered. That the testimony admitted in the present

case was so offered, admitted, and limited in its purpose and use cannot be questioned and is not questioned by the accused's counsel. The court's repeated and explicit injunctions and instructions forbid that.

[2] Counsel's contention that the court erred in admitting the testimony as it is presented in his brief is supported by three reasons. One is that the testimony admitted was not confined to what occurred in the bedroom or bore directly upon what there took place, but embraced all the testimony bearing upon the conspiracies for which conviction was sought. This claim overlooks the nature of the charges against Triplett. It is indeed true that this defendant's testimony dealt only with the occurrences in the bedroom. But however important that matter was in the determination of the case, the issue raised by the evidence concerning it was only a subordinate one. It was only incidental to the larger and ultimate issue as to the then accused's guilt of the crimes charged against him. He was charged with participation in conspiracies to commit an assault and a rape and with the commission of the assault with intent to commit rape through being an abettor. The state made no attempt to prove that he was a direct participant in an overt criminal act. It could not have claimed Triplett's conviction by reason of anything he or any one else did in that room standing by itself. If it hoped for such conviction, it was necessary that it give a far wider range to the testimony so that in some way the accused be criminally connected with what was there done to and concerning Mrs. Triplett by another hand than his. For the purpose of making that connection, all of the evidence now objected to was properly offered and admitted. It was therefore admissible in the present case under the principle established in *State v. Vandemark*, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161, for the purpose of showing the vital bearing of the accused's testimony upon the ultimate issue in the former case and thus establishing its materiality in the determination of the issue therein.

[3] It may be that the materiality of his testimony would have been amply established had some portions of the testimony offered and admitted been omitted. But we know of no rule which either requires a party litigant to limit himself to less than all of the relevant evidence at his command, or permits a court to exclude such evidence when offered; or justifies the imputation of error to a court for its nonexclusion upon the ground that it is superfluous and unnecessary.

[4] Another reason assigned is that the materiality of the accused's testimony given upon the former trial was admitted. The finding so states. But it is silent as to when, in the progress of the trial, that admission was made. The record before us indicates very clearly that it was not made until after the testimony under review was presented by the state. Our search has failed to discover

an objection to its admission based upon any such ground, or anything to suggest or imply that the accused at the time the evidence was admitted was conceding the materiality of his former testimony. Even if the fact were otherwise, its admission upon the present trial would not thereby have been rendered erroneous. The state would not have been compelled by such admission to rest satisfied with it and to dispense with other proof, nor the court justified in excluding such other proof presented. 1 Wharton on Criminal Evidence, § 24, C; Commonwealth v. McCarthy, 119 Mass. 354, 355; *State v. Winter*, 72 Iowa, 627, 631, 34 N. W. 475; *People v. Fredericks*, 106 Cal. 554, 560, 39 Pac. 944.

[5] The third of the reasons advanced in support of the contention that the court erred in its admission of the evidence is that the information which it conveyed to the jury was calculated to prejudice the accused, in that it would quite likely be considered and weighed against him. If the statement made in the brief in immediate connection with this complaint is correct to the effect that all the witnesses whose evidence upon the former trial was read were put upon the stand in the present trial and in substance repeated the same testimony, it is somewhat difficult to discover what material information the jury could have derived as a result of the court's ruling which was not given to them at first hand, and therefore in what way they could have been prejudiced against the defendant by such information. But however that may be, the situation presented by the admission of the testimony is the usual one arising whenever evidence admissible for one purpose and inadmissible for others is received for its proper purpose alone. The law recognizes the admissibility of evidence under such circumstances for its limited legitimate purpose, and does not, under ordinary conditions, forbid such admission for the reason alone that the evidence may be misused to the other party's disadvantage. *Trenton Passenger Ry. Co. v. Cooper*, 60 N. J. Law, 219, 223, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Starkey's Appeal*, 61 Conn. 199, 202, 23 Atl. 1081.

[6] Upon the trial the accused produced several witnesses who were asked what his character was. The court excluded the question in that unrestricted form, but permitted testimony as to his character for truth and veracity. The ruling was correct. Evidence of good character to be relevant, and therefore admissible on behalf of an accused, should be restricted to the trait of character involved in the issue and bear some pertinent analogy and reference to it. 3 Greenleaf on Evidence, § 25; 1 Wigmore on Evidence, § 59; 1 Wharton on Criminal Evidence, § 59; *State v. Kinley*, 43 Iowa, 294, 296; *State v. Dalton*, 27 Mo. 13, 16; *State v. Bloom*, 68 Ind. 54, 34 Am. Rep. 247.

[7] That portion of the cross-examination

of the witness Donahue which is complained of as improper, in that it brought to the jury's knowledge the scene wherein Mrs. Triplett made a statement which was calculated to harm the accused's case, had for its manifest purpose that of discrediting and weakening the force of the testimony which the witness had given. Its object was to show how he bore himself upon the former trial, while giving testimony similar in its character to that which he was now giving when during the course of his testimony he was subjected to the test to which Mrs. Triplett subjected him when brought face to face with him she denounced him as a falsifier, and how feeble and hesitating was his response to the pending question as compared to his preceding testimony. He had taken the stand to testify and testified in support of the truth of the accused's alleged false testimony that he (Donahue) was present in the bedroom and saw Mrs. Triplett there undressed and in bed with a certain man undressed and in bed with her. It was a matter of vital importance to the case whether, in so testifying, he spake truly or falsely. Upon so important an issue and in respect to such an important piece of testimony the state was certainly entitled to bring to the attention of the jury the test to which he was put upon the former trial and how he stood that test. It was entitled to show that when he was brought face to face with the woman whose character he had so assailed, and at the moment of her indignant outburst, his self-assurance so deserted him that his reply to the inquiry of identification shrank to the small proportions of, "I guess that's the woman all right." The reply, apart from its setting, would have been of little moment. It is its setting which gives it its real significance, and the state was entitled to the benefit of it.

[8] Were it not so, it would be difficult to discover what harm could have come to the defendant's case by the jury's acquisition of knowledge that Mrs. Triplett had then registered her dramatic denial of Donahue's damaging testimony. She was a witness upon the trial of the accused and, of course, a prominent one. The testimony she gave is not before us in the record. It is, however, certain that in course of it she either denied Donahue's presence in the room, or either expressly admitted it or by her silence upon the subject or otherwise impliedly did so. If she either expressly or impliedly admitted his presence and thereby conceded that her statement upon the former trial was not true, the accused's interests were rather helped than harmed by the attention of the jury being drawn to her resort to falsehood in her self-protection. If

she denied it, that denial certainly would have supplied all the information which the rehearsal of the former denial not under oath could have furnished.

[9] The complaint made that the court's instructions as to the amount of evidence necessary to justify a verdict of conviction in prosecutions for perjury was too favorable to the state is not well founded. The ancient rule that conviction of perjury could not be had, except in cases where the falsity of the alleged perjured statement was established by the testimony of at least two witnesses testifying directly to that fact, has long since been repudiated. The more recent authorities are in agreement that such a rule is neither based upon reason nor in the interest of substantial justice, and that it should be radically modified. The modified rule which has had the approval of the best modern authority is one with which the instructions of the court were in substantial accord. These instructions were correct in that they brought out clearly and intelligently the two essential facts: First, that conviction could not be had upon the uncorroborated testimony of a single witness testifying to the falsity; and, second, that corroborative proof through the medium of independent and material facts and circumstances supplementing the testimony of the single witness would suffice if it was of such a character that, when taken in connection with all the other testimony, the guilt of the accused was established beyond a reasonable doubt. 1 Wharton on Criminal Evidence, § 367; 8 Wigmore on Evidence, § 2042; Commonwealth v. Butland, 119 Mass. 317, 324. It is quite true, as counsel for the accused urges, that the state could not claim conviction upon the evidence of a single witness supported only by slight corroborative evidence. The instructions given, however, furnish no justification for such conviction. They require corroborative evidence of the single witness so strong that the opposing evidence and the presumption of innocence should be overcome and the guilt of the accused established beyond a reasonable doubt.

The remaining assignment of error relates to the minor matter of an alleged incorrect statement of a bit of evidence made in the course of the court's charge. The statement referred to is one which the court expressly said was not made with positiveness but upon his personal recollection. It is not open to the charge of incorrectness except as its intended meaning is distorted, and, in any event, it could not have misled the jury.

There is no error. The other Judges concurred, except WHEELER, J., who dissented.

(361 Pa. 344)

MILLIGAN v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. May 6, 1918.)

1. RAILROADS §327(8) — GRADE CROSSING — DUTY OF PEDESTRIAN.

After stopping at a grade crossing, a traveler must continue to look and listen as he goes forward and to be careful as long as danger is to be apprehended.

2. NEGLIGENCE §186(26) — QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE.

Though plaintiff's evidence in chief and that of his witnesses makes out a case free from contributory negligence, the case is for the jury, where some of plaintiff's answers on cross-examination indicate contributory negligence.

3. RAILROADS §350(26) — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In action for personal injury when plaintiff's wagon was struck at a grade crossing, after sundown, by fast train approaching without warning, where there was evidence that, after stopping, looking, and listening, he listened as he proceeded and could see but 300 or 400 feet, his contributory negligence was for jury.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for personal injury by John M. Milligan against the Philadelphia & Reading Railway Company. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

Wm. Clarke Mason, of Philadelphia, for appellant. John J. McDevitt, Jr., of Philadelphia, for appellee.

WALLING, J. This is an action of trespass to recover for personal injuries sustained in a grade crossing accident. The Chester Branch of defendant's railway extends southerly through Philadelphia and crosses the Island Road at grade near Seventy-Ninth street. It is a diagonal crossing as the road leads northwesterly. The Bell Road station building is on the southwest corner of the crossing; and the Bell Road Inn is on the north side of the Island Road about 200 feet east of the railway. West of the inn is a coal yard surrounded by a high board fence that extends westerly to within about 35 feet of the railway, then turns north apparently along the right of way. Two telegraph poles stand at the corner of the fence, and a few feet nearer the track is another pole on which is a stop, look, and listen sign. A house stands on the southeast corner, just how near the track does not appear. At the time in question, the railroad consisted of a single track, a view of which to the north could not be had, by a west-bound traveler on this road, until he had passed the corner of the fence. Just before 6 o'clock on the evening of September 29, 1915, the plaintiff accompanied by a Mr. Baxter, drove a horse and runabout or road wagon west in

this road until they came to the inn, where they made a brief stop, then re-entered the wagon and went on. Plaintiff testifies he had never been there before and was driving a strange horse, and when within about 25 feet of the track he stopped, looked in each direction and listened, then drove forward continuing to look and listen, and, just as the horse stepped on the track, plaintiff, for the first time, saw an engine coming from the north, about 100 feet away, when he struck the horse with the lines and it jumped forward; but the rear wheel of the wagon was caught by the tender, as the engine was running backward, by which plaintiff was very seriously injured and his companion was killed. Plaintiff's testimony that he stopped, looked, and listened is corroborated by several eyewitnesses. Two passenger coaches were attached to the engine, and the evidence for plaintiff justified a finding that the train was going about 45 miles per hour, without lights and without giving any warning of its approach to the crossing, which was a much-used public highway in the suburbs of the city. There was no safety gate or watchman at the crossing. It was after sundown, and evidence for plaintiff tended to show the presence of some haze or fog and approaching darkness. Plaintiff's own testimony, that from where he stopped he could see north along the track only from 300 to 400 feet, was corroborated by that of two other witnesses. To clear the track plaintiff had to go more than 35 feet from the point where the evidence indicates he stopped; in which space there was apparently no permanent obstruction between him and the approaching train, while there were some trees near the railway. The train was seemingly moving about 11 times as fast as plaintiff and ran some 600 feet after the accident.

Plaintiff's evidence is strongly contradicted by that for the defense, as the latter tends to show that the train was going 25 to 30 miles per hour, with lights on engine and tender; that due and timely warning was given by whistle and bell; that the weather was perfectly clear and daylight yet good; and that from where plaintiff says he stopped there was a clear view to the north so an engine could be seen for 3,400 feet. The last statement is supported by observations made and photographs taken just one month after the accident. There was some dispute as to how near the track it was necessary to be to clear the fence line. This depended on whether it was the distance along the road or direct to the railway, and was not of controlling importance, as plaintiff concedes that the stop was after he had passed that line. The trial judge refused defendant's request for binding instructions and later entered judgment for plaintiff on the verdict, from which defendant appealed. The question of defendant's negligence

was clearly for the jury; the only real controversy is whether plaintiff was as matter of law guilty of contributory negligence. In our opinion he was not. The finding that he stopped, looked, and listened, and at the proper place, is supported by ample evidence; in fact, is not seriously controverted. He was struck as the rear wheel of the wagon was clearing the last rail, and not immediately as he drove upon the crossing; hence the rule of *Carroll v. Penn. R. Co.*, 12 Wkly. Notes Cas. 348; that it is vain for a man to say that he looked and listened, if, in spite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive and was immediately struck, while entirely sound, does not apply. See *Rottmund v. Penn. R. Co.*, 225 Pa. 410, 74 Atl. 341; *Howard v. B. & O. R. Co.*, 219 Pa. 358, 68 Atl. 848; *Muckinhaupt v. Erie Railroad*, 196 Pa. 213, 46 Atl. 364; *Waltosh v. P. R. R.*, 259 Pa. 372, 103 Atl. 55.

[1-3] The traveler at the crossing as he goes forward, after the stop, is required to continue to look and listen and be vigilant so long as danger is to be apprehended. That it what plaintiff testifies he did; but it is strenuously urged that, had he actually done so, he must have seen the oncoming train before he was committed to the act of crossing. That is the most serious question in the case. Plaintiff was bound to see what was plainly visible. If, as defendant's evidence tends to show, it was light and plaintiff had a clear view of the track for over 3,000 feet and drove in front of a train that was coming in plain sight, then there could be no recovery. But there is a conflict in the evidence, not only as to the length of the view, but as to the daylight and the condition of the atmosphere, whether clear, hazy, or foggy; also, as to signals and whether there were lights on the engine or tender; as well as to the speed of the train, which had an important bearing on the question of contributory negligence. Forty-five miles an hour is 66 feet per second. An engine running backward at that rate over the crossing of a suburban street, without light, signal, or warning, especially in the twilight, creates a danger that even a careful traveler upon the highway may not always be able to avoid. Plaintiff says he was looking, but did not and could not see the engine until it was within about 100 feet. This is corroborated by defendant's engineer, who says he was looking ahead, but did not see the horse and wagon until the engine was within 10 or 15 yards of the crossing. His view was equal to plaintiff's. The real question is: What could be seen there under conditions then existing? True, witnesses seem to have seen the side of the train at a greater distance, but that was a larger view. Doubtless defendant's witnesses when called there on a bright afternoon could see the

track for a long distance; that is indicated by their testimony and also by the photographs then taken. That was October 29th, when there would naturally be less foliage than in September; that possibly might somewhat affect the view. Plaintiff's evidence in chief and that of his witnesses seems to make a case free of contributory negligence, while some of the answers on cross-examination might indicate the contrary; if so, it was still for the jury. *Ely v. Pittsburgh, C. & St. L. Ry. Co.*, 158 Pa. 233, 27 Atl. 970; *Shaffer v. P. R. R.*, 258 Pa. 288, 292, 101 Atl. 982. Plaintiff had to look in both directions and to manage his horse; in our opinion, there is sufficient doubt as to the facts and inferences to be drawn from them to render the question of his negligence one for the jury. See *Fritz v. N. Y. C. & St. L. R. Co.*, 236 Pa. 447, 84 Atl. 786.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 304)

PENSION MUT. LIFE INS. CO. v. WHITELEY et al. (No. 1.)

(Supreme Court of Pennsylvania. May 6, 1918.)

1. FRAUD ~~49~~—PLEADING AND PROOF—PARTIES LIABLE.

Where two parties are jointly charged with deceit, there can be no recovery on a statement of claim which makes out a cause of action against one only.

2. CONSPIRACY ~~5~~—ELEMENTS—OVERT ACT.

A mere conspiracy to do an act is not actionable where nothing is done in pursuance of the design.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for deceit by the Pension Mutual Life Insurance Company against Seth H. Whiteley and the Police Beneficiary Association, Incorporated. From a judgment on demurrer to plaintiff's statement of claim, it appeals. Affirmed.

Bregy, P. J., filed the following opinion in the common pleas sur defendant's demurrer to the statement of claim:

The writ in this case is in assumpsit. The statement of claim is in trespass. The allegations of the statement are, briefly, these: That the plaintiff insurance company issued a policy of insurance to the Police Beneficiary Association, one of the defendants, in pursuance of an application made therefor, which is attached to the statement of claim, and that Seth H. Whiteley was the agent of the plaintiff company in placing the policy. The statement continues that the premiums were paid, and that certain death losses were paid by the plaintiff company to the defendant Police Beneficiary Association; but that it is now discovered certain fraudulent statements were made to it (the plaintiff company) at the time the application for insurance was made. The allegation as to this is in the following words: "At or about the same time and before the receipt of the application, said Whiteley was asked as to the loss ratio per thousand among members of said association, and replied that he would ascertain and supply it. Later and before the receipt of the applica-

tion he told the president and general agent of the plaintiff company that for a year prior to the time of furnishing said information the total number of deaths occurring among the members of said beneficiary association was 64 or an average of about 15 for each 1,000 members of said association. The plaintiff has since learned that during said year the number of deaths had been more than 100, being in excess of 25 for each 1,000 members of said association. Said Whiteley also told plaintiff that this information was supplied to him by the officers of said Police Beneficiary Association, Inc., and he knew that it was correct because he was the agent who had written for said association the policy which it had in force for some time with the Aetna Life Insurance Company of Hartford, Conn."

[1, 2] That is the only allegation of false statement alleged in the statement of claim, and it will be noticed that this statement was made by Whiteley alone. It is true that Whiteley told the plaintiff that he had received this information from the officers of the Police Beneficiary Association, but no one states that that is true. The plaintiff does not state in his statement of claim that any officer of the Police Beneficiary Association ever said such a thing. It contents itself in saying that Whiteley said so. This, in our judgment, is the fatal error which prevents the plaintiff from recovering on this statement against the defendant, the Police Beneficiary Association, and, as they are jointly charged with this wrongdoing, there could be no recovery against either. There is an allegation that Whiteley and the secretary and treasurer of the Police Beneficiary Association conspired together to cheat and defraud the plaintiff; but, unless something was done in pursuance of that conspiracy, no right of action accrues.

For these reasons the demurrer was sustained. We discharged the rule to amend the summons because the statement would be bad even if the summons was amended. It will be noticed that there was no application made then or now to amend the statement of claim.

From the record it appeared that the statement of claim averred, *inter alia*: "That by the terms of the application signed by the said Police Beneficiary Association its officials agreed to pay the premiums monthly. Within the past few days the plaintiff has learned that neither the Police Beneficiary Association nor its officers have ever paid any of such premiums, but that by an arrangement said Horter and McCay (treasurer and secretary, respectively, of the said Police Beneficiary Association) had made with said Whiteley they did not intend to pay said premiums. By the terms and conditions of the policy, there was to be paid \$1,000 to the Police Beneficiary Association (and subsequently this amount was raised to \$2,500) upon the death of any member of the said association to the beneficiary of the deceased member of said association, after proper proofs had been furnished. It was understood and stated by the Police Beneficiary Association through its officers and by said Whiteley that members of said association were individually paying their pro rata proportion of the entire premium, and it was supposed that in the event of death the family of the deceased members were to receive the benefits under said policy. Plaintiff now learns for the first time that the individual members did not pay the premiums, nor did the association pay it or any part of it, although the said association made proofs of loss and a claim against the plaintiff company whenever a death occurred under the policy. The plaintiff within the last few days has learned that the payments made by the company for losses incurred under the policy of the Police Beneficiary Association were not paid by the Police Beneficiary Association to the families and relatives or beneficiaries of said deceased

members, but nearly the whole of said sum was immediately after its payment by the plaintiff to the Police Beneficiary Association paid by the said association to said Whiteley; that the information furnished to said Whiteley and to the plaintiff as to the deaths occurring or which had occurred, the application for the policy which they made to the company through said Whiteley, the agreement which they now say they made with said Whiteley that he or some one else was to pay the premiums and by which the said beneficiary association was permitted to retain and did retain in its treasury only \$100 of the death benefit to be paid by the plaintiff, was all made as part of a plan and conspiracy to defraud the plaintiff company.

"The result of said fraudulent transaction is that the said Police Beneficiary Association has illegally received \$6,652.76, and the said Whiteley has made an illegal and fraudulent profit of \$49,548.75. The Pension Mutual Life Insurance Company has paid death benefits by reason of the death of members of said Police Beneficiary Association in the sum of \$127,667.98 and has received in premiums from said business \$71,466.47, showing a loss to plaintiff under this contract of insurance of \$56,201.51."

The Police Beneficiary Association, defendant, filed an affidavit of defense, denying that there was an arrangement between McCay and Horter and Whiteley under which they did not intend to pay the said premiums, but admitting that Whiteley advanced the premiums in the name of and for the account of the association. It was further admitted by the affidavit that under the terms of the policy \$2,500 was to be paid to the association on the death of a member, but defendant denied that the said sum was to be paid to the beneficiary of the deceased member of the association. The affidavit further denied that the association through its officers and by Whiteley had stated that the members of the association were individually paying their pro rata proportion of the entire premium. The affidavit denied any agreement existing with Whiteley, except that he was to arrange for the advancement of premium payments for the account of the association, and that the advancements should be paid out of death claims paid by the plaintiff, and it expressly denied that there was any conspiracy or plan to cheat or defraud the plaintiff by Horter, McCay, or Whiteley, or any of them. The affidavit further denied that plaintiff has sustained a loss, but, on the contrary, that plaintiff had made a profit from the transactions totaling \$15,264.97. The affidavit also set up a counterclaim for \$40,000, representing \$2,500 due upon the death of each of 16 members of the Police Beneficiary Association, and which plaintiff had refused to pay, although proof of death had been made.

The defendant Seth H. Whiteley filed an affidavit of defense in the nature of a demurrer.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Joseph W. Shannon, of Philadelphia, for appellant. Owen J. Roberts and Joseph S. Conwell, both of Philadelphia, for appellee Whiteley. Frederick A. Sobernheimer, of Philadelphia, for appellee Police Beneficiary Ass'n.

PER CURIAM. This judgment is affirmed on the opinion of the learned president judge of the court below, in pursuance of which it was entered.

(261 Pa. 310)

**PENSION MUT. LIFE INS. CO. v.
WHITELEY et al. (No. 2.)**(Supreme Court of Pennsylvania. May 6,
1918.)**DISCOVERY — CHARACTER OF DEFENSE.**

A bill for discovery in aid of an action at law solely to obtain knowledge of character of defense, and which asked to have certain information given by one not a defendant to bill, was properly dismissed on demurrer.

Appeal from Court of Common Pleas, Philadelphia County.

Bill for discovery in aid of an action at law by the Pension Mutual Life Insurance Company against Seth H. Whiteley and another. From a decree dismissing the bill, plaintiff appeals. Appeal dismissed.

The facts appear in Pension Mutual Life Insurance Co. v. Whiteley et al. (No. 1) 104 Atl. 653, and in the following opinion of Bregy, P. J., in sustaining demurrer to the bill:

The bill in equity in this matter is subject to the same criticism which has just been made in relation to the statement of claim filed in the suit at law for the same cause of action. Very little need be added to what is therein said. There are, however, the following additional objections or complaints to the bill which, in our opinion, justify the sustaining of the demurrer to it:

In the argument it is claimed this is a bill of discovery in aid of the suit at law. The suit at law apparently did not need any discovery, because the statement of claim had been filed and all the information necessary to do so seems to have been within the knowledge of the plaintiff. The only discovery that he could seek would be to know what the defense is.

Another objection is that he seeks to have certain questions answered and information given by two persons, naming them, who are not defendants in the bill at all. If the officers of the Police Beneficiary Association misused the funds that were received from the plaintiff company, such officers are responsible to the Police Beneficiary Association, and can be sued by them; but exactly what business that is of the plaintiff we fail to see. They claim to have issued a policy in pursuance of an application which was entirely true and faultless as far as any allegation in the bill is concerned, the premiums were paid, and the plaintiff company as deaths occurred paid certain money over. There their responsibility ended. If their own agent cheated them, they can sue him; but to join him with the Police Beneficiary Association, as to which it has not alleged any wrong to have been done, is a joinder that the law does not allow.

Briefly stated, these are the reasons for our sustaining the demurrer.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Joseph W. Shannon, of Philadelphia, for appellant. Owen J. Roberts and Joseph S. Conwell, both of Philadelphia, for appellee Whiteley. Frederick A. Sobernheimer, of Philadelphia, for appellee Police Beneficiary Ass'n.

PER CURIAM. This appeal is dismissed, at the costs of the appellant, on the opinion of the learned president judge of the court below sustaining the demurrer to plaintiff's bill.

(261 Pa. 370)

**HAMMOND v. ALUMINUM CO. OF
AMERICA.**(Supreme Court of Pennsylvania. May 9,
1918.)**1. CORPORATIONS — 323 — KEEPING BOOKS
AND RECORDS — PENALTIES — REPEAL OF STATUTE.**

Section 46 of the General Corporation Act of April 29, 1874 (P. L. 73), repealing Act April 7, 1849 (P. L. 563), as amended by Act April 17, 1869 (P. L. 71), so far as providing for corporations for any purpose provided by repealing act, confined operation of Act 1849 to companies already formed thereunder for purpose not covered by Act 1874.

2. CORPORATIONS — 323 — BOOKS AND RECORDS — PENALTIES — IMPLIED REPEAL OF STATUTE.

Act April 7, 1849 (P. L. 563) § 24, relating to penalties for not keeping corporations' books and records, does not operate as to corporations chartered under General Corporation Act April 29, 1874 (P. L. 102), by section 89, cl. 8, making similar provision, and since passage of that act section 24 applies only to corporations chartered under Act 1849.

3. STATUTES — 159 — CONSTRUCTION — IMPLIED REPEAL.

The mere fact that a statute is enacted shows that so far as it goes, and so far as it introduces a new rule of general application, it was intended as a substitute for and to displace an earlier act of equal general application.

4. STATUTES — 161(1) — IMPLIED REPEAL.

Where a later statute establishing a general system for government is silent as to repeal of former statutes relating to the same subject, an intention to repeal the earlier statute is implied.

Appeal from Court of Common Pleas, Allegheny County.

Assumpsit for penalty prescribed by Act April 7, 1849 (P. L. 563) § 24, by Benjamin D. Hammond against the Aluminum Company of America. From a judgment for defendant on demurrer to plaintiff's statement of claim, contained in an affidavit of defense, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

Sidney J. Watts, of Pittsburgh, for appellant. Gordon & Smith and George B. Gordon, all of Pittsburgh, for appellee.

STEWART, J. The appeal is from a judgment entered sustaining a demurrer which appears in the affidavit of defense filed to an action brought to recover from the Aluminum Company of America, a corporation chartered under General Corporation Act April 29, 1874 (P. L. 73), the penalty prescribed by the twenty-fourth section of Act April 7, 1849 (P. L. 563), which act, after prescribing that it shall be the duty of the directors of every

such company, incorporated under the provisions of said act, to cause a book to be kept by the treasurer or secretary thereof at the office or principal place of business of the company, which shall contain among other things the names of all persons, alphabetically arranged, who are or who shall within one year have been stockholders of such company, showing their places of residence, the number of shares of the stock held by them respectively, and the time when they respectively became the owners thereof, and the amount paid on such shares, and the total amount of the capital stock paid in, which book shall at the end of the year be carefully preserved in the office of the company for future reference, and shall during the usual business hours of the day, on every business day, be opened for the inspection of all persons who may desire to inspect the same, and any and every person shall have the right to make extracts from such book, further provides that:

"If any such company shall neglect or refuse to keep such book, or to make or cause to be made any proper entry therein, or shall, on application made to any director or officer thereof, neglect or refuse to exhibit the same, or to allow extracts to be taken therefrom, as heretofore required, such company shall forfeit and pay to the party aggrieved, fifty dollars for each and every day it shall so neglect or refuse as aforesaid, recoverable by said party as in other cases of claims against such company."

By Act April 17, 1869 (P. L. 71), it was enacted that the provisions of the twenty-fourth section (above quoted) of the act of April 7, 1849, "shall be and are hereby extended to all manufacturing or mining companies now or hereafter incorporated under any special or general law of this commonwealth."

[1, 2] The plaintiff in his statement of claim avers that he is the owner of one share of capital stock in the defendant company; that on or about September, 1917, he demanded of the defendant company the right to inspect the book required by the statutes to which reference has been made, to be kept and maintained for inspection, and demanded further that he be allowed to make extracts therefrom; that the defendant company refused plaintiff's demand, and in such refusal persisted for 41 days from October 3, 1916; and that because of such refusal defendant became indebted to plaintiff in the sum of \$2,050, for the recovery of which sum suit was brought. The affidavit of defense averred that the facts set forth in the statement were insufficient in law to constitute a good cause of action, inasmuch as the acts of assembly upon which the cause of action was based had been repealed, and judgment was prayed for on the whole record. The learned trial judge sustained the demurrer, holding in an opinion to which little need be added, that Act April 7, 1849 (P. L. 563), and Act April 17, 1869 (P. L. 71), supra, had no application to a manufacturing company charter-

ed under the General Corporation Act of April 29, 1874 (P. L. 73). This latter act in its thirty-eighth section provides for the incorporation of companies formed for the manufacture of iron or steel or both, or of any other metals or of any articles of commerce from wood or metal or both, and in its several sections prescribes rules, regulations, and requirements for the control and management of such corporations. By the forty-sixth section in express terms it repeals Act April 7, 1849, along with several other acts specifically mentioned, and the several supplements to each of said acts, "so far as they provide for the creation of corporations for any of the purposes provided for by this act, or are inconsistent with this act."

One necessary result of this legislation was to confine the earlier act of 1849 thereafter in its operation to companies already formed thereunder and engaged in some branch of manufacture for which no provision was made in the General Corporation Act of 1874, if any such there can be. So comprehensive and embracing in its provisions is the act of 1874, both with respect to kind and character of companies that may be formed and incorporated thereunder, having regard to their objects and purposes, and the rules and regulations appropriate and prescribed for their government, management, and control, that it seems quite manifest that the purpose of the act was to provide a complete system for the creation and regulation of corporations, substituting such system for the practice which had theretofore prevailed of obtaining a special charter in each particular case under such regulations as the Legislature might see fit to impose, and with such privileges as the Legislature might see fit to grant. Under such method uniformity of legislation with respect to requirements in the conduct and management of corporations was entirely impracticable, and the result was discrimination in rights and powers which gave to some advantages which were denied to others. The time chosen was opportune for a change. Our present Constitution went into effect in January, 1874, and it took away from the Legislature the power to pass any local or special law creating corporations or amending, renewing or extending the charters thereof, so that thereafter corporations could be chartered only under a general law to be thereafter enacted. This was the exigency the Legislature of 1874 was called upon to meet, and it could meet it only as it provided a system under which companies organized for a prescribed and legitimate purpose might be incorporated, defining rules and regulations by which they were to be governed and controlled, depending upon the nature and character of the business in which they were to engage. Admittedly this defendant corporation at the time of its organization could not have been incorporated under the act of 1849, its proposed object be-

ing within the provisions of the act of 1874 the power to incorporate under the act of 1849 was taken away by the repealing clause contained in the forty-sixth section of the act of 1874. This repealing clause extended further and embraced all provisions in the act of 1849 and its supplement which are inconsistent with the act of 1874, that is to say, inconsistent with the provisions of that act which are intended to regulate corporations chartered thereunder. The act of 1849 contains many provisions for the regulation of corporations chartered under its terms, therefore an unqualified repeal of the act of 1849, while it would not have affected the continued existence of the corporations previously chartered thereunder, would have left such corporations without guide or compass in the conduct of the business of each. Therefore it was that the express repeal in the act of 1874 was limited to such parts of the act of 1849 as were inconsistent with the provisions of the later act. Clause 8, section 39, page 102 of the act of 1874 reads as follows:

"Every such corporation shall, annually, in September, make, and the president, treasurer and a majority of the directors, shall sign, swear to and deposit with the recorder of deeds for said county, a certificate stating the amount of capital stock paid in, the names and number of shares held by each stockholder, the amount invested in real estate and in personal estate, the amount of property owned and debts due to the corporation, on the first day of August next preceding the date of such certificates, and the amount, as nearly as can be ascertained, of existing demands against the corporation at the date of the certificate."

It may be admitted that there is no such inconsistency between the provisions of the twenty-fourth section of the act of 1849 and the clause of the act of 1874 above recited as indicates repugnancy or positive opposition, but it is we think too evident to admit of discussion that both were not intended to operate in the case of corporations chartered under the latter act; that the purpose of the legislation of 1874 was to provide a different protection for the public and the creditors of corporations—and such must have been the only purpose of the legislation—than that provided by the twenty-fourth section of the act of 1849; allowing each act to operate without conflict in a sphere of its own, limited as that sphere might be in the case of companies chartered under the earlier act. To the extent we have indicated there is here a manifest inconsistency; we do not say, nor do we mean, an open conflict between the terms used in the several acts, but an inconsistency that would become apparent and confusing, had the Legislature, in addition to the thirty-ninth section, clause 8 of the act of 1874 incorporated in that act the twenty-fourth section of the act of 1849. The whole purpose of the provision in the earlier act, so far as it could serve any public end, and it could have had no other, seems to be fully

met by the later provision requiring every corporation to deposit in September of each year with the recorder of deeds of the county where the corporation had its seat a sworn certificate stating the amount of capital stock paid in, the names and number of shares held by each stockholder, etc. It is not to be supposed that it was a legislative intent to introduce into the system it was about to establish a requirement under an older statute which had been so far supplied within its own terms as to leave it without end or purpose. It is to be kept in mind that the act of 1874 was not a revision or codification of existing laws governing corporations, but was an original enactment embracing in its terms all organizations thereafter to be incorporated, defining their powers and limitations and prescribing rules and regulations for their conduct and management by which they were to be governed. This was a clear substitution for the rules and governing regulations prescribed by earlier acts.

[3, 4] The rule here applicable is thus stated in *Endlich on Interpretation of Statutes*, § 201:

"In such cases, the later act, although it contains no words to that effect, must, in the principles of law, as well as in reason and common sense, operate to repeal the former—the negative being implied from the 'reasonable inference that the Legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time.' If this could be the case, it is obvious that the later statute could become the law only so far as parties might choose to follow it; whereas, the mere fact that a statute is made shows, that, so far as it goes, and so far as it introduces a new rule of general application, it was intended as a substitute for, and to displace, an earlier one of equally general application."

Among the authorities cited in support of this rule are *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Johnston's Estate*, 33 Pa. 511. To these may be added *Rhoads v. Hoerners-town Building & Savings Ass'n*, 82 Pa. 180. As will be observed these authorities are to the effect that when the later statutes establishing a general system for government are silent as to the repeal of former statutes relating to the same subject, an intention to repeal the earlier statutes arises by implication. This of itself would be conclusive in the present case, and fully justifies the action of the court below therein. Aside, however, from this feature of the case, there is that expressed in the repealing clause contained in section 46 of the act of 1874, which, in the opinion of the writer, might with much reason have application here, and we would be fully warranted in holding that there is such inconsistency between the provisions we have discussed in the two acts as to bring the act of 1849 within the express repeal contained in the later. It is upon the former ground, however, that the court rests its conclusion, namely, an implied repeal.

The judgment is affirmed.

(261 Pa. 333)

FORREST v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. ABATEMENT AND REVIVAL §74(1)—SUBSTITUTION OF REPRESENTATIVE—TIME.

Where plaintiff dies before trial of his action for personal injury, substitution of administratrix as plaintiff under Act April 15, 1851 (P. L. 674) § 18, may take place more than one year after death; that section fixing no time for substitution.

2. DISMISSAL AND NONSUIT §67—LACHES—PRACTICE.

The usual and proper practice, where an unreasonable delay in a prosecution or laches is urged as a ground for abatement of a suit, is a motion or rule by defendant and not an objection to testimony on the trial.

3. DISMISSAL AND NONSUIT §67—PROSECUTION—LACHES—WAIVER.

Defendant may waive default or laches in prosecution and go to trial on merits, and, if taking no steps to abate action until after plaintiff has incurred expenses of preparation for trial, defendant cannot on trial defeat recovery by objection to evidence of plaintiff's authority to sue.

4. CARRIERS §320(9)—PASSENGERS—BOARDING MOVING CAR—QUESTION FOR JURY.

In action for personal injury while attempting to board a street car, where testimony of only two eyewitnesses conflicted as to whether car was standing or moving, and plaintiff's witness was contradicted, the case was for the jury.

5. TRIAL §252(10)—INSTRUCTION—EVIDENCE TO SUPPORT.

In action for injury while boarding street car, wherein defendant offered deceased's written statement that car was moving, charge that plaintiff in his sworn statement of claim stated that it was standing was error, where that statement was not in evidence and plaintiff had not referred to it as contradicting signed admission.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by John R. Forrest, continued after his death by Indiana Forrest, his administratrix, against the Philadelphia Rapid Transit Company. Judgment for plaintiff for \$4,000, and defendant appeals. Reversed, with a venire facias de novo.

Argued before MESTREZAT, POTTER, STEWART, FRAZER, and WALLING, JJ.

Charles H. Edmunds, of Philadelphia, for appellant. John Martin Doyle and Eugene Raymond, both of Philadelphia, for appellee.

MESTREZAT, J. This is an action of trespass, brought March 26, 1907, by John R. Forrest to recover damages for injuries which he sustained by reason of the alleged negligence of the defendant company in July, 1906. The statement was filed, a rule to plead was granted June 3, 1907, and on June 17th the defendant pleaded "not guilty." The plaintiff died November 2, 1907, and in October, 1915, his death was suggested, and June 5, 1916, his death was again suggested of record, and Indiana Forrest, his administratrix, was substituted as plaintiff. In the statement the plaintiff averred

that the defendant's car had stopped to receive passengers, and, when he was attempting to board it, it prematurely started, throwing him to the ground, and causing him severe injuries. The defendant denied that the car stopped, and claims that it was in motion when plaintiff attempted to board it. This was the issue of fact between the parties. The trial resulted in a verdict for the plaintiff. Judgment having been entered on the verdict, the defendant has appealed.

[1] The substituted plaintiff offered in evidence at the trial the letters of administration granted her, which offer was objected to by the defendant on the ground that it was too late to maintain the action; in other words, that the suit was abated by delay in its prosecution. The objection was overruled, and the evidence admitted. Defendant contends that as an action for death must be brought within one year after the death and an action for personal injuries within two years, under the statutes, the right to substitute the personal representative and prosecute the action should be limited to one year after the death of the injured party. The conclusive reply to this argument is that no act of assembly by direct provision or even by inference requires the substitution of the personal representative to be made within one year succeeding the injured person's death. It is a matter solely within the discretion of the Legislature, and hence the courts cannot establish such limitation by construction of the statutes dealing with the subject. Section 18 of the Act of April 15, 1851 (P. L. 674), authorizing the substitution, simply provides that no such action "shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction." It will be observed that no time within which the substitution shall be made is fixed by the statute, and it is clear that we cannot, and should not, as claimed by the appellant, invade the exclusive province of the Legislature, and do so by construction.

We do not regard the present case as ruled in appellant's favor by *Waring Bros. & Co. v. Pennsylvania Railroad Co.*, 176 Pa. 172, 180, 35 Atl. 106, 109. There the summons was issued in 1879, and no further steps were taken in the prosecution of the case until 1894, when plaintiffs filed a statement and affidavit of claim which showed that the cause of action had originated in November, 1873, about 21 years prior to filing the statement. The court made absolute the defendant's rule to strike off the statement and affidavit and entered judgment of non pros. because of the laches of the plaintiffs in proceeding with the cause. We sustained this action of the common pleas, holding "the judgment was within the power and

discretion of the court below and it will not be reviewed." The ground of this decision is stated in the concluding part of the opinion of Green, J., as follows:

"We decide this case upon the undoubted power of the court below to make the rule of practice relating to this subject, and upon the necessarily implied power to grant the same relief upon motion and hearing, which the defendant could have had by the mere act of its counsel in directing the prothonotary to enter a non pros. at any time after three months, and also upon the further consideration that in any event, and in the best aspect of the case for the plaintiffs, the matter was within the discretion of the learned court below, and in the exercise of that discretion the decision was against the plaintiffs."

In the subsequent case of *Hillside Coal & Iron Co. v. Heermans et al.*, 191 Pa. 116, 118, 43 Atl. 76, 77, this court sustained the court below in refusing to grant a judgment of non pros. on the ground of laches in prosecuting the action which was brought in 1881, and the motion for the judgment was made in 1898 by defendant, who had held by adverse possession since 1872. In explaining and distinguishing the *Waring Case* *Green J.*, who wrote the opinions in both cases, said, *inter alia*, in the later case:

"That action however was a personal action. * * * It was also the fact that after the issue and service of the writ of summons no further step had been taken until nearly 15 years later when for the first time the plaintiff filed a statement and affidavit of claim. So that, in point of fact, while the summons was issued in November, 1879, no statement of the plaintiff's claim and no narr. was filed until October, 1894. There was nothing on the record during all that time which informed the defendant as to what was the cause of action. When the statement was filed it appeared that the cause of action arose in 1873, which was nearly 21 years before the statement was filed. In these circumstances and for the reasons appearing in the opinion we sustained the nonsuit granted by the court below. In the present case none of these features is found except the period of delay. * * * Defendants were immediately apprised by the writ of summons which was served upon them, as to the exact character of the demand made upon them. * * * The granting of a nonsuit for such a cause as this is a matter within the discretion of the court to which the application is made. We attached importance to that feature in the *Waring Case*, *supra*, and think we should do so here. There was certainly no abuse of discretion in refusing the nonsuit in this case, on the contrary, we think the discretion of the court was wisely exercised in the rejection of the application."

Most of the features of the *Heermans Case*, distinguishing it from the *Waring Case*, are to be found in the present case. Here *Forrest* was injured in July, 1906, the action was brought in March, 1907, the statement of claim was filed June 8, and a plea was entered June 17, 1907. It is true that the plaintiff's death was not suggested until about 8½ years after the suit was brought, but during all that time the defendant was fully apprised, by the record, of the cause of action, and could prepare to meet it. Either party could have listed the cause for trial. In the *Waring Case* the statement was not

filed until 15 years after the summons was issued, and it was nearly 21 years after the cause of action originated until it appeared on the record, and in the meantime, so far as the record disclosed, the defendant was ignorant of the cause of action and hence could not prepare his defense.

[2, 3] The usual and proper practice, as appears by the reported cases on the subject, where unreasonable delay or laches is urged as the ground for abatement of the suit, is a motion or rule taken by defendant, and not objection to testimony on the trial of the cause. The defendant can and may waive the default or laches in the prosecution of the action and go to trial on the merits, and it is not too much to assume that he does so, where he takes no steps to abate the action until the plaintiff has incurred the expense of the preparation of the trial and the cause is before the court and jury for hearing and determination. Promptness by both parties in asserting their legal rights is expected and should be required. If at any time the defendant company in the present case thought the action had been abandoned, it should have pursued the established practice and moved the court or taken a rule to abate it, and not sought to accomplish that result by waiting until the case was listed for trial and was being heard by the court on its merits. We think there is a clear and controlling distinction between the facts of the *Waring Case* and the case at bar, and we think the court did not commit error in admitting in evidence the letters of administration granted the substituted plaintiff, and declining to hold that the action was abated by undue delay in its prosecution.

[4] It is contended by appellant that, if the question considered above is ruled in favor of the appellee, the case should be reversed, with a venire, for errors committed by the court on the trial of the cause. We agree with the appellant that the case was for the jury. There was but a single witness produced on either side who saw the accident. The plaintiff's witness testified that the car was at rest when the deceased attempted to enter it, and the witness for the defendant testified that it was in motion. In further contradiction of the plaintiff's witness, the defendant introduced statements made by the deceased and his witness that the car did not stop, but was in motion at the time the deceased attempted to board it. The credibility of the witnesses was clearly for the jury, and the court was required to submit it.

[5] We think the learned judge below erred in that part of his charge wherein, referring to the statement of *Forrest*, he said that:

"He [*Forrest*] did, 10 months and 13 days afterward, swear to another paper, which he signed by making his mark; that paper being the statement of claim in this case, in which he swore that the car was standing still."

This, as is apparent, was most prejudicial to the defendant, and was directing the attention of the jury to evidence that had not been offered and was not before them; and, so far as the record discloses, the plaintiff had not adverted to the affidavit as evidence contradicting the statement of the deceased and in support of her claim. Whether the statement of claim would have been competent, if offered for the purpose of contradicting the statement of the deceased, is not before us, and need not be decided.

The appellee has not pointed out, and, so far as we can ascertain from the record, there is no evidence, that the affidavit and signature of the deceased to the statement were procured by fraud, coercion or undue influence, and hence the eighth assignment of error must be sustained.

Without referring to the several assignments, we have considered the controlling questions in the case, and, for the reasons stated, the judgment is reversed, with a venire facias de novo.

(261 Pa. 422)

SHIELDS v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. NEGLIGENCE — 68 — CONTRIBUTORY NEGLIGENCE — RELIANCE ON EXERCISE OF DUE CARE.

While one has no right to put himself in dangerous position and rely wholly on assumption that one controlling source of danger will protect him, yet every one exercising due care in the circumstances has an abstract right to rely on assumption that others will do likewise and use ordinary care to protect him.

2. NEGLIGENCE — 70 — CONTRIBUTORY NEGLIGENCE.

Mere failure to anticipate another's negligence resulting in injury cannot be said to be negligence and will not defeat an action for such injury.

3. STREET RAILROADS — 88(7) — CROSSING TRACK — CONTRIBUTORY NEGLIGENCE.

A pedestrian is not negligent in attempting to cross street at crossing merely because a street car is approaching in plain sight.

4. STREET RAILROADS — 85(6) — CROSSING TRACK — CARE REQUIRED.

Where pedestrian attempts to cross a street at a crossing when a car is approaching in plain sight, his rights and those of the street railway company are mutual, and each must exercise the care required by the circumstances.

5. STREET RAILROADS — 88(6) — CROSSING TRACK — DUE CARE.

The danger a pedestrian is bound to foresee and avoid at a street crossing is that of being injured by cars operated in a proper and legal manner.

6. APPEAL AND ERROR — 930(1) — PRESUMPTIONS — VERDICT.

After verdict for plaintiff in action for injury when struck by street car at a crossing, his account of the accident must be taken as true on appeal.

7. STREET RAILROADS — 117(22) — ACCIDENT AT CROSSING — QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE.

Where pedestrian started to cross street when he saw approaching car 275 feet away, apparently slowing down, and where when on near track he saw car two lengths away and thought it was slowing down and was struck when almost across and carried 165 feet by fender, his contributory negligence was for jury.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Patrick J. Shields against the Philadelphia Rapid Transit Company to recover damages for personal injuries. Verdict for plaintiff for \$3,000 and judgment thereon, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKE, FRAZER, and WALLING, JJ.

Layton M. Schoch, of Philadelphia, for appellant. Horace L. Henderson, of Philadelphia, for appellee.

FRAZER, J. Plaintiff was injured by one of defendant's cars at a street crossing in the city of Philadelphia, and sued to recover damages. The trial judge submitted to the jury the questions of negligence and contributory negligence, and, from a verdict and judgment for plaintiff, defendant appealed, assigning for errors the refusal of the court to give binding instructions in its favor and subsequent refusal to enter judgment non obstante verdicto.

On November 5, 1915, between 8 and 9 o'clock in the evening, plaintiff alighted from a north-bound car on Twenty-Second street at the south side of Erie avenue at the intersection of Twenty-Second street, Schuyler street, Erie avenue, and Hunting Park avenue, crossed Erie avenue to the northwestern side of Hunting Park avenue, intending to proceed eastward on Erie avenue, and to do so was obliged to cross to the northeastern side of Hunting Park avenue. Defendant operates a double line of tracks on Hunting Park avenue, a thoroughfare 60 feet in width from curb to curb; the distance from each curb to the nearest car track being 23½ feet. Plaintiff testified that while standing on the curb, and as he started to cross the avenue, he noticed a car coming westwardly on Hunting Park avenue, on the near track, that seemed to be slowing down, and 250 or 275 feet distant; that he started to cross the street, and upon reaching the track the car was at least two lengths from him. He further testified:

"When I got to the first rail, I continued to cross, still thinking it was slowing down, and probably going to stop there, which they generally do. Before I got almost over the track, he came on me like a flash, and that was really the last I knew. * * * Q. From the view that you had of the car as it bore down on you, could you give any estimate of what speed it was coming at? * * * A. From what I saw

it coming, when I was within two car lengths, until the time it struck me, it certainly must have been going about 25 miles an hour. * * * Q. Did you observe that it went faster after you attempted to cross the track? A. Yes, sir; I did. I couldn't get off the track."

Plaintiff has no recollection of what happened subsequently. The evidence, however, is undisputed that he was picked up on the opposite side of the crossing, a distance of 165 feet beyond the place at which he stated the accident occurred; the testimony on behalf of defendant tended to show plaintiff was, in fact, struck on the south side of the crossing near the place where he was found, and that the car stopped within its length after hitting plaintiff. By special verdict the jury found the accident did not occur at the place specified by defendant's witnesses.

[1-6] The general rule, in cases of this character, is that, while a person has no right to put himself in a position of danger and rely entirely on the assumption that another who controls the source of such danger will see that he is protected, yet every one who exercises due care, according to the circumstances, has an abstract right to rely on the assumption that others will do likewise and use ordinary care to protect him and his property from injury. *Young v. Philadelphia Rapid Transit Co.*, 248 Pa. 174, 93 Atl. 950; *Wagner v. Philadelphia Rapid Transit Co.*, 252 Pa. 354, 97 Atl. 471. Consequently, mere failure to anticipate negligence by another, resulting in injury, cannot be said to be negligence and will not defeat an action for injuries sustained. In applying these principles to cases of collision between pedestrians and street cars at crossings, it has been held a pedestrian is not negligent in attempting to cross a street at a place set apart for that purpose, merely because a car is approaching at a distance, although in plain sight. *Dunn v. Philadelphia Rapid Transit Co.*, 244 Pa. 176, 90 Atl. 526. In such case the rights of the pedestrian and the street railway company are mutual, and each is bound to exercise the care required by the circumstances. The danger the pedestrian is bound to foresee and avoid is that of being injured by cars operated in a proper and legal manner. Accepting plaintiff's account of the accident as true, as we are bound to do in view of the verdict of the jury, he was almost across the track when injured; the case, consequently, is ruled by *Young v. Philadelphia Rapid Transit Co.*, supra.

[7] Defendant relies upon a line of cases represented by *Flynn v. Pittsburgh Rys. Co.*, 234 Pa. 335, 83 Atl. 207, 39 L. R. A. (N. S.) 1055, *Cunningham v. Philadelphia Rapid Transit Co.*, 240 Pa. 194, 87 Atl. 291, and *Wolf v. Philadelphia Rapid Transit Co.*, 252

Pa. 448, 97 Atl. 684. The facts in those cases, however, distinguish them from the case now before us. In the case first cited the accident occurred in daytime almost immediately as plaintiff stepped upon the track. In the *Cunningham* Case the accident also occurred in daytime, and, as was stated in the opinion of the court (240 Pa. 196, 197, 87 Atl. 291), the only reasonable inference deducible from the undisputed testimony was that plaintiff stepped upon the track directly in front of an approaching car and was struck instantly. So, also, in the *Wolf* Case, the accident occurred in daylight, and plaintiff's testimony was to the effect that the car was coming fast and he saw the motorman was not looking ahead. Under such conditions, he could not rely upon the assumption that the motorman saw him and would exercise proper care to avoid an accident.

It cannot be said in the case now before us that the only reasonable inference to be drawn from the circumstances clearly demonstrated that plaintiff was guilty of contributory negligence; the question, accordingly, was for the jury. *Young v. Philadelphia Rapid Transit Co.*, supra.

Appellant further contends the circumstances of the accident showed plaintiff's account, in view of the place and position of his body when found, described impossible conditions; hence defendant's version of the place where the accident occurred was the true one, and conclusively demonstrated no negligence on the part of the motorman. The jury found this question in favor of plaintiff, however, and it cannot be said that plaintiff's account was so impossible as to warrant setting aside their finding as not being supported by evidence. Under plaintiff's theory of the case, he must have been carried on the fender of the car for a distance of 165 feet. There is nothing so clearly impossible in this as to justify us in holding as matter of law that it could not have occurred. Neither is the fact that plaintiff was found on the right-hand side of the track, rather than on the left, conclusive as to his exact location when struck by the car, since, if carried on the fender for such a distance and around a curve to the left, his position would not necessarily remain the same as that occupied by him immediately following the contact, and a reasonable inference might readily follow that the momentum and the overhang of the front of the car in rounding the curve to the left would have a tendency to throw plaintiff's body to the right-hand side of the track. The inferences were necessarily for the jury.

The assignments of error are overruled, and the judgment affirmed.

(261 Pa. 533)

V. & S. BOTTLE CO. v. MOUNTAIN GAS CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

SPECIFIC PERFORMANCE §55—CONTRACTS OF GAS COMPANY—ILLEGAL PREFERENCE.

Bill by a manufacturing company against a public service gas company to compel performance of a contract for supply of gas was properly dismissed, where the contract gave unreasonable preference to plaintiff in rate and service; such agreement being invalid, under Public Service Act July 26, 1913 (P. L. 1393, art. 3) § 8, subds. A, B.

Appeal from Court of Common Pleas, Potter County.

Bill by the V. & S. Bottle Company against the Mountain Gas Company. Bill dismissed, and plaintiff appeals. Affirmed.

On October 30, 1913, plaintiff and defendant entered into an agreement under which the latter agreed to sell and deliver to the former, at the price of 8 cents per 1,000 cubic feet, based on an 8-ounce pressure, delivered at the place hereinafter mentioned, for the term of 5 years, and 10 cents per 1,000 cubic feet, based on the same pressure, such quantities of natural gas as required by the party of the second part (plaintiff) to supply its factory with natural gas for fuel, light, heat, and other necessary purposes, for the proper and successful operation of said factory, for and during the term of 10 years from the date thereof; said gas to be used at the factory of said party in the village of Roulette, Potter county, Pa. The contract further provided that the plaintiff should furnish the necessary pipes, regulators, and meters.

The Mountain Gas Company, on December 22, 1913, filed a tariff fixing the price of natural gas to manufacturers in quantities of 100,000 cubic feet daily at 10 cents per 1,000 cubic feet. The defendant, subsequent to January 1, 1914, refused to supply gas to the plaintiff for less than the rate required by such tariff. Plaintiff brought this bill in equity to compel the specific performance of its contract of October 30, 1913.

The lower court found that the agreement in question gave the plaintiff company special privileges forbidden by article 3, § 8, subds. A and B of the Public Service Act of July 26, 1913 (P. L. 1374), and that such agreement was rendered inoperative from the time the said act went into effect January 1, 1914, and dismissed the bill. Plaintiff appealed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WAL-LING, JJ.

W. K. Swetland, of Coudersport, for appellant. S. S. Mehard, of Pittsburgh, and W. F. Dubois, of Coudersport, for appellee.

PER CURIAM. This appeal is dismissed, and the decree affirmed, at appellant's costs.

on the correct conclusion of the learned court below that, when the Public Service Law went into effect on January 1, 1914, the agreement in question became inoperative.

(261 Pa. 452)

RUEMBELI v. WILSON et al.

(Supreme Court of Pennsylvania. June 3, 1918.)

APPEAL AND ERROR §1004(1)—EXCESSIVE VERDICT—AFFIRMANCE.

The reasonableness of a verdict is a question for the trial court under all the evidence on the motion for a new trial.

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Babette Ruemeli against Ellwood A. Wilson and Irvin W. Wood to recover damages for personal injury. Verdict for plaintiff for \$5,000 and judgment thereon, and defendant Irvin W. Wood appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHISKER, and FRAZER, JJ.

Maurice W. Sloan, of Philadelphia, for appellant. Warren C. Graham, of Philadelphia, for appellee.

PER CURIAM. Two of the three assignments of error are not pressed. The third complains of the excessiveness of the verdict. That was a question for the court below, under all the evidence, on the motion for a new trial, and we cannot therefore disturb the judgment for the only error pressed.

It is therefore affirmed.

(261 Pa. 457)

MILES v. GEORGE.

(Supreme Court of Pennsylvania. June 3, 1918.)

APPEAL AND ERROR §215(4)—CONDUCT OF TRIAL JUDGE—REVERSIBLE ERROR.

Trial judge's undue comment on probabilities in favor of plaintiff in charge cannot be reviewed, where at conclusion of charge counsel for defendant stated that he did not then object to anything in court's statement of facts or instructions.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Wilbur F. Miles for boarding, washing, and lodging furnished to Sarah A. George. Verdict for plaintiff for \$2,500 and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHISKER, and FRAZER, JJ.

Bertram D. Rearick, of Philadelphia, for appellant. A. S. Ashbridge, of Philadelphia, for appellee.

PER CURIAM. The claim of the appellee is for boarding, lodging, and washing fur-

nished to his mother-in-law, under an alleged express contract that she would pay him for the same. The issue was one of pure fact, and, while the charge of the learned trial judge is fairly open to the criticism that he unduly commented on the probabilities in favor of the plaintiff, it cannot be regarded as reversible on that account, especially as he stated, at the conclusion of his charge, in addressing counsel for the defendant, "Is there anything in my statement of facts or instruction concerning the law that you object to specifically?" To this reply was made, "Not at this time." Then was the time to have called the court's attention to what is now complained of on this appeal, and the assignments of error complaining of the charge are dismissed.

Judgment affirmed.

(261 Pa. 445)

STIDFOLE et al. v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

RAILROADS §281(4)—**INJURY TO TRESPASSER—LIABILITY.**

Where a brakeman struck at and pursued a 10-year old trespasser on a train, in consequence of which he fell off and was run over, the railroad company is not relieved of liability because the brakeman was at the time temporarily engaged in flagging trains, where the keeping of trespassers from the train was another of his duties.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Zortman Stidfole, by his next friend and mother, Nettie Stidfole, and by her in her own right, against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, O. J., and POTTER, MOSCHZISKE, FRAZER, and WALLING, JJ.

Wm. Clarke Mason, of Philadelphia, for appellant. Francis M. McAdams and William H. Wilson, both of Philadelphia, for appellee.

PER CURIAM. This action was brought for the recovery of damages for injuries sustained by Zortman Stidfole, a boy 10 years of age, in being chased or driven from a car of the defendant company on which he was a trespasser. The jury found that the brakeman who chased or drove him off had done so in a negligent manner, for which the company was responsible, and verdicts and judgments for the boy and his mother followed. On this appeal from them by the railway company, its main contention is that Maurer, the brakeman, was not acting within the scope of his employment when he drove the boy off. This is sufficiently and correctly

answered by the following from the charge of the learned trial judge:

"Mr. Maurer was a brakeman, temporarily engaged in one of his duties, and that duty was flagging, nevertheless he was still a brakeman, and while flagging he was in the service and engaged in the business of the defendant company, and among his duties as a brakeman was the duty of keeping trespassers off of trains. The mere fact, therefore, that he ordered this boy off this train and pursued him, both striking and striking at him, while he was temporarily engaged in flagging trains at this switch, would not alter or affect the liability of his employer, the defendant company, for his negligent act. I instruct you that this is the law that you will apply in this case, if you believe that the facts warrant its application. In other words, if you find as a fact from the whole evidence that the accident occurred in the way as related by the boy plaintiff, by the flagman, Maurer, hitting at him, calling him the opprobrious name, and pursuing him in a menacing and threatening manner after having struck him, then you would be entirely justified in concluding as a fact that the defendant company by its flagman was negligent."

The case was for the jury, and the motion for judgment non obstante veredicto was properly dismissed. Nothing in the assignments of error calls for special discussion, and, as no reversible error appears in any of them, the judgment is affirmed.

(261 Pa. 423)

MacEVOY et al. v. KERR.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. GUARANTY §36(5)—**SALE OF GOODS—CONSTRUCTION OF CONTRACT.**

Contract of suretyship under which plaintiff was to furnish principal 6 barrels of dye, deliverable 600 pounds monthly, not referring to time of month on which shipment should be made, or whether there should be one or more shipments per month, covered all goods shipped under contract amounting to 600 pounds per month.

2. GUARANTY §36(5) — **LIABILITY — CONSTRUCTION OF CONTRACT.**

Under suretyship contract covering delivery of 600 pounds of dye monthly, surety was not released from liability because in first month more than 600 pounds were delivered, where all goods called for by contract had not been shipped, so that it could not be said that he was required to pay for more than he had agreed to pay.

3. GUARANTY §36(5)—**CONTRACT — LIABILITY.**

Under contract of suretyship covering delivery of 6 barrels of dye at rate of 600 pounds monthly, not referring to time of month on which shipment should be made, or whether one or more shipments a month should be made, surety was liable for 2 barrels in one month, exceeding 600 pounds.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit on a contract of suretyship by Thomas J. MacEvoy and Hugo Ristelhueber, copartners, trading as Thomas J. MacEvoy, against James D. Kerr. Verdict for plaintiffs for \$1,826.13, and judgment thereon, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

H. M. McCaughey, of Philadelphia, for appellant. W. Logan MacCoy, of Philadelphia, for appellees.

FRAZER, J. Defendant appeals from a judgment entered on a verdict in an action on a contract of suretyship wherein he became surety for the purchase price of merchandise bought from plaintiff.

H. J. Hallam, desiring to purchase a quantity of dye on credit, applied to plaintiff, who refused to sell unless the former obtained a financially responsible person to guarantee payment of the account. Later Hallam returned to plaintiff's office with the following letter dated June 20, 1916, and signed by defendant:

"In reference to Mr. H. J. Hallam security on his contract for Blk, known as National's type dye I am agreeable to be responsible for payment of said goods in thirty days."

In reply, plaintiff wrote defendant:

"I beg to acknowledge receipt of your favor of the 20th inst. giving security for the payment of H. J. Hallam's account for direct Black known as National's type dye."

The evidence referring to the quantity of dye appears in a memorandum written by plaintiff to Hallam the same day as those above quoted as follows:

"Having received a letter from James D. Kerr of date June 20, 1916, security for the payment of six barrels of direct black, known as National's type dye, it is understood that delivery is to be made 600 pounds monthly, at \$2.75 per pound until January 1, 1917."

No reference is made in the communications as to time of the month on which shipments were to be made or the proportions, whether in separate quantities or of 600 pounds each or divided into a number of shipments in quantities sufficient to make a total of 600 pounds during the course of the month. The day the contract was entered into, plaintiff shipped one barrel of dye containing 398 pounds, and 17 days later, on July 7th, shipped another barrel containing 501 pounds, making a total delivery of 899 pounds. Defendant, becoming uneasy concerning Hallam's financial condition, requested plaintiff to delay further shipments until goods already delivered were paid for. In compliance with the request, no additional shipments were made, and, on Hallam's failure to pay for the dye previously shipped, defendant declined to fulfill the terms of his contract, whereupon this action was brought.

The principal fact in dispute is the date on which the discontinuance of shipments was requested by defendant and the effect

of the request. Plaintiff testified the second barrel was shipped July 7th and that defendant's request to make no further deliveries was not made until the middle of August. On the other hand, defendant fixed the date as June 29th, which was previous to the second delivery, and for that reason denied his responsibility for the latter shipment. The question raised by this contradictory testimony was necessarily for the jury and was submitted under instructions of which no complaint is made, the principal contention of defendant being that the delivery of the second assignment within the period of 17 days from the delivery of the first was a sufficient departure from the terms of the contract to release him from liability.

[1-3] Defendant's agreement is an absolute one to become "responsible for payment of said goods" within 30 days and would seem to be sufficiently broad to cover all goods included in the contract amounting to 600 pounds monthly for a period slightly exceeding 6 months. Consideration of the question of defendant's right to cancel the contract becomes unnecessary, since plaintiff voluntarily ceased making shipments at defendant's request. In absence of evidence to establish the time for delivery or definitely fix the quantity of each shipment, we assume the contract was intended to be operative from its date, and, in fact, this was the construction placed upon it by the parties, as the first shipment was made on the day the guaranty was received. Taking the average daily supply as a criterion, the quantity shipped was sufficient to cover a period of 20 days, and at the expiration of that time plaintiff's duty would be to forward an additional supply. Whether such further shipment should be in quantities sufficient to meet defendant's demand for a part or an entire month was apparently left to the discretion of plaintiff, who testified that in making shipments the quantity of each must necessarily depend upon the capacity of the barrel available at the time. The second barrel containing 501 pounds was also insufficient to make up the quantity required for the ensuing month, and whether or not there was an overshipment necessarily depends upon the time of making the third delivery. As the second shipment was but two days earlier than a delivery of an additional supply would actually be due computed on a daily basis, it might well be contended a further delay would not be consistent with good business judgment or with an honest endeavor on the part of plaintiff to carry out his contract.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 432)

In re PLUMLY'S ESTATE.

Appeal of SHOEMAKER.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. WILLS ⇨470 — CONSTRUCTION AS A WHOLE.

Meaning of words used in will as expressing intention of testatrix are to be read in connection with will as a whole.

2. WILLS ⇨535—EXCLUSION OF HEIR.

While a residuary clause carries all not well given, an heir cannot be disinherited, except by express words or by necessary implication.

3. WILLS ⇨452—CONSTRUCTION—RESIDUARY CLAUSE.

Where the scales hang evenly, the intention of testatrix is to be gathered from language of will, and, if it is doubtful whether the particular term was intended to carry the residue, a construction is to be favored which most nearly conforms to the intestate laws.

4. WILLS ⇨587(3)—CONSTRUCTION—RESIDUE —"BALANCE."

Under a will devising \$15,000 in 15 separate legacies, and interest on \$4,000 for life, and providing that, if estate did not equal amount devised, each should receive pro rata of amount willed, and, if exceeding that amount, devising "balance" to a nephew and niece, the latter took merely the balance over the legacies, they not being general residuary legatees; and hence the corpus of the \$4,000 did not pass to them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Balance.]

Appeal from Orphans' Court, Philadelphia County.

Exceptions by Thomas S. Shoemaker to adjudication in the estate of Mary P. Plumly, deceased. From a decree dismissing the exceptions, the exceptant appeals. Reversed, and record remitted, with direction.

Argued before MESTREZAT, POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

J. H. Shoemaker, of Philadelphia, for appellant. Henry Budd, of Philadelphia, for appellee.

MOSCHISKER, J. Mary P. Plumly died May 7, 1912, leaving a will whereby she disposed of the corpus, or principal, of \$15,000, in 15 separate legacies ranging in amounts from \$100 to \$3,000. In addition to these legacies, and interlarded between them, she provides:

"To my brother-in-law, John M. Plumly, I will the interest of four thousand dollars during his lifetime."

After the last bequest in the testament, the following provision appears:

"If my estate should not reach the amount as willed, then I wish each one to receive pro rata of the amount as willed, and if on the other hand it should exceed the amount, I wish the balance to be divided between my nephew, Eugene K. Plumly, and my niece, R. May Swalm, or their heirs. I wish * * * all taxes to be paid out of the estate on the four thousand I have left him [John M. Plumly], so he can have the full interest on what I have left him."

John M. Plumly died May 29, 1916. At the audit in the court below, one-half of the \$4,000 from which Mr. Plumly had received the income during his life was claimed by Thomas S. Shoemaker, as one of the heirs of testatrix, under the intestate laws, and also by Eugene K. Plumly, as a residuary legatee, under the above quoted testamentary provision. The Orphans' Court decided in favor of the latter (Lamorelle and Gest, JJ., dissenting), and the former has appealed.

It was admitted at the audit that:

"The excess of testatrix's estate, after payment of legacies, including the trust legacy of \$4,000, and all expenses, was something less than \$100."

The question for determination is: Do the words of the will constitute Eugene K. Plumly and R. May Swalm general residuary legatees, so that, upon the death of John M. Plumly, the corpus of the \$4,000 is to be divided between them, or does testatrix simply give to them the balance, if any, of her property over and above the total of the sums previously named in her will; i. e., the above-mentioned sum of "less than \$100"?

[1] The controlling inquiry is: What meaning is conveyed, as to the intent of the testatrix, by the words employed in the part of the will under immediate consideration, read in connection with the document as a whole; for, when so looked at, if the meaning is clear, there is no necessity for the application of technical rules of construction. If such meaning leads to a partial intestacy, even though the testatrix might have thought she had avoided this result, the heirs under the intestate laws will take to the exclusion of those claiming as residuary legatees—that is to say, should the latter's claim be inconsistent with the apparent meaning of the language employed in the will.

[2-4] A close study of the present document convinces us that the testatrix did not intend thereby to constitute Eugene K. Plumly and R. May Swalm general residuary legatees. We must assume Mrs. Plumly knew in a general way of what her estate consisted; but it is apparent she did not know the exact amount for which her securities would sell. Evidently, however, she anticipated that the sum likely to be realized and the total of the amounts contemplated by her as bequests would about equal each other, leaving either a slight deficiency or a small excess. With this in mind, it is only reasonable to assume that she used the word "balance" in a mathematical sense, meaning remainder over and about a sum total, and not in the general sense of all her estate which might remain undisposed of. In other words, the language employed indicates that what testatrix had in mind, when she disposed of "the balance" to Eugene K. Plumly and

R. May Swalm, was any amount in excess of what she for the moment considered "as willed" by the prior bequests, and no other general residuary estate, if any.

While Mrs. Plumly gave only the interest on \$4,000 to John M. Plumly, and not the principal, yet it is apparent, from the final language employed in the particular testamentary provision under consideration that she had this \$4,000 in mind "as willed," when she provided for the disposition of "the balance." As we read the words used by testatrix, in the part of the will now before us, the thoughts thereby expressed concern a division, either in case of a shortage in the total necessary to meet the aggregate of the amounts already mentioned by her or in the event of a balance above such total, and, apparently, she had no thought of an eventual disposition of any part of her estate after the death of John M. Plumly. We agree with the following view expressed in the dissenting opinion written by Judge Lamorelle, of the court below:

"If the clause was intended to dispose of all of the residue, the auditing judge was undoubtedly right; but was it the purpose and intent of testatrix to write into the will a clause disposing of any residue save and except such surplus as might exist after totaling all of her legacies? What was the amount 'as willed'? Manifestly all that she had given, including, of course, the \$4,000 left in trust. Testatrix, having thus disposed of all her effects, seemed to realize that, if her possessions were unequal to her gifts, it was incumbent upon her to provide for a pro rata abatement; and, having incorporated this clause in her will, what more natural than that she should at the same time cover a possible increase and make disposition of such surplus, if any? That, and that only, to my mind, was the intention as determined by the language used. If this clause had not been inserted, an intestacy as to the \$4,000 on the death of John M. Plumly [certainly] would have resulted; and, if the testatrix did not intend by this clause to dispose of the \$4,000, why should we resort to an artificial rule of construction [to bring about that result]? 'Balance' is the word used by testatrix, and 'balance,' considering the context, can mean but one thing, the excess over and above the legacies given. While it is, of course, true that a residuary clause carries all not well given, it is equally true that an heir cannot be disinherited except by express words or necessary implication. Citation of authority on these well known propositions is unnecessary. Where, however, the scales hang perfectly even, the intent of the testator is to be gathered from the language of the will [alone]; and, if it be doubtful whether a particular item was intended to carry the residue, a construction is to be favored which most nearly conforms to the intestate laws."

If the testatrix meant Eugene K. Plumly and R. May Swalm to take only the balance over and above the aggregate of the amounts previously mentioned in her testament "as willed," and we have already decided such to be the meaning conveyed by the words she employed, then it is clear that she did not intend to designate them as general residuary legatees, and they cannot claim as such against those entitled under the intestate laws.

The assignments of error are sustained, the decree of the court below is reversed, and the record is remitted, with directions to make distribution in accordance with the views here expressed; costs to be paid out of the estate.

(261 Pa. 520)

FERRY et al. v. WEDGE et al.

(Supreme Court of Pennsylvania. June 8, 1918.)

WATERS AND WATER COURSES §177(1) — DAMS—OBSTRUCTION OF WATER — INJUNCTION.

On bill in equity to enjoin riparian owner on one side of stream from erecting a wall higher than that on opposite side increasing overflow upon land on opposite side in flood time, injunction compelling removal of wall so far as it barricaded natural flow over defendant's land was proper.

Appeal from Court of Common Pleas, Toga County.

Bill in equity for injunction by Clive C. Ferry and others against Henry Wedge and others. From a decree for plaintiffs, defendants appeal. Appeal dismissed.

From the record it appeared that Norris brook is a rapid mountain stream in Middlebury township, Toga county, Pa., about nine miles in length, flowing easterly, and the point where it emerges from the hills is practically the watershed between the headwaters of Marsh creek and the headwaters of Crooked creek, different branches of the headwaters of the Susquehanna river, and for a distance of about three-fourths of a mile at the east end of said stream it flows over flat bottom lands, the lands of the plaintiffs lying mostly to the north and the lands of the defendants lying mostly to the south of said stream. In December, 1916, shortly before the present suit was commenced, Henry Wedge and Imogene Wedge, the owners of the land through which said Norris brook flows immediately east of the point where the stream emerges from the hills, started and undertook to change the whole course of said Norris brook and have it run along the south line of lands of C. C. Ferry, one of the plaintiffs; and immediately a suit in equity was commenced, and an injunction was issued by the court of common pleas of Toga county enjoining said Henry and Imogene Wedge from changing the course of said stream, to which suit the defendants made no reply and a decree pro confesso was entered, and the course of the stream was not changed. Immediately thereafter the defendants in the present suit commenced to barricade and raise the wall or embankment along the south side of said stream and built and constructed an embankment, wall, or water obstruction along the south side of said stream beginning at the foot of the hill where said stream emerges from the hills, which embankment was built

of large stones, logs, and dirt piled together in a compact mass and varying in height from three to four feet, and extending easterly completely across a depression, sag, or low place, and thence running on east a distance of 384 feet to a point close to the bank of said stream, and such wall was built by the defendants with the express purpose of filling up said natural depression and stopping the waters of Norris brook from flowing south through the same, which was the natural channel for them to take and had been for many years.

The lower court's eighth and tenth findings of fact were as follows:

"(8) In times of high water considerable quantities of sand and gravel are washed down from the hills which are west of the point in question, and are deposited along the line of this stream, and more especially so after getting some 25 rods from the hill where the stream becomes less rapid; but this washing has a tendency to fill the stream in its entire length, especially over the flat lands."

"(10) We further find from the evidence that the effect of this wall or barricade of the water, if allowed to remain at the west end, will increase the damage to the lands of the plaintiffs by increasing the quantity of water in Norris brook in times of flood and increasing the overflow from the same upon the lands of the plaintiffs along the lower levels of the stream, and will constitute more or less of a peril to the lands of the plaintiffs and will impair the value of said lands."

The lower court entered a decree compelling defendants to remove the wall at and along that part of the stream acting as a barricade to the natural flow of the water over defendants' land in time of high waters.

Argued before BROWN, C. J., and STEWART, MOSCHZISKE, FRAZER, and WALLING, JJ.

David Cameron, A. B. Dunsmore, and P. J. Edwards, all of Wellsboro, for appellants. Frank H. Rockwell, of Wellsboro, and Chester H. Ashton, of Knoxville, for appellees.

PER CURIAM. The findings of fact by the learned chancellor below are not assigned as error, and the decree is affirmed on the eighth and tenth.

Appeal dismissed, at appellants' costs.

(361 Pa. 496)

COMMONWEALTH v. DANTINE

(Supreme Court of Pennsylvania. June 3, 1918.)

1. ROBBERY — FELONIOUS TAKING.

"Robbery" is the felonious and forcible taking from person of another of goods or money to any value by violence or by putting in fear, and offense is complete if there is a taking in presence of although not from owner's person by putting in fear.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Robbery.]

2. HOMICIDE — §253(1) — MURDER IN FIRST DEGREE—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction of murder in the first degree.

Appeal from Court of Oyer and Terminer, Westmoreland County.

John Baptist Dantine was convicted of murder in the first degree, and he appeals. Affirmed, with direction that record be remitted for purpose of execution.

From the record it appeared that on the night of February 17, 1917, the dead body of Louise Delare, a woman 65 years of age, was found on the floor of an inclosed porch, just outside the kitchen door of her home at Jeannette, Pa. The deceased was badly beaten and had come to her death as the result of violence inflicted upon her body. At 3 o'clock on the afternoon of the same day, the decedent's son gave her \$70, which she put in a bureau drawer in the bedroom. The son then went to Pittsburgh and did not return home until late that night, when he found his mother dead, and the bedroom showing evidence of a violent struggle. The drawer in which the \$70 had been put had been forced open and the money taken. The defendant was arrested later the same night. The condition of his raincoat and trousers then indicated that they had been recently washed. There was blood on his raincoat, spectacles, and on his underwear. There were scratches on defendant and finger marks on the back of his raincoat.

There was evidence that on the evening of the murder defendant was in the washroom of a hotel in Jeannette washing his raincoat and trousers, that immediately thereafter he boarded a street car on which he several times displayed a roll of bills, stated that he had \$50, and paid a stranger's car fare. It appeared that the day of the commission of the crime was pay day at the plant at which defendant worked, and that he had received only \$2.50, and on the pay day of the previous week had been paid only \$9.25. A short time before February 16, 1917, he borrowed money from a friend stating that he was out of funds. He had not paid his board bill for months. The defendant admitted that he had committed the crime to officers in the lockup after his arrest and later in jail to his brother in the presence of a friend.

The jury found a verdict of guilty of murder of the first degree, upon which sentence of death was subsequently passed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKE, FRAZER, and WALLING, JJ.

James L. Kennedy, of Greensburg, for appellant. O. Ward Eicher and Nevin A. Cort, Dist. Atty., both of Greensburg, for the Commonwealth.

PER CURIAM. [1,2] The contention of the commonwealth on the trial of the prisoner was that he killed the deceased in the perpetration of, or the attempt to perpetrate, robbery, and that his offense was therefore

murder of the first degree under the statute. The jury found him guilty of that crime, and, on this appeal from the judgment pronounced against him, his main complaint is that the learned trial judge erred in defining "robbery" to the jury. While it is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear, the offense is complete if they are taken in the presence of the owner by violence or putting in fear. In other words, it is not necessary for the completion of the offense that they be taken from the person of the owner. 2 East, P. O. C. 16, § 124; 2 Roscoe's Criminal Evidence, 935; 2 Wharton's Criminal Law, § 1061; Trickett's Pennsylvania Criminal Law, 664; United States v. Jones, No. 15,494, 26 Fed. Cas. 653.

The first four assignments are dismissed. The ingredients necessary to constitute murder of the first degree having been proved to exist, the fifth assignment is overruled, and the judgment is affirmed, with direction that the record be remitted for the purpose of execution.

(261 Pa. 480)

In re WOOD'S ESTATE.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. WILLS ⇐686(2) — TESTAMENTARY TRUST — TERMINATION.

Where testator left property in trust to divide proceeds equally between two daughters, and one daughter died, the other who was sui juris was presently entitled to receive one-half the trust fund as the only person interested, notwithstanding the trust in terms was active.

2. WILLS ⇐687(2) — TESTAMENTARY TRUST — TERMINATION — DIVISION OF FUND.

Where will devised property in trust to divide proceeds equally between two daughters, the representatives of a deceased daughter were entitled to one-half of the trust estate, upon its termination by the surviving daughter.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Richard D. Wood, deceased. From a decree dismissing exceptions to an adjudication, George Wood, trustee, and R. Francis Wood, substituted trustee for Mary and Julia Wood under the will of testator, appeal. Affirmed.

The facts appear in the following opinion of Gest, J., sur exceptions to adjudication:

The testator by his will gave to his sons certain personal property and the proceeds of certain real estate to be held in trust by them for the use of his daughters, Mary and Julia, "the proceeds to be equally divided between them . . . and desire said trustees to pay them equally the net proceeds of the above-named property derived from dividends, rents and interest after payment of taxes and current repairs. And in case a majority of the said trustees deem it for the interest and safety of the property so bequeathed to Mary and Julia Wood and with their consent to sell any of the above mentioned trust property and invest it in the bonds of the United States, I understand

that in this devise that the said Mary and Julia Wood shall have power to dispose of equal portions of this estate so held for them in trust by will." Under this trust, the accountants took possession of the property and administered it for many years. Testator's daughter Mary is now deceased. His daughter Julia survives. Upon the audit of the trustees' account, filed because of the death of Mary, the auditing judge awarded one half of the trust fund to the legal representatives of Mary's estate, and the other half to Julia under her petition to have the trust terminated.

There are two sets of exceptions filed to the adjudication; the first relates to the trust for Julia Wood, and the second to that for Mary Wood. The first exceptions are dismissed by a divided court, the four judges who heard the argument being equally divided in their opinions; but we all agree that the second exceptions should be dismissed.

[1] As to the trust for Julia Wood: The auditing judge has concisely and accurately stated his reasons for finding that the cestui que trust is presently entitled to demand and receive the assets held for her. In addition to what has been said, we add that the principles that should govern this case are well set forth in Rodrigue's App., 22 Wkly. Notes Cas. 358, where there was a devise of real and personal estate to trustees, who were required to apply all the proceeds and profits thereof to the personal use of the testator's daughter and to her support and benefit from time to time as she may need and require when by her demanded in writing for herself and her children, but not to be applied or used otherwise. The Supreme Court said: "But the trustees have no functions except merely to apply all the proceeds and profits of the estate to the personal use of the appellant as she might require it. There is no limitation over of either the income or principal of the estate to any person. There are no other estates or interests to be preserved. It is not a spendthrift trust. It was not a trust for protection during coverture, as the appellant was a widow and not in contemplation of marriage. No ultimate purpose of any kind, requiring the continuance of the trust, is expressed in the will, or can be implied from its terms, except the mere payment of the income to the cestui que trust." Rodrigue's Estate has been followed in Marshall's Est., 30 Wkly. Notes Cas. 228; Audenried's Est., 4 Pa. Dist. Rep. 507; Keyser's Est., 6 Pa. D. R. 181.

It is not sufficient to show that the trust according to its terms is active. There must be something else to support the trust, and this is sufficient to distinguish the cases cited to support the contrary opinion. In Hemphill's Est., 180 Pa. 87, 88 Atl. 408, in Eshbach's Est., 197 Pa. 153, 46 Atl. 905, and in Mooney's Est., 206 Pa. 418, 54 Atl. 1094, there were remainder interests to be protected. In Shower's Est., 211 Pa. 297, 60 Atl. 789, the Supreme Court pointed out the purpose of the testator that the income should not be liable for the debts of the beneficiaries or subject to anticipation by them. Spring's Est., 216 Pa. 529, 66 Atl. 110, appears to have been decided on the discretionary powers vested in the trustees.

The principle that underlies this case is clearly that of Culbertson's App., 76 Pa. 145, holding that, where all parties in interest are sui juris, the trust may be ended by their agreement, and that Julia Wood is the only party in interest under this will is perfectly clear. The principle of Culbertson's Estate has been recently affirmed in Stafford's Est., 258 Pa. 595, 102 Atl. 222, where Mr. Justice Moschizker reviewed the authorities. As therefore Julia Wood is the only person having any interest in

the trust, we are of opinion that she is entitled to terminate the trust and receive it in her own right.

[2] As to the trust for Mary Wood, who is now deceased: As we have stated, we are all of opinion that the award to her personal representatives was correct. Millard's App., 87 Pa. 457. She was the only person interested, and the mere fact that she was given the power to dispose of the estate by will is an affirmation of the testator's intent that she should have control of the estate rather than a restriction upon her interest in it. Shallcross's Est., 13 Phila. 374.

The court dismissed the exceptions. George Wood, trustee, and R. Francis Wood, substituted trustee, appealed.

Argued before BROWN, O. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

James Wilson Bayard, of Philadelphia, for appellants. Owen J. Roberts and Conlen, Brinton & Acker, all of Philadelphia, for administrators of estate of Mary Wood, deceased. W. W. Montgomery, Jr., of Philadelphia, for appellee Julia Wood.

PER CURIAM. The decree in this case is affirmed, at the costs of the appellants, on the opinion of the learned court below dismissing the exceptions to the adjudication.

(261 Pa. 473)

HOFFMAN v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. EMINENT DOMAIN ⇨295—PROCEEDING TO FIX DAMAGES—DELAY IN PAYING AWARD—BURDEN OF PROOF.

In proceeding to fix damages caused by a city's taking of land, the burden is upon the city to show facts excusing its delay in making payment.

2. EMINENT DOMAIN ⇨302—DELAY IN PAYING AWARD—DAMAGES.

Where there was no showing that plaintiff, whose land had been condemned by city, had stubbornly refused to agree with city as to what it should pay him or was responsible for delay in payment, and where it did not appear on trial which party had appealed from award of view-ers, the owner was entitled to compensation for delay.

3. TRIAL ⇨296(2)—ERRONEOUS INSTRUCTION—CURE.

Error, in charge permitting finding, without evidence, that one whose property had been taken by city was responsible for delay in payment so as to defeat his right to compensation for such delay, was not cured by other correct instructions.

Appeal from Court of Common Pleas, Philadelphia County.

Proceedings by Benjamin Hoffman against the City of Philadelphia for damages sustained in the taking of lands for a park. Verdict for plaintiff for \$18,000 and judgment thereon, and he appeals. Reversed, with a venire facias de novo.

Argued before BROWN, O. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Edwin O. Lewis and J. Lee Patton, both of Philadelphia, for appellant. John P. Connelly, City Sol., Hubert J. Horan, Jr., and Glenn O. Mead, Asst. City Sols., all of Philadelphia, for appellee.

BROWN, O. J. The proceeding in the court below was an issue for the ascertainment of damages sustained by the plaintiff in the taking of his land by the city of Philadelphia for park purposes. On his appeal from the judgment on the verdict in his favor, his sole complaint is that the trial judge erred in instructing the jury as to his right to compensation for delay in paying him his damages.

[1, 2] The six assignments of error raise no other question. In his opinion refusing a new trial the learned trial judge comments on certain facts as having been sufficient to warrant a finding that the claim of the plaintiff was so excessive and unconscionable as to justify the defendant in refusing payment of it. This comment was inadvertently made, for the facts to which reference was thus made were not before the jury. Whether the instructions complained of were erroneous depended entirely upon what the facts were upon which the jury were to pass on plaintiff's claim to compensation for the delay in paying him for the damages he sustained, and we proceed to state them. The land was taken in 1910, and there was, of course, a finding by a jury of view in the first instance of the amount of damage the plaintiff had sustained. The issue in the common pleas followed an appeal from that finding, but it did not appear on the trial below whether the claimant or the city had appealed. In 1917—nearly seven years after the land had been taken—plaintiff's claim for damages was submitted to a jury in this issue. There was absolutely nothing before them to have justified a finding that, during this long delay, he had ever refused to name an amount he was willing to accept as compensation, or had ever made an unreasonable or exorbitant demand for the same, and the law did not presume such action on his part. He was not called as a witness in the case, and there was therefore nothing from him to indicate what sum he had claimed. True, his witnesses differed from those called by the city in their estimate of the damages sustained; but this was no ground for finding that the plaintiff's claim had been so excessive and unconscionable as to have justified the defendant in withholding payment from him. The case as presented to the jury on the question of his right to compensation for the delay in paying him cast the burden upon the city of showing the facts excusing its delay in paying him. But it did not assume that burden, and as there was absolutely nothing in the evidence to show that the plaintiff had stubbornly refused to come to

an agreement with the city as to what it should pay him, or that he was responsible in any way for the delay in paying him, he was entitled to compensation for the delay, and the jury should have been unqualifiedly so instructed. *Wayne v. Pennsylvania R. Co.*, 231 Pa. 512, 80 Atl. 1097; *Hoffman v. City of Philadelphia*, 250 Pa. 1, 95 Atl. 388.

[3] While the learned trial judge followed, in some portions of his charge, what has been distinctly ruled by the two foregoing cases, in others portions of it he departed from them and gave a license to the jury to find, in utter absence of anything to justify the finding, that the delay on the part of the city in paying was right and proper. In the extract from the charge which is the subject of the second assignment of error, the instruction was:

"Whether there has been a right and proper delay depends upon what you believe to be the facts of the case."

And, in the answer to the second and third points presented by the plaintiff, the further instruction as to compensation for delay was:

"But in fact he may not be so entitled. If he has disappointed the law and stubbornly refused to name an amount which he would be willing to accept as compensation, or in the same spirit has been extortionate in his demands and has named a sum exorbitant and unreasonable, a jury might well find that he has himself unjustifiably provoked the delay and deny him all damages therefor."

These erroneous instructions were not cured by others that were correct, for the jury may have found, under the license given them, that the plaintiff had himself to blame for not getting his damages promptly from the city. Such license ought not to have been given them; on the other hand, the instructions asked for by plaintiff's second and third points should have been unqualifiedly given.

The second and fourth assignments of error are sustained, and the judgment is reversed with a *venire facias de novo*.

(261 Pa. 484)

IN RE MASLOWSKI'S ESTATE.

(Supreme Court of Pennsylvania. June 8, 1918.)

1. APPEAL AND ERROR \S 77(2)—DECISION REVIEWABLE—INTERLOCUTORY ORDER—CONFIRMATION OF SALE.

An order directing an administrator to apply for an order of court to sell decedent's realty to pay debts is interlocutory, and an appeal to Supreme Court will be quashed.

2. EXECUTORS AND ADMINISTRATORS \S 375—ORDER TO SELL PROPERTY—CONFIRMATION—APPEAL.

If administrator sells realty of deceased for payment of debts pursuant to order of court, an appeal will lie from the confirmation thereof.

Appeal from Orphans' Court, Luzerne County.

Petition for order directing administrator to apply for leave to sell the realty of estate

of Rosalie Maslowski, deceased, for the payment of debts. From a decree granting the petition, Alexander Maslowski appeals. Appeal quashed without prejudice.

Argued before BROWN, C. J., and MOSCHZISKER, FRAZER, and WALLING, JJ.

Edmund G. Butler and Joseph P. Lord, both of Wilkes-Barre, for appellant. John McGahren and R. B. Alexander, both of Wilkes-Barre, for appellee.

BROWN, C. J. [1, 2] This appeal is from an order directing the appellant, as administrator of the estate of Rosalie Maslowski, to apply for an order of court to sell her real estate for the payment of debts. The order was merely interlocutory, and the appeal must therefore be quashed. *Snodgrass' Appeal*, 96 Pa. 420. If a sale should be made in pursuance of the said order or decree, an appeal will lie from the final confirmation of it, and the errors now justly, but prematurely, complained of will then be properly here for correction.

Appeal quashed, without prejudice to the appellant.

(261 Pa. 525)

IN RE DAVIES' ESTATE.

Appeal of BECKENBAUGH.

(Supreme Court of Pennsylvania. June 8, 1918.)

WILLS \S 717 — RELINQUISHMENT OF DEVISE.

Where testatrix devised her property equally to a son and two daughters, a paper thereafter executed by son during her lifetime, relinquishing all right in estate, in view of fact that testatrix made no change in will and verbally reaffirmed its provisions, was of no effect, and he was entitled to share equally in estate.

Appeal from Orphans' Court, Lackawanna County.

Exceptions by Margaret Beckenbaugh to adjudication in the estate of Mary I. Davies. From a decree dismissing the exceptions, the exceptant appeals. Appeal dismissed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Charles H. Soper, of Scranton, for appellant. John R. Edwards, of Scranton, for appellee.

PER CURIAM. The complaint of the appellant is of the refusal of the court below to give effect to a certain paper signed by her brother, the appellee, agreeing to relinquish all his right, title, and interest in their mother's estate. At the time he signed this paper she was living, and he had no interest in anything belonging to her to be released. But, aside from this, she chose to let her will stand thereafter as it had been executed, more than three years before, dividing her estate equally between her three children, the

appellant, the appellee, and a second daughter. She not only made no change in her will after her son had signed the said agreement, but, according to the testimony of the second daughter, testifying against her own interest, she said, with emphasis, about three weeks before her death, when spoken to about the agreement:

"Do you think I am going to deprive Ella-worth of the things that are coming to him? He has just as much right to the things here as you or Margaret."

The only possible conclusion of the court below was that the contention of the appellant was groundless in law and in fact, and her appeal is therefore dismissed at her costs.

(261 Pa. 450)

LIFTER v. EARLE CO.

(Supreme Court of Pennsylvania. June 8, 1918.)

APPEAL AND ERROR §80(1)—INTERLOCUTORY ORDER—DISMISSAL—TERMS.

Refusal to order receivers to pay rent in arrears and rent to accrue under lease of premises occupied by receivers was interlocutory, and appeal therefrom will be quashed without prejudice to lessor's claim to fund in hand of receivers.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for appointment of a receiver by Joseph J. Lifter, trading as the Lifter Ice Cream Company, against the Earle Company. Petition of Samuel Sternberger for order upon receivers for payment of rent denied, and from the decree petitioner appeals. Appeal quashed.

From the record it appeared that the receivers were appointed for the Earle Company on January 18, 1918; that they continued to occupy the premises 1019-21 Market street, in the city of Philadelphia, under a lease from Samuel Sternberger to the Earle Company; and that the rent due January 1, 1918, and thereafter was unpaid. Petitioner prayed for an order on the receivers for the payment of rent in arrear and for the further payment of rent as it should accrue under the terms of the lease.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

George P. Rich, of Philadelphia, for appellant. Morris Wolf, Gordon A. Block, and Horace Stern, all of Philadelphia, for appellee.

PER CURIAM. The decree in this case was interlocutory, and the appeal from it is therefore quashed, at appellant's costs, without prejudice to his right to present his claim for rent as a preferred one upon distribution of the funds in the hands of the receiver.

(261 Pa. 410)

KNECHT v. KNECHT.

(Supreme Court of Pennsylvania. June 8, 1918.)

1. APPEAL AND ERROR §171(1)—REVIEW—THEORY OF CASE BELOW.

In assumpsit for money had and received, where verdict indicated that contract or understanding of parties was as testified to by plaintiff, and case was tried on that assumption, Supreme Court could not be asked to review action upon different theory.

2. HUSBAND AND WIFE §4—SUPPORT.

If finding that common-law marriage existed between parties was warranted by facts, husband was liable for wife's maintenance and support.

3. MARRIAGE §50(5)—COMMON-LAW MARRIAGE—EVIDENCE.

Evidence as to cohabitation and reputation held sufficient to raise a presumption of marriage, and to show that an agreement to marry, if made, was fully carried out.

4. MARRIAGE §40(4)—COMMON-LAW MARRIAGE—PROOF.

That the relations between a man and woman were meretricious in the beginning will not prevent establishment of a subsequent common-law marriage.

5. MARRIAGE §40(4) — PRESUMPTION — CONTINUANCE OF ILLICIT RELATIONS.

The presumption that an illicit relation between a man and woman continues until a change in the relation is actually proved fails, in the face of positive evidence of marriage overcoming the presumption.

6. MARRIAGE §50(5)—COMMON-LAW MARRIAGE—PROOF.

A common-law marriage may be shown by evidence that parties entered into a contract to live as man and wife, and continued thereunder for a period of seven years, and by a showing that they were commonly known as husband and wife.

7. MARRIAGE §51 — COMMON-LAW MARRIAGE—QUESTION FOR JURY.

In action by alleged common-law wife against husband, held, on the evidence, that whether a valid contract of marriage existed was for the jury.

Appeal from Court of Common Pleas, Berks County.

Assumpsit by S. Kathryn Knecht against Elmer Knecht. Verdict for plaintiff for \$1,747.80 and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

W. B. Bechtel and Earle I. Koch, both of Reading, for appellant. Paul N. Schaeffer, of Reading, for appellee.

FRAZER, J. Plaintiff avers she is the common-law wife of defendant, and sues in assumpsit to recover money she claims to have given defendant from time to time out of her earnings, under agreement to deposit in bank in their joint names, that the fund so deposited might be drawn by plaintiff at her pleasure. Defendant denied such agreement, as well as averment of marriage, and testified to an understanding that plaintiff should pay her expenses and that the money

should be used for that purpose, she to receive only the balance of the fund. This version of the agreement was denied by plaintiff, who, to corroborate her testimony, and show liability on the part of defendant to support her without deduction from her earnings, offered evidence to establish a common-law marriage. The terms of the contract, if any, between the parties, and whether a marriage actually took place, were submitted to the jury, who returned a verdict for plaintiff, and from judgment entered thereon defendant appealed.

[1] No denial is made that a considerable sum of money was paid over to defendant by plaintiff. In fact, he admits receiving the sum of \$1,283.55, but avers he paid out on plaintiff's account more than the amount received, and that there remained after deducting such payments a balance due him. The evidence as to the terms of the contract between the parties depended entirely upon their individual testimony, which, being conflicting, was necessarily a question for the jury. The verdict indicates the jurors found the contract to be as testified to by plaintiff. Defendant denies a marriage between himself and plaintiff, and sets off against plaintiff's claim the amount of money expended by him on her behalf. The case was tried by defendant, however, on the theory of an express contract, whereby plaintiff agreed to pay her personal living expenses, and upon a settlement of their account any balance remaining in his hands should be returned to her. The verdict of the jury indicates the contract or understanding of the parties was as testified to by plaintiff, and, the case having been tried on this assumption, this court cannot now be asked to review the action on a theory different from that upon which it was presented to the court below. *Richardson v. Flower*, 248 Pa. 35, 93 Atl. 777, Ann. Cas. 1916E, 1088; *Armstrong & Latta v. Philadelphia*, 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917B, 1082; *Weiskircher v. Connelly*, 256 Pa. 387, 100 Atl. 965.

[2, 3] The contention of defendant is also refuted by the finding of the jury that a common-law marriage existed between the parties; if such finding is warranted by the facts, defendant's set-off is invalid, for the reason he was liable for the maintenance and support of his wife, and could not seek reimbursement for such expenditures as a set-off against her claim to recover her separate earnings intrusted to his care. There is little dispute in the testimony concerning the relations between the parties, with the single exception as to what took place at the time the alleged marriage was contracted. Defendant and plaintiff first met in 1905, and it is not denied that from that time until August, 1908, there were frequent instances of improper intercourse between them. Plaintiff testified that at the request of defendant they came to Philadelphia in August, 1908, to be married. No actual ceremony,

however, was performed by either a clergyman or magistrate. They remained at a hotel the night of their arrival in the city, and on the following day visited the home of defendant's sister, where plaintiff was introduced by defendant as his wife. As to the agreement to marry plaintiff testified:

"After he told her [his sister] we were married, we just had the ordinary conversation, after he had told her we were married and I was his wife. After that we left, and coming up on the train to Reading we agreed to be married, and would live together as man and wife. * * * Q. What else did he say, if anything? A. He said we were mated by God, and not by the people, and that we were married just as well as if we were married by all the ministers in the world. Q. What did you say to that? A. I agreed to the same thing, we would live together as man and wife. Q. Was that on the train coming back? A. Yes, sir. Q. And you agreed to live together then? A. Yes, sir; and so did he."

Upon their return to Reading plaintiff went to her home and defendant to Ashland, Pa., where he was employed at the time, and continued to work there until the following February, frequently visiting plaintiff at her boarding house in Reading, where they were known as husband and wife. Defendant returned to Reading in February, 1909, and took up his residence with plaintiff, and from that time until April, 1916, a period of seven years with the exception of about a year, when employed in other parts of the county, they lived and cohabited together as man and wife, were known as such to their relatives and friends, and to the pastor of the church they attended, and by whom their child was baptized, and when absent from home defendant frequently wrote to plaintiff, addressing her as Mrs. Elmer R. Knecht.

[4-6] There is no doubt of the sufficiency of the evidence as to cohabitation and reputation to raise a presumption of marriage, and to show the agreement, if made, was fully carried out. Defendant contends, however, that the presumption arising from cohabitation and reputation is rebutted in this case by evidence showing the relation between the parties was illicit in its commencement, and consequently such relation will be presumed to have continued until a change of the situation is actually proved—citing *Hunt's Appeal*, 86 Pa. 294; *Tholey's Appeal*, 93 Pa. 36; *Reading Fire Ins. & Trust Co.'s Appeal*, 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448; *Grimm's Estate*, 131 Pa. 199, 18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. Rep. 796. It does not appear, however, that this is a case where the beginning of the cohabitation was meretricious. While it is admitted there was frequent illicit relation between the parties previous to the marriage agreement testified to by plaintiff, such relation took place not under the guise of marriage but before cohabitation as man and wife began and while they were living apart from each other. In this respect the case is

distinguishable from the cases cited above. In Hunt's Appeal cohabitation began while the man had a wife living from whom he had not been divorced and for this reason a valid contract of marriage between the parties was impossible and the court found that, during the period intervening between the date of the decree for divorce and his death, decedent continued to reside with the claimant without a marriage being solemnized, nor does the report of the case show evidence of an agreement to marry. In Tholey's Appeal, in place of an actual marriage, there was merely evidence of a statement by deceased that he would claim plaintiff as his wife and take care of her and the child. In Reading Fire Ins. & Trust Co.'s Appeal, the relation between the parties was illicit in its inception, and, as this court points out in the opinion, the plaintiff did not testify she was married, or that there was an agreement between herself and deceased under which they lived together as husband and wife. In Grimm's Estate, the evidence was to the effect that the parties cohabited as man and wife, and the marriage ceremony which they intended to have performed in the future was prevented by the man's death.

Admitting the cohabitation was meretricious in the beginning, that situation will not help appellant. It can hardly be contended a man and woman living together in illicit relations cannot subsequently marry. In McCausland's Estate, 213 Pa. 189, 62 Atl. 780, 110 Am. St. Rep. 540, this court held, where the father and mother of a child, who had been living together, agreed, six weeks after the birth of the child to become husband and wife, and thereafter continued to live together as man and wife, holding themselves out to the world as such, the contract of marriage was valid. The rule of presumption has no force in the face of positive evidence of marriage, except that the evidence shall be sufficient to overcome the presumption. In Thewlis' Estate, 217 Pa. 307, 66 Atl. 519, it was held a presumption of continuance of an illicit relation gives way to a superior presumption in favor of compliance with the law under the following circumstances: A husband, who deserted his wife in England, came to this country and remarried here, which marriage was void by reason of the fact that his first wife was living at the time, and, after the decease of the latter, the person whom he had married in this country was recognized as his wife until the time of his death. There was, however, no repetition of the marriage ceremony, or evidence of a formal contract or understanding between them. It was said in an opinion of the lower court, affirmed by this court (217 Pa. 309, 66 Atl. 519):

"That marriage may be established by long-continued cohabitation and reputation is too well settled to require citation of authority. See *Richard v. Brehm*, 73 Pa. 140 [13 Am. Rep.

733]. And while there is a presumption of continuance as to a relation illicit in its inception, under such circumstances as existed in Hunt's Appeal, 86 Pa. 294, where the interval during which it might have become lawful was but two months (December 13, 1873, to February 16, 1874, or in Grimm's Estate, 131 Pa. 199 [18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. Rep. 796], where it was but one week), the doctrine of those cases is not to be extended to one like the present, where in good faith the parties continue to live together as husband and wife, after the complete removal of the only obstacle in the way of a valid marriage, and so for many years continuously proclaim themselves to the public, until the relation ceases by the husband's death. The presumption of continuance of an illicit relation, under such circumstances, gives way to the superior presumption in favor of compliance with the requirements of the law, of morality, and of common decency. See *Greenleaf on Evidence*, § 41; *Bergdoll's Estate*, 7 Pa. Dist. Rep. 137."

[7] The agreement as testified to by the plaintiff in this case and believed by the jury, was sufficient (under the above cases) to constitute a valid agreement to live together as man and wife, and, when carried out by the parties for a period of over seven years, the court cannot say, as matter of law, that no valid contract of marriage in fact existed.

The judgment is affirmed.

(361 Pa. 489)

KELLER v. LAWSON.

(Supreme Court of Pennsylvania. June 8, 1918.)

1. WILLS §318(3) — TESTAMENTARY CAPACITY—VERDICT.

On a trial of an issue devisavit vel non, the trial judge sits as a chancellor, and is not bound by the verdict, and should not sustain it when against the manifest weight of evidence.

2. WILLS §423—FINAL JUDGMENT—CONCLUSIVENESS.

When final judgment is entered on a verdict on an issue devisavit vel non, the orphans' court is concluded thereby.

3. WILLS §318(3)—TESTAMENTARY INCAPACITY—SUFFICIENCY OF EVIDENCE.

On an issue devisavit vel non, the jury's finding of testamentary incapacity, held against the weight of the evidence, and should have been set aside by the chancellor.

4. WILLS §318(3)—DEVISAVIT VEL NON—EVIDENCE.

On an issue devisavit vel non, the court sits as a chancellor, and must consider the entire evidence, and the question is not whether some of the testimony standing alone would justify the verdict, but whether it would when considered as a whole.

5. WILLS §52(1)—TESTAMENTARY CAPACITY—PRESUMPTION.

There is a presumption of testamentary capacity.

Appeal from Court of Common Pleas, Luzerne County.

Issue of devisavit vel non by Child Keller against Blanche Lawson. From a judgment on a verdict for defendant, on the ground of testamentary incapacity, plaintiff appeals. Reversed, and issue directed to be set aside

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, and WALLING, JJ.

J. Q. Creveling and D. L. Creveling, both of Wilkes-Barre, for appellant. W. Alfred Valentine and T. B. Miller, both of Wilkes-Barre, for appellee.

WALLING, J. This appeal is from judgment entered upon a verdict for contestant in an issue devisavit vel non. Susan Mack died January 17, 1914, leaving two married daughters, who are the parties to this suit. The paper writing admitted to probate as her last will is as follows:

"I, Susan Mack, of Larksville, make and publish this my last will and testament. It is my will that my entire estate real and personal be given to my daughter, Chid Keller, absolutely. I appoint my said daughter, Chid Keller, to be executrix of this my last will and testament. In witness whereof, I have hereunto set my hand and seal this thirteenth day of August, A. D. 1913. Susan X Mack. [Seal.]
her mark

"In presence of:
"J. W. Price,
"Horace J. Smith."

[1-3] From the probate thereof, the other daughter, Blanche Lawson, took an appeal to the orphans' court, where an issue was awarded to determine the questions of testamentary capacity and undue influence. The jury resolved the latter question in favor of Chid Keller, the proponent, but found the will invalid for lack of mental capacity to make it. This appeal by proponent is from judgment entered on the verdict. In such case the trial judge sits as a chancellor and is not bound by the verdict, nor should he sustain it when against the manifest weight of evidence. However, when final judgment is entered on the verdict, the orphans' court is concluded thereby. *Union Trust Co. v. People's Trust Co.*, 254 Pa. 385, 390, 98 Atl. 1062. The trial judge fell into error in treating it as advisory only to the orphans' court; this may have influenced his decision. In our opinion the verdict cannot be sustained. While there is some conflict in the evidence, that for contestant is not sufficient to overcome the presumption of testamentary capacity, supported as it is by clear and abundant affirmative evidence.

Mrs. Mack, who was possessed of an estate of about \$30,000 and had been a woman of strong physical and mental vigor, suffered such a stroke of paralysis about 5 years prior to her death as to render her thereafter crippled and practically bedfast. The paralysis was of the left side, and later the right side also became partially disabled. Mrs. Mack lived to the age of 73 years, the last 26 of which Mr. and Mrs. Keller lived with her as one family in a home which she owned. She was a widow, and they nursed and cared for her during the long illness above mentioned. The other daughter, Mrs. Lawson, was married and lived away, and, when the will in question was made, was temporarily estranged from her hus-

band and children and living in a manner highly displeasing to her mother. Then, according to the evidence for proponent, Mrs. Mack decided to change her will and sent directions to her attorney, who in accordance therewith drew the will here in question and sent it to the testatrix, to whom it was read and reread in presence of witnesses. She expressed satisfaction therewith and sent for her pastor and a neighbor as witnesses to its execution. They came, the matter was talked over, she said in substance that she knew the nature of the paper and the effect of its execution, and that it was her will. They signed their names as witnesses, and, owing to her physical inability and at her request, the minister wrote her name, and she then affixed her mark. The neighbor remained and she explained to him fully why she had given the property to Mrs. Keller and why she had given nothing to Mrs. Lawson. He had known her for 30 years, frequently visited and conversed with her, and as a subscribing witness expresses the opinion that she was then of sound mind, memory, and understanding. The minister (the other subscribing witness) who visited her two or three times a week during the years 1911, 1912, and 1913, and was in the habit of conversing with her, expresses his judgment that her mind was clear and sound and that she knew the nature and value of her property and fully about the will. His testimony is unequivocal and emphatic. To like effect is the testimony of Mrs. Avery, a neighbor, who was there just before the will was executed and heard it read to Mrs. Mack, and also that of the three ladies from the lodge who came and spent the next evening with her in honor of her birthday and conversed with her for over two hours on various subjects; also, that of the dressmaker who did work in the home earlier in the season, and of others who conversed with her near the end of that year. They all knew her well, and their evidence is that the testatrix could and did converse intelligently and was of good mind. To different witnesses Mrs. Mack expressed satisfaction at the disposition she had made of her property and clearly indicated that she understood the will. True, the paralysis had affected her speech and rendered conversation with her somewhat difficult; but the evidence is that she did talk intelligently with the witnesses mentioned, and with others. Then there is the family doctor, who knew her intimately and had been her physician for 37 years and was in the habit of talking with her and who visited her professionally in July, August, and December, 1913, and he says her mind was normal and that she was thoroughly capable of knowing what she wanted to do, but that she could not articulate well. All the testimony to which we have referred is affirmative in character, comes from disinterested witnesses, familiar with the matters about

which they speak, and is seemingly credible and convincing. To like import is the testimony of Mr. and Mrs. Keller and their daughter. They, however, took an active part in procuring the making and execution of the will, and at the trial assumed the burden of disproving any undue influence on their part and did so to the satisfaction of the jury, who found for Mrs. Keller on that issue.

Testimony submitted for contestant included, *inter alia*, that of Mrs. Mack's sister, Mrs. Morrish, and her two sons, tending to show that the testatrix had suffered from paralysis for 15 years, and that when the will was made she was entirely paralyzed, except a slight use of her right hand; that they saw her often and tried to converse with her and were unable to do so; that she was in a state of partial coma and had at times a vacant look and was difficult to arouse; that her memory was exceedingly defective and she could not keep a secret; that it was with difficulty she recognized her relatives; and that she was very childish, grew worse, and in their opinion was unable to make a will or do any business. This found some corroboration in evidence of other witnesses, but the majority of the testimony of contestant's other lay witnesses was of dubious import and of slight value. In addition, three doctors, who never saw Mrs. Mack, were called as experts and answered hypothetical questions. The expert evidence indicates that paralysis usually results from a brain lesion and tends to break down the tissue and to weaken and sometimes destroy the mind, and that it is apt to progress. Doubtless this is true, yet it is common knowledge that people so afflicted do transact business. There is no evidence that Mrs. Mack was insane or had any delusions, and the facts testified to by contestant's witnesses are by no means conclusive of her inability to make a will. We do not know why she did not or could not converse with her sister and the sister's sons, but undoubtedly she did converse with so many other people as to establish her ability to do so. Certainly a verdict that she could not converse would be against the manifest weight of the evidence. Near the end, her eyesight became very poor, which may account for her seeming inability to recognize people. However, the weight of the evidence is that she did even then recognize acquaintances. The other infirmities to which reference is made, such as forgetfulness, etc., are not uncommon to old age. There was great physical weakness, which might easily be confounded with mental incapacity. Like most invalids, she was doubtless better some days than others. While such a person might often seem to comprehend less than she actually did, she would not be likely to seem to comprehend more. There is nothing

in the disposition made of the property or on the face of the will that tends to impeach it, and it is supported by abundant affirmative evidence.

[4] Here the court sits as a chancellor and must consider the entire evidence, and the question is not whether some of the testimony, standing alone, would justify the verdict, but whether it would be considered as a whole. See *Kane's Est.*, 206 Pa. 204, 207, 55 Atl. 917; *Roberts v. Clemens*, 202 Pa. 198, 51 Atl. 758; *Mulholland's Est.*, 217 Pa. 65, 66 Atl. 150; *Draper's Est.*, 215 Pa. 314, 64 Atl. 520; *Eddey's App.*, 109 Pa. 406, 1 Atl. 425; *Phillips' Est.*, 244 Pa. 85, 90 Atl. 457; *Hersperger's Est.*, 245 Pa. 569, 91 Atl. 942.

[5] Starting with the presumption of testamentary capacity and considering the entire case, the verdict is so decidedly against the manifest weight of the evidence that it cannot stand. See *Shreiner v. Shreiner*, 178 Pa. 57, 35 Atl. 974; *Englert v. Englert*, 198 Pa. 326, 47 Atl. 940, 82 Am. St. Rep. 808. The jury having found there was no undue influence, the court should have entered judgment for the proponent (plaintiff in the issue) non obstante verdicto.

It is not necessary to consider the other questions presented in the record.

Judgment reversed, and issue directed to be set aside; costs to be paid by appellee.

(261 Pa. 447)

CAZZULO v. HOLSCHER et al.

(Supreme Court of Pennsylvania. June 3, 1918.)

NEGLIGENCE — §66(2) — CONTRIBUTORY NEGLIGENCE — DISREGARDING WARNINGS.

In action for death of plaintiff's husband, in employ of one contractor, by fall of a large stone, placed by another contractor, under which deceased was working, deceased was guilty of contributory negligence, where he had been warned not to work under the stone until the mortar should dry.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Caterina Cazzulo against Peter Holscher and Joseph Holscher, copartners trading as Peter Holscher & Son. Judgment for plaintiff, and defendants appeal. Reversed, and judgment rendered for defendants.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Maurice W. Sloan, of Philadelphia, for appellants. William A. Gray, of Philadelphia, for appellee.

BROWN, C. J. Stephano Cazzulo, the husband of the appellee, was a stone carver in the employ of Tongnarelli & Voigt Company. The appellants, Peter Holscher & Son, were stone setters, and had a contract for the setting of stone in the erection of an armory building at Thirty-Second street and

Lancaster avenue, in the city of Philadelphia. On May 29, 1916, they were setting the last two courses, and immediately under them Cazzulo was standing on a scaffold to carve an eagle on one of the stones. While he was thus working, the stones above him, which had just been set in place by the appellants, fell and struck him, and his instant death resulted. In this action, brought by his widow, the questions of the negligence of the defendants and the contributory negligence of the deceased were submitted to the jury, whose verdict was for the plaintiff. From the judgment on it the defendants have appealed.

The work of the defendants was to set stones; that of the deceased, as an employé of another firm or company, was to do carving work on them after they had been set. The relation of employé and employer between the deceased and the defendants did not exist. On the trial of the case the defendants offered no testimony. From that offered by the plaintiff it did not appear in what respect the defendants had been negligent in setting the stones which fell. There was nothing before the jury except the mere happening of the accident; but, even if this brought the case within the rule that, when the thing which causes the injury is shown to be under the management of the defendants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care, the court ought to have declared as a matter of law that the deceased had been guilty of contributory negligence, barring a recovery by his widow.

George Wilson, called as a witness by the plaintiff, testified that he saw the stones being set immediately before they fell; that he saw and heard the deceased and another carver on the scaffold, carving stones immediately beneath those which fell upon them; and he further stated that one of the defendants, who had charge of the setting of the stones, warned the deceased not to work under them while they were freshly set and before the top stones had been put in place. His testimony was:

"Q. Cazzulo, the man that was killed, he was working underneath this freshly cut stone, chiseling at the eagle, wasn't he? A. He was working under there. Q. With hammer and chisel, hammering on it? A. I guess so. I was on the roof. Q. You know he was there and that is what he was doing? A. Yes. Q. You heard the hammer hitting? A. Yes, I heard it. Q. You know he was working on the eagle? A. Yes, sir. Q. His duty was carving out the eagle? A. Yes. Q. That is what he was doing underneath there? A. Yes. Q. Did you hear Mr. Holscher tell him not to work under there while the stone was freshly set and before they got the top stone on? A. I heard him tell him that, that morning. Q. You heard him tell him that morning not to work there;

that it was dangerous? him that morning. Q. An- ous to work there? A. I he would not work there; underneath that place. Q him not to work there; that place? A. Yea."

This testimony, coming tiff's own witnesses, with any other witness called it in the slightest degree, ed to the jury discloses lligence of her husband in at a place of danger aft not to do so by the ma stones immediately abov was lawfully at his work and who knew the dange them before they becar their places, duly warne this danger; but the war and the risk was assume of just what did happel as presented to the jury, tory negligence on the p nate husband, and for hi ants are therefore not a they were guilty of neglig Butler v. Gettysburg & B Company, 126 Pa. 160, 18 Erie City, 151 Pa. 880, 2 v. Pennsylvania Light & P Pa. 640, 69 Atl. 282; Tol Rapid Transit Company, 1017.

The first and second as are sustained, the judg and is here entered for the

LOEB v. DAVIDSON

(Supreme Court of Penn 1918.)

1. VENDOR AND PURCHASER'S RIGHT TO RECOVER PURCHASE PRICE ON FAILURE OF CONTRACT TO RECOVER PURCHASE PRICE.

In action for money paid of property with buildings t erection, which plaintiff rel ground of deviation from sp by building laws of city of that whether there was a su from specifications was for

2. EVIDENCE — 552 — EXPERT TESTIMONY.

The usual practice is to timony in the form of ansve questions, which the witness testimony assumes to be tr

3. EVIDENCE — 548 — EXPERT TESTIMONY — RESULT OF EXAMINATION.

An expert who frequent personally examine subject such as compliance with spe ing contract, and who ma building and of specification sult of such examination, w a hypothetical question.

4. APPEAL AND ERROR — QUESTIONS INVOLVED.

Questions attempted to signments of error which s

statement of questions involved will not be considered by Supreme Court.

Appeal from Court of Common Pleas, Philadelphia County.

Rule to open judgment entered by Oscar D. Loeb against Louis Davidson and another upon a bond. Judgment opened, and on issue framed there was judgment for defendants. Motion for new trial denied, and plaintiff appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHZISKER, FRAZER, and WALLING, JJ.

Daniel W. Simkins, of Philadelphia, for appellant. Edward Hopkinson, Jr., of Philadelphia, for appellees.

FRAZER, J. Plaintiff entered into an agreement in writing August 11, 1915, to purchase from defendants certain property "with the buildings thereon now in course of erection," the latter agreeing to complete the houses within three months from date "according to plans and specifications" with a promise to pay \$5 a day as liquidated damages for delay beyond the time specified. The contract also provided that—

"Minor and unintentional deviations from the plans and specifications shall not abrogate this agreement but shall be the subject of allowance to the vendee if the value of the building is thereby depreciated."

Plaintiff paid \$2,000 on account of the purchase price, which sum, the contract provided, might be forfeited as liquidated damages if he failed to effect a settlement. At the time the contract was signed, the building was practically finished on the outside, the roof was on, and the floors laid. The building not being completed within the time stipulated, nor strictly in accord with the plans and specifications, plaintiff subsequently refused to pay the balance of the purchase money, and, to recover the sum already paid, entered judgment on the bond given by defendants to secure its completion in accordance with the agreement. The judgment was subsequently opened and issue framed to determine "whether Oscar D. Loeb is entitled to recover the sum of \$2,000 with interest." The trial resulted in a verdict for defendants; a motion for a new trial was refused, and judgment entered for defendants. Plaintiff appealed.

[1] The question before the jury was, not the extent of an allowance, if any, plaintiff was entitled to receive by reason of deviations from the plans and specifications or by reason of delay in completion, but solely whether the departure from the specifications was intentional or so material as to justify plaintiff in refusing to complete the purchase. The testimony is conflicting, and the question was necessarily one for the jury to whom it was submitted with instruction that, if the variations were material, plaintiff would be entitled to recover the money paid, but, if the defects were merely

minor matters, the contract provided a way in which they could be adjusted.

The departure from the specifications upon which plaintiff appears to lay most stress is the fact that in erecting the brick walls the "headers" were made every tenth course instead of every seventh as required by Act of May 5, 1899, P. L. 193, regulating the erection of buildings within the city of Philadelphia. The specifications required the building laws of the city of Philadelphia to be carefully observed. The city building inspector called by defendants testified he observed the building regularly during the course of construction and gave as a reason for making a header every ten courses, instead of every seven, that, the bricks used on the inside of the wall being of greater thickness than the outer brick, the two layers consequently did not reach the same level in the seventh course, and to avoid a split the headers were laid on every tenth course in accordance with the general practice in the city of Philadelphia, which not only made a better wall but was approved by him as building inspector for the city. Under this testimony the court could not say, as matter of law, there was in this respect a substantial departure from the specifications. Numerous other instances of departure from the specifications are referred to in the testimony and discussed by counsel, most of them, however, of a minor character and none of such importance as to justify the legal conclusion that the contract was not substantially performed.

[2, 3] Plaintiff also complains of the action of the trial judge in permitting expert witnesses for defendants to state whether in their opinion there had been a substantial performance of the contract in compliance with the plans and specifications, the objection not being to the competency of the witnesses testifying as experts on the subject-matter of the inquiry, but on the ground the answers of the witnesses were not based upon a hypothetical statement of the facts. While the usual practice is to receive the testimony of an expert in the form of answers to hypothetical questions which he, for the purpose of his testimony, assumes to be true, an expert frequently has occasion to personally examine the subject-matter of the inquiry; a familiar example being in the cases of physical ailments or injury, in which case he is permitted to testify to the result of his examination. Each expert offered by defendant made a personal examination of the building, together with plans and specifications, and an objection that they should not be permitted to testify as the result of such examination without the use of a hypothetical question cannot be sustained. Wigmore on Ev. vol. 1, § 875; Greenleaf on Ev. (16th Ed.) § 441.

[4] The remaining assignments of error are to portions of the charge. The charge

as a whole is substantially free from error, and the questions attempted to be raised are not included in the statement of questions involved, and for that reason need not be considered.

The judgment is affirmed.

(361 Pa. 409)

COMMONWEALTH ex rel. MAXEY, Dist. Atty., v. ZALEWSKI.

(Supreme Court of Pennsylvania. June 8, 1918.)

MUNICIPAL CORPORATIONS §144—OATH OF COUNCILMAN—DIRECTORY STATUTE—"MAY."

Borough Act May 14, 1915, c. 7, art. 1, § 2, designating a judge, justice of the peace of county, or burgess of borough, when qualified, as the officer before whom borough councilman's oath of office "may" be taken, is directory, and the oath may be taken before a notary public, under Act Aug. 14, 1864.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

Appeal from Court of Common Pleas, Lackawanna County.

Suggestion for writ of quo warranto by the Commonwealth, on relation of George W. Maxey, District Attorney, against Joseph Zalewski. From a judgment sustaining defendant's demurrer, and refusing a judgment of ouster, relator appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKE, and WALLING, JJ.

A. A. Vosburg, of Scranton, for appellant. M. J. Martin and Ralph W. Rymer, both of Scranton, for appellee.

BROWN, C. J. This proceeding was instituted to oust the appellee from his office as councilman of Dickson City borough, on the ground that he had taken his oath of office before a notary public. Section 2, article 1, chapter 7 of the Act of May 14, 1915 (P. L. 812), provides that:

"Before entering upon the duties of their office, the councilmen shall take and subscribe an oath or affirmation to support the Constitution of the United States, and of the commonwealth of Pennsylvania, and to perform the duties of their office with fidelity. The oath or affirmation may be taken before any judge or justice of the peace of the county, or before the burgess of the borough, when he is qualified, and shall be entered upon or filed among the records of the borough."

Before entering upon his duties the appellee took the oath so prescribed, and the notary public who administered it to him had power to administer an oath, "as fully, to all intents and purposes whatsoever, as any judge of the Supreme Court, or president, or associate judge, of any of the courts of common pleas, or any alderman, or justice of the peace, within this commonwealth." Act Aug. 10, 1864 (P. L. 962). The provision in the act of 1915 that the councilmanic oath of office "may be taken" before a judge, justice of the peace, or burgess is merely direc-

tory or permissive, and not mandatory, as it would be if the word "shall" had been used, instead of "may," and the learned president judge of the court below correctly so held.

Judgment affirmed.

(361 Pa. 507)

COMMONWEALTH v. BALANZO.

(Supreme Court of Pennsylvania. June 8, 1918.)

1. HOMICIDE §255(2) — MANSLAUGHTER — EVIDENCE—KILLING POLICEMAN.

On trial for murder, a conviction of voluntary manslaughter will be sustained, where it appeared that defendant killed a police officer in uniform while the latter was subjecting him to a search for weapons without a warrant on a public street late at night.

2. WITNESSES §269(4) — CROSS-EXAMINATION—DYING DECLARATIONS.

Where no dying declaration was offered in evidence, and only incoherent utterances by deceased were shown, it was not error to exclude cross-examination as to what attending physicians said to deceased.

3. CRIMINAL LAW §751—WITHDRAWAL OF JUROR—REMARKS OF ATTORNEY.

Where district attorney, in making an offer as to rebuttal evidence, stated that the story of one of defendant's witnesses was "cooked up," and "that defendant was telling his story the way his attorneys wanted him to tell it," it was not error to refuse to withdraw a juror, especially where certain of the remarks were not excepted to and the others the court directed the jury to disregard.

4. HOMICIDE §109—KILLING POLICE OFFICER—UNWARRANTED SEARCH.

A mere attempted search for weapons on defendant by a police officer without a warrant, without more, would not excuse killing the officer.

5. HOMICIDE §116(4)—SELF-DEFENSE—REASONABLE APPREHENSION OF DANGER.

Reasonable apprehension of danger to life, which would justify the killing of a police officer, where the danger turns out to be apparent only, and not actual must have a reasonable basis on which to rest before the taking of human life would be warranted thereby.

Appeal from Court of Oyer and Terminer, Beaver County.

Emil Balanzo was convicted of voluntary manslaughter, and appeals. Affirmed.

From the record it appeared that defendant, Emil Balanzo, in company with four other men, was walking along a public street in the borough of Midland, Beaver county, about midnight on May 12, 1917. They met Michael T. Ford and Edward McKay, two police officers of the said borough, on duty. Ford wore the full uniform of a police officer, but McKay was in plain clothes. The prisoner and the men in company with him, on the approach of the officers, started to scatter. The officers then commanded defendant and the others to stop and to submit to a search. The men in company with the defendant stopped and were searched, but the prisoner attempted to get away. Ford followed defendant and was in the act of turning him around, preparatory to making a

search for concealed weapons, when defendant drew a revolver and fired five shots at him, one of which passed through his chest, one through his abdomen, and one through the ball of his foot. Ford died about nine hours later in a hospital.

On the trial no dying declaration of the deceased was offered in evidence; the only evidence as to what he said being that while in the hospital he made certain incoherent utterances. The trial judge sustained an objection to the question put to one of the commonwealth's witnesses, on cross-examination, as to what statement the doctors made to the deceased in the hospital. On the trial the district attorney exhibited deceased's coat to the jury, stating "this is the place where the bullet came out" (indicating). Later during the trial he stated that the story of one of defendant's witnesses was "cooked up," and at another time that "defendant was telling his story the way his attorneys wanted him to tell it." The court directed the jury to disregard the first and last mentioned utterances, and ruled that the reference to the testimony of defendant's witness as "cooked up" was not improper, as it was made by the district attorney in addressing the court in reference to what he intended to prove in rebuttal, and no exception to such ruling was taken at the time.

Defendant's fifth point for charge and the court's answer thereto were as follows:

"There is no evidence in this case that the deceased and his fellow officer had a weapon on his person and it being admitted that there was no warrant against the prisoner or any of his companions the attempted search of the prisoner for weapons was an unlawful act upon the part of the deceased and his fellow officer.

"Answer: Affirmed. Nevertheless a mere attempted search, without more, would not justify or excuse the killing of the officer. One is not warranted in taking human life to repel or redress a wrong of small magnitude."

Defendant's sixth point for charge and the court's answer thereto were as follows:

"If the prisoner and his companions were walking quietly and peaceably along the public street, the deceased and his fellow officer had no legal right to stop them and search them without a warrant, and in so doing the deceased and his fellow officer were guilty of an unlawful act.

"Answer: Affirmed. Nevertheless, so doing, without more, would not justify or excuse the killing of Michael T. Ford."

Defendant's seventh point for charge and the court's answer thereto were as follows:

"If the jury believed from the evidence that the deceased assaulted the prisoner with his club, and the prisoner's life was in danger, or he was actually in danger of great bodily harm, or if it so reasonably appeared to him, and the danger, either real or apparent, was so great that it could not be averted, without inflicting serious injury upon the deceased or even taking his life, the prisoner would be excusable under the law in so doing, in order to save his own life or avert great bodily harm.

"Answer: Affirmed. But reasonable apprehension of such danger as is referred to in this point, where the apparent danger turns out to be apparent only, and not actual, must have a

reasonable basis on which to rest, before the taking of human life would be warranted thereby."

The jury found a verdict of guilty of voluntary manslaughter, upon which the maximum sentence was thereafter imposed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Lawrence M. Sebring and John B. McClure, both of Beaver, for appellant.

The questions involved are: (1) May a defendant, on trial for murdering a policeman, show that the officer was drunk, that he attempted an illegal search of defendant, and show that, after the infliction of the mortal wound, the officer could have an ante mortem statement? (2) What are improper remarks by commonwealth counsel in such a case, and was the jury adequately and correctly instructed as to the law of self-defense and manslaughter?

James L. Hogan, Louis E. Graham, Dist. Atty., and Frank H. Laird, all of Beaver, for the Commonwealth.

PER CURIAM. The questions raised on this appeal are within a narrow compass, and are briefly stated by counsel for the appellant. After duly considering them, we find nothing in the 44 assignments of error calling for a retrial of the case, and the judgment is therefore affirmed.

(261 Pa. 476)

COMMONWEALTH TITLE INS. & TRUST CO. v. GROSS.

(Supreme Court of Pennsylvania. June 8, 1918.)

WILLS \S 608(5) — CONSTRUCTION — REAL PROPERTY — RULE IN SHELLEY'S CASE.

Where testator bequeathed to his wife and son all of his property, share and share alike, and a house as a home, but not to be sold by either, and if the wife died before the son he was to have her share, and if he died before her she to have his share, unless "he had heirs," the rule in Shelley's Case applied, and on the death of his mother the son took a fee.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Commonwealth Title Insurance & Trust Company, trustee for Thomas A. B. McCloskey, against Samuel Gross. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts appear in the following opinion of Shoemaker, J., in the common pleas:

This is a case stated, submitted to the court upon an agreement that, if the plaintiffs have an estate in fee in the premises described in the deed tendered by them to the defendant, judgment should be entered for the plaintiffs; otherwise, the judgment should be for the defendant. The question presented by the case stated is the interpretation to be given to the will of James B. McCloskey, which reads as follows:

"In making this my last will and testimony, I bequeath to my wife, Florence E. McCloskey,

and my son, Thomas A. B. McCloskey, share and share alike of my estate after all my just debts are paid. The house, No. 4841 North Broad street to be a home for my wife and son as long as they agree. If rented, each to have a share alike. I want it understood that my property is not to be sold or mortgaged by either my wife and son. In case my wife dies before my son he is to have her share of the estate and if he dies before her she will have his share, without he has heirs who will receive his share then. I want my wife, Florence E. McCloskey, to have all household goods and effects.

"I appoint my wife executor without bond of this my last will and testimony revoking all others previously made.

"In case of death of both my wife and son (he leaving no heirs) I want my estate to go to my mother's half-sister Annie McCloskey, wife of Owen and her heirs, share and share alike."

McCloskey died March 11, 1907, leaving to survive him his wife, Florence, and his son, Thomas A. B. Florence, the widow of James B., died January 8, 1916. By deed dated August 15, 1917, and duly recorded, Thomas A. B. McCloskey and wife granted and conveyed the premises No. 4841 North Broad street to the Commonwealth Title Insurance & Trust Company as trustees for the grantors. By agreement dated August 15, 1917, the said Commonwealth Title Insurance & Trust Company, trustee, agreed to sell to Samuel Gross, who agreed to purchase the said property free and clear of assessments, liens, and incumbrances; the title to be good and marketable. On October 8, 1917, the plaintiffs tendered a deed duly executed by themselves, conveying to defendant the said premises free and clear of all incumbrances, and demanded the balance of the purchase money agreed upon. The defendant refused to accept the deed, or pay the purchase price, alleging that the grantors did not have a good and marketable title in fee in the premises, whereupon plaintiffs brought this suit to recover the balance of the purchase money.

The will provides that "in case my wife dies before my son he is to have her share of the estate and if he dies before her she will have his share, without he has heirs who will receive his share then." The survivorship in favor of the wife is conditioned upon the son dying without heirs. In the last clause of the will it is provided: "In case of death of both my wife and son (he leaving no heirs) I want my estate to go to my mother's half-sister Annie McCloskey, wife of Owen and her heirs, share and share alike." The son is living and has children. Did the son take a fee? The present Chief Justice said, in *Kemp v. Reinhard*, 228 Pa. 147, 77 Atl. 487, 29 L. R. A. (N. S.) 9568:

"The rule in *Shelley's Case* is not a means of ascertaining the intention of a testator, nor is it one of the construction of a will. It is one of law, unbending in its application, when the intention of the testator is ascertained, that the heirs of his devisee of a freehold estate are to take from the devisee qua heirs. When such intention is ascertained, the heirs take by descent from the devisee, and there is therefore vested in him an estate of inheritance. *Doebler's Appeal*, 64 Pa. 8; *Shapley v. Diehl*, 203 Pa. 563 [53 Atl. 874]. It is therefore always a precedent question, in any case to which it is supposed the rule is applicable, whether the limitation of the remainder is made to the heirs in fee or in tail, as such, and in solving this question, the rule itself renders no assistance. It is silent until the intention of the grantor or deviser is ascertained. But if that intention is found to be that the remaindermen are to take as heirs of the grantee or devisee

of the particular freehold, instead of becoming themselves the root of a new succession, the rule is applied though it may defeat a manifest intention that the first taker should have but an estate for life. It is very carefully to be noted, that in searching for the intention of the donor or testator, the inquiry is not whether the remaindermen are the persons who would have been heirs, had the fee been limited directly to the ancestor. The thing to be sought for is not the persons who are directed to take the remainder, but the character in which the donor intended they should take. In the very many cases in which the question has arisen whether the rule was applicable, the difficulty has been in determining whether the intention was that the remaindermen should take as heirs of the first taker, or originally as the stock of a new inheritance." *Guthrie's Appeal*, 37 Pa. 9."

Applying the above rules of interpretation to the will in this case, it seems manifest that in the first paragraph of the will it is clearly provided that the "heirs" to take were as heirs of the son; the language used being that if the son "dies before her [the widow] she will have his share, without he has heirs, who will receive his share then." Reading the third clause in connection with the first clause, it is, in our opinion, clear that such was the meaning of the testator's words, as the devise to Annie McCloskey was only to take effect in case the son died "leaving no heirs," thus limiting the character of the persons who were to take upon the death of the son to such as were his heirs, and "to constitute such devisee a source of inheritable succession." (*Harrison v. Harris*, 245 Pa. 397, 91 Atl. 617), and the rule in *Shelley's Case* applies (*Stathers v. Renz*, 251 Pa. 315, 96 Atl. 717).

The court entered judgment for the plaintiffs on the case stated. Defendant appealed. Error assigned was the judgment of the court.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

Morris Wolf and Horace Stern, both of Philadelphia, for appellant. William Henry Kern, of Philadelphia, for appellee.

PER OURIAM. This judgment is affirmed, on the opinion of the court below, upon which it was entered.

(361 Pa. 458)

RUGG v. MIDLAND REALTY CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. VENDOR AND PURCHASER \S 111—RESCISSI- ON BY VENDEE—RECOVERY OF PAYMENT MADE.

Where a vendee tenders performance at the appointed time, and the vendor cannot perform, the vendee can rescind, particularly where time is of the essence of the contract.

2. VENDOR AND PURCHASER \S 340—RESCISSI- ON BY VENDEE—RESCISSI-ON OF PURCHASE MONEY—TENDER OF PERFORMANCE.

Where contract for sale of realty provided that, when price was paid, a conveyance should be made free of incumbrances, and plaintiff tendered the balance of the price due and demanded a deed, which was refused, because defendant was then unable to make a good title, plaintiff could recover the money paid and reasonable expenses, though defendant tendered a deed with a policy of insurance issued by a title company, and after suit offered to convey a clear title.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Howard V. Rugg against the Midland Realty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Audenried, P. J., filed the following opinion in the common pleas:

The statement of claim and the affidavit of defense are quite voluminous, but the question raised by this rule is a simple one. The essential facts alleged by the plaintiff are as follows, and they are not disputed by the defendant:

The plaintiff agreed to buy certain land from the defendant. Its price was payable by installments, but the buyer might when he paid any of them anticipate the dates fixed for subsequent payments and pay the remainder of the purchase money although not yet due. It was agreed that the land should be conveyed to the plaintiff, subject to certain building restrictions, but otherwise clear of incumbrances, as soon as the latter had paid for it in full, and that, in the meanwhile, the seller should pay all state and county taxes legally assessed upon it. The plaintiff paid the defendant the sum of \$2,080 on account of the purchase money. On November 22, 1916, he tendered it the further sum of \$650.57, which was all that remained unpaid on that account, and demanded that the land be conveyed to him in accordance with their agreement. The defendant did not accept the money tendered or deliver the deed requested. The reason given for its failure to do so was that the land was incumbered by a tax claim filed by the commonwealth. Prior to that date the plaintiff had spent \$85 for improvements on the land and \$36 for the preparation of a bond and a mortgage and the examination of its title.

The plaintiff's claim is for the sum of \$2,080 paid by him under his contract with the defendant, with interest thereon, and for the further sum of \$121 by way of reimbursement of his outlay on the faith of the defendant's undertaking to convey. The defense set up may be summarized as follows: When the plaintiff tendered payment of the remainder of the purchase money owing for the land, all of the defendant's property was subject to the lien of certain taxes claimed by the commonwealth. The defendant was then negotiating for a settlement of the claim. The plaintiff was informed of this situation, and promised that during the following week his money would be received, and a deed would be executed and delivered to him. A few days afterwards a contract was made by the defendant with the Land Title & Trust Company, under which the latter undertook to insure title to the land bought by the plaintiff against the tax claimed above mentioned. A deed for the land was executed, and the plaintiff was notified that the defendant was ready to make settlement with him. Instead of paying for the land and accepting the defendant's deed therefor with the Land Title & Trust Company's policy, the plaintiff instituted this action. Since his suit was brought the defendant has settled with the commonwealth and thus discharged the claim filed for taxes. It is now ready and willing to deliver to the plaintiff a deed for his land, and, to the extent above described, has been ready and willing to do so since November 28, 1917.

[1, 2] This defense is insufficient. It is admitted that at the time when under their agreement the plaintiff was entitled to a conveyance of the land that he had purchased, the defendant was neither ready nor willing to convey it. That it was not willing to convey appears from the fact that it did not comply with his demand for a deed. That it was not able to perform its covenant to convey clear of incum-

brances other than the restrictions under which the plaintiff had agreed to take the land appears from the conceded fact that the commonwealth had filed against it a tax claim, which still stood unsatisfied. This was an incumbrance, although the amount claimed was larger than the sum subsequently paid to liquidate it. Nowhere does the defendant squarely allege that the claim was not a lawful one, or that the taxes claimed had not been legally assessed. The plaintiff was not bound to accept the defendant's deed, even when supported by a policy of the Land Title & Trust Company insuring him against the commonwealth's claim in lieu of the conveyance of a title appearing by the record to be clear of incumbrances. Time was of the essence of the contract between these parties. Such was their plain agreement. The plaintiff was, therefore, under no obligation to await the outcome of the defendant's negotiations with the auditor general. When it became apparent that the defendant wished to fob off upon him a title incumbered in a "very considerable sum," and that against the uncertain extent of the liability of the land for this charge he was expected to be content with the policy of insurance issued by a private corporation, he was undoubtedly justified in declaring his contract with the defendant rescinded and in demanding the return of what he had paid the defendant, with the amount of his reasonable outlay on the faith of the contract. The defendant does not deny that the plaintiff made the expenditures for which he asks reimbursement or that they were necessary or proper.

If a vendee performs or tenders performance of his part of the contract, at the time appointed, and the vendor is unable to perform his part, the vendee may rescind, and recover back any purchase money paid on the footing of the contract. *Borough of Erie v. Vincent*, 8 Watts, 510; *Stitzel v. Kopp*, 9 Watts & S. 29; *Moorehead v. Fry*, 24 Pa. 37; *Stickter v. Guldin*, 30 Pa. 114. This is particularly true where time is of the essence of the contract. *Hollenbach v. Moore*, 1 Wkly. Notes Cas. 192. "It has long been settled that on default by the vendor, without fraud, the vendee may recover for expenses necessarily or properly incurred on the faith of the contract, with the consideration paid." *Eberz v. Heisler*, 12 Pa. Super. Ct. 388.

The rule for judgment is made absolute.

The court entered judgment for plaintiff for want of a sufficient affidavit of defense for \$2,500.02. Defendant appealed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

John Douglas Brown, of Philadelphia, for appellant. Albert W. Sanson and J. Kirk McCurdy, both of Philadelphia, for appellee.

PER CURIAM. By the second paragraph of the agreement between the appellant and its vendee, time was made the essence thereof, and the judgment is affirmed on the clear, concise opinion of the learned president judge of the court below directing it to be entered.

(261 Pa. 437)

FAY v. MOORE.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. CONTRACTS §292 — BUILDING CONTRACT — ACTION FOR PRICE — ARCHITECT'S CERTIFICATE.

Where refusal of architect to give certificate to building contractor on completion of work

contractor from recovering a balance due.

2. CONTRACTS — 290—BUILDING CONTRACT — WAIVER OF PROVISION.

Though a building contract provided that alterations should be made only on a written order of the architect, the parties could waive the provision.

3. CONTRACTS — 292—BUILDING CONTRACTS — ARCHITECT'S CERTIFICATE.

Where the evidence establishes refusal of the architect to issue a certificate on completion of a building contract to be fraudulent, or by collusion with the owner, his withholding the certificate would not prevent recovery of amount due.

4. EVIDENCE — 471(25) — CONCLUSION OF WITNESS.

Testimony of a witness for plaintiff, in action on building contract, in reply to question, "What did you do?" that he completed the work in accordance with the plans and modifications by the architect, was not inadmissible as a legal conclusion, being a summary of what the witness did under the contract.

5. APPEAL AND ERROR — 688(2)—REVIEW—REMARKS OF JUROR.

Refusal to withdraw a juror because of statements made by counsel cannot be reviewed, where the record fails to state the subject-matter of the objectionable remarks.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Ella M. Fay, administratrix of the estate of Edward Fay, against James S. Moore. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MESTREZAT, POTTER, MOSCHIZSKER, FRAZER, and WALLING, JJ.

George J. Edwards, Jr., of Philadelphia, for appellant. Ignatius A. Quinn, of Chestnut Hill, and John J. Green, of Philadelphia, for appellee.

FRAZER, J. Plaintiff, a contractor, sues to recover from the owner a balance alleged to be due under a contract for the erection of a building. The defense is that plaintiff failed to complete the work in accordance with the specifications, whereby defendant was obliged to take possession of the building and finish it at an expense beyond the contract price. Plaintiff having died while the action was pending, his wife was substituted on the record as administratrix of his estate. The case has been tried three times, the result of the last trial being a verdict and judgment for plaintiff, from which defendant appealed.

The first two assignments of error are to the refusal of the court below to give binding instructions and subsequently to enter judgment for defendant non obstante verdicto. The contract required payments to be made only upon the certificate of the architect. When the building was practically completed, and a certificate for final payment requested, the architect notified plaintiff in writing that

with the contract in certain specified particulars. Plaintiff contends the defects enumerated by the architect were rectified by him, while defendant avers such was not the case, but, on the contrary, he was obliged to employ another contractor to complete the work.

[1] The first objection is that corner beading was omitted. The specifications call for "wood corner beads on all exposed angles," but failed to set forth the particular kind of beading to be used. Plaintiff's son, who had charge of the construction work, testified beads were put on at exposed corners, and this does not seem to be denied; the contention being a different style of beading should have been supplied, as appears in a subsequent letter from the architect, in which he states the owner—

"has instructed me to put on beads in accordance with his desire, although I have never seen that kind of bead which he desires, at the same time he states that nothing else [will] be accepted by him; so there is no other alternative, and therefore I am compelled to instruct you to make them different from what I would personally select."

In another letter, written a few days later, the architect says:

"I am perfectly aware that the bead Mr. Moore desires is impractical, as well as impossible; but as Mr. Moore gave me no other alternative in the matter, and the best I could do was to give his instructions verbatim to you."

And in a third letter says he had again taken the matter up with the owner—

"and asked him to give me instructions for the regular old-fashioned wood corner bead put on, which is the only thing that can be accomplished outside of the covered bead, which you have at present, and which Mr. Moore does not want."

Under these circumstances the jury were warranted in finding the architect, in condemning the bead used by plaintiff, was not acting upon his own impartial judgment as to the sufficiency of the work, but at the dictation and to satisfy the whim of the owner.

[2] Another objection is the window sashes were of chestnut instead of white pine lumber, as called for in the contract. With respect to this item, the testimony on behalf of plaintiff is to the effect the architect instructed him to use chestnut instead of pine, so as to conform to the interior finish of the house. The owner visited the work almost daily, and with the architect made up lists of matters to be attended to or corrected, among which appears a memorandum to the effect that the owner would consider the matter of using chestnut instead of white pine sash. While it is true the contract provides that no alterations should be made, except on the written order of the architect, the parties had the right to waive the provision. *Raff v. Isman*, 235 Pa. 347, 84 Atl. 352. And this the verdict indicates they did. Furthermore, there is no attempt in this case to charge for extra work.

As to the various items of which complaint is made, the testimony on behalf of plaintiff is to the effect that portions of the work, the details of which were not mentioned in the specifications, were done under the direction of the architect, and that other variations and defects were remedied after complaint was received. The architect having persisted in refusing a certificate of completion, giving as an excuse for his action the owner's dissatisfaction with the work, and the contractor continuing to claim a completion of the contract, the owner procured a bid and entered into a contract for the additional work on the house he deemed necessary to complete the contract according to specifications, paying therefor the sum of \$818, and for other items the sum of \$220, which amounts were deducted from the contract price, and the architect signed a certificate to the effect that, after deducting such items, a balance of \$1,100 remained due the contractor.

[3] While the testimony on behalf of plaintiff was contradicted by the architect and other witnesses for defendant, the case was necessarily for the jury, to whom it was submitted by the trial judge with instructions to consider the decision of the architect conclusive, unless they found from the circumstances in the case his decision was the result of collusion with the owner, and not a fair and impartial one. The court also left to the jury to say whether the contractor faithfully, honestly, and substantially complied with the provisions of his contract, and further charged, if they so found, and minor defects or deficiencies existed, such defects would not prevent a recovery for the amount due under the contract, less a reasonable allowance for the cost of remedying the imperfections.

The provision in the contract requiring the production of the certificate of the architect, showing completion of the work, is intended as a protection to the owner against unjust claims by the contractor and to see that the latter properly carries out his agreement, and in cases where the evidence establishes refusal of the architect to be capricious, fraudulent, or based on collusion with the owner, his withholding the certificate will not prevent the contractor from recovering the amount due him. *Pittsburg, etc., Lumber Co. v. Sharp*, 190 Pa. 256, 42 Atl. 685. There also being evidence in the case to support the conclusion of the jury of there being no willful or intentional departure from the terms of the contract, the doctrine of substantial performance was applicable, and was properly stated by the trial judge in accordance with the principles laid down in *Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410.

[4] The remaining assignments of error present no cause for reversal. The third is to the refusal of the court to strike out testimony. A witness for plaintiff, who had charge of the work, in reply to the question,

"What did you do?" answered, "I completed the work in accordance with the plans, specifications, and contract, and the modifications by the architect." This answer was a rather brief summary of what the witness did under the contract, and by reason of its brevity the answer sounds like a legal conclusion, rather than a statement of fact; yet the statement was directly responsive to the question, and, as the details of the work performed by the witness were given more fully in other parts of his testimony, the discretion of the trial judge, in refusing to strike out the answer, is not an adequate cause for reversal. *United States Telephone Co. v. Wenger*, 55 Pa. 262, 98 Am. Dec. 751.

The fourth assignment is to the refusal of the trial judge to strike out testimony to the effect that the change in the material used in window sashes was made upon the verbal order of the architect. The question of waiver of the provisions of the contract requiring alterations to be in writing has already been referred to and need not be repeated.

[5] The refusal of the court to withdraw a juror because of the statement made by counsel for plaintiff set forth in the fifth assignment does not seem to show abuse of discretion. The record fails to indicate the subject-matter of the objectionable remarks, and this court has no means of determining whether or not they were improper.

The sixth assignment objects to the action of the court in permitting a witness for plaintiff to testify that the fireplace was "pointed" in accordance with the direction of the architect. In regard to this objection, it is sufficient to say that specifications required the pointing of the masonry to be done "as directed" with no special provision for the fireplace.

We find nothing objectionable in the language of the court of which complaint is made in the seventh assignment, and furthermore the court subsequently gave each party an opportunity to have the case continued if they wished. Counsel, however, expressed a desire that it be concluded.

The eighth assignment complains of the failure of the trial judge to properly instruct the jury on the question of deduction to be made from plaintiff's claim of damages for failure to fully perform his contract. While the charge in this respect was brief, and the court did not refer in detail to the evidence or state amounts, either of plaintiff's claim or of the expense to which defendant was subjected, the items refused and the principles applicable were clearly stated, and the jury had before them the written statement of the architect, showing the exact amount defendant claimed to be entitled to set off. If counsel deemed further and more definite instructions necessary, he should have so stated at the time.

The assignments of error are overruled, and the judgment affirmed.

CARRIERS — 820(26) — INJURY TO PASSENGERS — CONFLICTING EVIDENCE — QUESTION FOR JURY.

Sharply conflicting evidence as to whether plaintiff's personal injuries resulted from his own intoxicated condition, or defendant's negligence in starting a car before plaintiff alighted, held to present a jury question.

Exceptions from Superior Court, Providence and Bristol Counties; Edward W. Blodgett, Judge.

Action by Martin Broderick against the Rhode Island Company. Judgment for plaintiff, and defendant's motion for new trial granted, unless plaintiff remit all of the verdict above \$1,200. Remittitur filed, and defendant excepts. Exceptions overruled.

Thomas L. Carty, of Pawtucket, for plaintiff. Clifford Whipple and Frederick W. O'Connell, both of Providence, for defendant.

PER CURIAM. This is an action of trespass on the case for negligence brought by Martin Broderick against the Rhode Island Company to recover damages for personal injuries, which he claims resulted from the negligence of the defendant's servants and agents in the operation of one of its cars. The plaintiff alleges that on January 13, 1917, he was a passenger upon one of the cars of the Rhode Island Company which was proceeding along Dexter street in the city of Pawtucket; that as he approached the place where he desired to alight he notified the conductor who stopped the car; and that while he was in the act of stepping from the car the car was suddenly started, throwing him to the ground and injuring him. In his account of the accident he is corroborated by two witnesses; one being his daughter, a little girl of 11 years of age, who testified that the car suddenly started while the plaintiff was getting off.

The account of the accident given by the witnesses for the defendant is materially different from that given by the plaintiff and his witnesses. There is testimony on the part of the defendant that the plaintiff proceeded to the rear platform of the car and attempted to get off while the car was still in motion. There was also some further testimony on behalf of the defendant to the effect that the plaintiff had evidently been drinking, and was not in a condition to judge correctly of his own movements and actions. It is evident from this brief statement of the case that the testimony bearing on the defendant's liability was conflicting and presented a question of fact for the jury.

The jury returned a verdict for the plaintiff in the sum of \$1,800. The defendant moved for a new trial, which was granted by the trial court, unless the plaintiff should

if they saw fit, find a verdict for the plaintiff upon the questions of fact submitted to them for their determination, and that the verdict, as reduced, must stand.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment for the plaintiff in the sum of \$1,200.

WOLFE v. WOLFE. (No. 5171.)

(Supreme Court of Rhode Island. Oct. 25, 1918.)

1. CONTINUANCE — 7 — DISCRETION OF COURT.

Granting or refusing continuance is within the discretion of the trial court.

2. DIVORCE — 161 — VACATING JUDGMENT — DISCRETION.

Vacating default decree for divorce on respondent's motion is within discretion of trial court.

3. DIVORCE — 161 — VACATING JUDGMENT — DISCRETION.

Refusal to vacate divorce decree rendered by default, where respondent had one continuance, and motion for second, supported by physician's affidavit of sickness, was traversed by petitioner's affidavit that she was malingering, was not abuse of discretion.

Exceptions from Superior Court, Providence and Bristol Counties; Elmer J. Rathbun, Judge.

Action by Samuel Wolfe against Mary Wolfe. Decree for petitioner, and respondent excepts. Overruled.

Cooney & Cahill, of Providence, for petitioner. William M. P. Bowen, of Providence, for respondent.

PER CURIAM. This is a suit for divorce, and comes before this court upon the respondent's exceptions. On April 19, 1917, Samuel Wolfe filed a petition for divorce against his wife, May Wolfe, alleging adultery and gross misbehavior and wickedness, repugnant to and in violation of the marriage covenant; the petition further setting forth with some particularity the acts of the respondent constituting such gross misbehavior, etc. Later the respondent filed two motions, one for a bill of particulars and the other for an allowance for support during pendency of petition and for counsel and witness fees. These motions were granted, and a bill of particulars was duly filed. The case was assigned for hearing on July 3, 1917. Upon the last-named date the respondent moved for a continuance, which was granted upon her waiving her right to the \$14 per week which had been ordered paid to her for her temporary support.

On September 27, 1917, when the case again came up for hearing, the respondent, through counsel, moved for a continuance on the ground of her inability to be present on account of illness, and in support of her motion

produced the sworn certificate of a physician, resident at Jamaica Plain, in the commonwealth of Massachusetts, stating that she was physically unable to attend the hearing. Affidavits were also produced on behalf of the petitioner tending to show that the illness of the respondent was not real, but was pretended, and designed to aid her in procuring the continuance asked for. The trial court refused to continue the case, the petitioner presented his testimony, and a decision was rendered in his favor. It is not claimed that the testimony offered was insufficient, but that the court erred in its refusal to continue the case.

On March 19, 1918, the respondent filed two motions, the one in the nature of a cross-petition for divorce, and the other to vacate the decision of the trial court in granting the petition and to assign the case for hearing upon the petition and cross-petition. These motions were denied. The case now comes to us upon the respondent's exceptions, which in substance allege the errors of the trial court in refusing a continuance on September 27, 1917, and in denying the respondent's motion to vacate its former decision in favor of the petitioner.

[1-3] These matters are within the discretion of the trial court. It is within the province of this court to grant relief in cases where an abuse of discretion is shown. An examination of the record presented to us does not disclose anything which would justify the conclusion that the trial court had abused its discretion, and therefore we think that the respondent's exceptions must be overruled.

The respondent's exceptions are overruled, and the cause is remanded to the superior court for further proceedings.

PUBLIC UTILITIES COMMISSION v. RHODE ISLAND CO.

(Nos. 297-302.)

(Supreme Court of Rhode Island. Oct. 30, 1918.)

CARRIERS §18(2)—REGULATION—INCREASE OF FARES — ORDER OF PUBLIC UTILITIES COMMISSION—APPEAL.

Where Public Utilities Commission, in order to provide railway company with funds necessary for continued operation of its lines, made order authorizing a schedule of increased fares, such schedule will be permitted to remain in force, where appeals from order are taken until determination upon merits of the appeals.

Appeals from Public Utilities Commission.

Proceedings before the Public Utilities Commission. From an order of the Commission authorizing schedule of increased fares for passengers of Rhode Island Company, the Town of Warwick, the City of Cranston, the Town of Johnston, the Town of North Providence, the Town of East Provi-

dence, and the Town of Lincoln separately appeal. The Rhode Island Company moves that appeals shall not operate as a stay of the Commission's order. An order that appeals shall not operate as stay of Commission's order continued in force until further order.

Harold R. Curtis, Town Sol., of Providence, for town of Warwick. Frank H. Wildes, City Sol., of Cranston, for city of Cranston. James E. Dooley, Town Sol., of Johnston, for town of Johnston. Cushing, Carroll & McCartin, of Providence, for town of North Providence. A. Truman Patterson, Town Sol., of Providence, for town of East Providence. Albert B. West, of Providence, for town of Lincoln. Clifford Whipple and G. Frederick Frost, both of Providence, for Rhode Island Co.

PER CURIAM. Now, after a hearing held on October 28, 1918, before the full court, of the motion made on behalf of the Rhode Island Company that the above-entitled appeals shall not operate as a stay of the order of the Public Utilities Commission made on the 19th day of October, 1918, and after a consideration of the arguments of counsel for the several interests represented at the said hearing, the court has come to the following conclusion:

It clearly appeared at the hearing that the Rhode Island Company, before the entry of said order by the Public Utilities Commission, was in great need of increased revenue to meet its obligations and the cost of operating its transportation system; that the order appealed from was one authorizing a schedule of increased fares, which said company should be permitted to charge its passengers, and was intended to provide the funds necessary for the continued operation of the trolley lines of said company.

The main objections of the appellants stated at the hearing were that the commission in authorizing said schedule of increased fares had not placed the burden of increase fairly and that the patrons of said company residing in certain sections were subject to unfair and unjust discrimination. The force of these objections can only be determined by this court after a hearing upon the merits of the appeals. In the meantime it is essential to the welfare and safety of the various communities served by said company that there should be no interruption of that service. From what this court has been able to learn at said hearing, the court is of the opinion that the rights and interests of all parties will best be preserved by permitting the schedule of fares fixed by said commission to remain in force until there can be a determination upon the merits of said appeals.

Our determination, therefore, is that the orders heretofore entered in the above mat-

as a stay of the order of the Public Utilities Commission, until further order of this court, be continued in force until further order.

(7 Boyce, 178)

DE PARIS v. WILMINGTON TRUST CO.
(Supreme Court of Delaware. Sept. 5, 1918.)

1. GUARANTY ¶105 — CONTRIBUTION — ENFORCEMENT.

If a coguarantor pays the whole debt, he may compel the other to pay one-half thereof by action at law based on an implied promise.

2. EXECUTORS AND ADMINISTRATORS ¶518(5) — PRIVACY BETWEEN DOMICILIARY AND ANCILLARY ADMINISTRATORS.

There is no privity between a domiciliary and an ancillary administrator, there being but one estate, and both being in privity with decedent and his estate but not with each other.

3. EXECUTORS AND ADMINISTRATORS ¶524(1) — SUIT BY ADMINISTRATOR — FOREIGN JUDGMENTS.

A domiciliary administrator may sue in his own name in another state on a judgment recovered by him in his representative capacity in the state of the domicile, because the judgment is his property.

4. EXECUTORS AND ADMINISTRATORS ¶518(5) — DOMICILIARY AND ANCILLARY ADMINISTRATORS.

Where a contract of guaranty was executed in Venezuela by two coguarantors, and one of them died after demand for payment and the debt was paid by his succession in Venezuela, an ancillary administrator of his estate appointed in Delaware could not enforce contribution from the coguarantor; there being no privity of estate between the two administrators.

Error to Superior Court, New Castle County.

Foreign attachment by the Wilmington Trust Company, administrator against Isabel M. R. de Paris, under which defendant's shares of stock in a Delaware corporation was seized. The defendant appeared by giving security, thereby dissolving the attachment. The case was pleaded to issue. Trial by jury. Verdict for the plaintiff. Judgment entered. Defendant brings error. Judgment reversed.

Hugh M. Morris, of Wilmington, for plaintiff in error. Ward, Gray & Neary, of Wilmington, for defendant in error.

The declaration consisted of the common counts and thereafter from time to time three amendments, each consisting of additional counts. The defendant demurred generally to the counts of one of the amendments. The demurrer was overruled (5 Boyce, 565, 96 Atl. 30), Judges RICE and HEISEL sitting below, and before whom the case subsequently came on for trial. When plaintiff at the trial rested, counsel for defendant moved for a non-suit, for the following reasons:

That the testimony and the documentary evidence in this case show that the contracts were made in Venezuela, that the contracts

was paid by his Venezuelan succession; that the dictionary in evidence shows that succession intestate means heirs-at-law; that we have from the testimony of Doctor Rivas that the receipt paid by the succession means paid by the heirs-at-law, so that we have a payment made by the heirs-at-law in Venezuela or by the succession; that no devolution of title from the persons in Venezuela has been shown passing from them to this plaintiff; that the documentary evidence shows that this payment was made in September, 1912, and that letters of administration were not granted to the Wilmington Trust Company until a year or more thereafter; that the evidence shows that the payment was not made by the Wilmington Trust Company; that the testimony shows title in the Venezuelan heirs-at-law of the Venezuelan succession; that there is no privity between administrators in Venezuela and the Wilmington Trust Company, administrator, the plaintiff in this case; citing Story on Conflict of Laws, 518; Davis v. Herald of Liberty, 39 Pa. Co. Ct. R. 399; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; 8 A. & E. Ency. of Law (1st Ed.) 427; Eng. Com. Law Reps. vols. 1-8, p. 15; 19 A. & E. Ency. of Law (1st Ed.) 156; Stacy v. Thrasher, 6 How. 44, 58, 12 L. Ed. 337; McCord v. Thompson, 92 Ind. 565; 18 Cyc. 1229-1237, 874, 878; Gliddings v. Green (C. C.) 48 Fed. 489; Hare v. O'Brien, 233 Pa. 330, 82 Atl. 475, 39 L. R. A. (N. S.) 430, Ann. Cas. 1913B, 624; Talmage v. Chapel, 16 Mass. 71; that there is no identity of parties, and the burden of showing privity of parties is upon the plaintiff. The motion for a non-suit was also based on defendant's plea No. 2, being the first special plea, on the points which were disposed of on the demurrer, reported in 5 Boyce, 565, 96 Atl. 30.

The motion was refused, HEISEL, J., delivering the following opinion:

The testimony introduced by the plaintiff shows that during the year 1911, Joseph J. Paris, son of the defendant, was the maker of several instruments of writing in the nature of promissory notes and an account current wherein he obligated himself to pay to certain banks in Maracaibo, Venezuela, the several sums of money mentioned in said instruments of writing.

At the same time the plaintiff's intestate, Federico Evaristo Schemel, and the defendant, Isabel M. R. de Paris guaranteed the payment of the sums of money mentioned in the said several instruments of writing in the following language, or language to the same effect:

"The undersigned bind themselves jointly with the grantor to the fulfillment of this obligation under the same terms and conditions above stipulated. Dated as above."

That under such guaranty and the law of Venezuela, Schemel and Mrs. De Paris, as such joint guarantors, were each liable for the total unpaid balance of each of said instruments of writing so guaranteed by them; but should either of them be obliged to pay any sum by reason of such guaranty, the other would be liable to the one so paying for one-half of the amount so paid, with interest from the time of such payment.

Said notes and account current being overdue and unpaid by the said Joseph J. Paris, the holders thereof on the sixth of July, 1912, duly and properly notified Schemel to that effect, and demanded that he pay the several amounts due under his contract of guaranty with Mrs. De Paris thereon.

Schemel died intestate on the fifteenth of the same July without having made any payment on said notes or account current, but on the fifth of September following, the estate, or representatives of the estate of Schemel paid to the holders of said notes and account current the sum of 72,428.58 bolivars in money of the United States of Venezuela.

That under the Laws of Venezuela, upon the death of a person intestate no administrator is appointed to administer the estate as is provided under our law, but the estate is represented by those heirs of the intestate who elect to take the inheritance, and administered by them collectively until all the debts of the estate are paid and the estate divided amongst them.

That all the parties heretofore mentioned resided in the United States of Venezuela and the transactions described took place in that country.

That letters of administration on said Schemel's estate was granted to the Wilmington Trust Company in this state, September 11, 1913.

Upon this evidence counsel for defendant moves for a non-suit on two grounds:

First: For reasons fully set out by defendant in her second plea, being the first special plea, to the declaration, and which is briefly, that all the parties to the notes and account current sued upon, being residents of Venezuela and the debts in question contracted in that country, they constitute no portion of Schemel's estate, rights or credits within the State of Delaware, and therefore the Wilmington Trust Company, as administrator in this State, acquired no claim, right, title or interest in said notes and account current, and had no right to maintain this action. This same question was decided by this Court at an earlier stage of this case upon demurrer and there determined contrary to defendant's contention, so without repeating here the reasons stated there, we decline to grant the motion on this first ground.

Defendant's second ground for his motion is that the representatives of Schemel's estate in Venezuela are the only parties who can properly maintain this action, for the

reason that the case of action resulted from, or arose out of, something done by them, after the death of Schemel, and not because of anything done, or contract entered into, by Schemel during his lifetime;

In other words that no action could be brought by Schemel's estate anywhere against this defendant for contribution under the contract of guaranty, until some amount of money had been paid by Schemel in his lifetime or by representatives of his estate after his death.

That the evidence shows no payment by Schemel in his lifetime, but does show payments by representatives of his estate in Venezuela after his death; therefore such representatives only could maintain the action, because the cause of action accrued by reason of the payment of money by them, which conferred upon them, or fixed in them, the exclusive right to maintain the action, either in their representative capacity or personally; and there being no privity between representatives of estates in different states or countries, the right to maintain this action could not pass from them to the plaintiff, the administrator of Schemel in this state. Citing among others the following authorities: Story on Conflict of Laws, 518, 522; 8 A. & E. Ency. of Laws, 427; 19 A. & E. Ency. of Laws, 156; Stacy v. Thrasher, 6 How. 44, 58, 12 L. Ed. 337; 18 Cyc. 874, 878; McCord v. Thompson, 92 Ind. 565; Talmage v. Chapel, 16 Mass. 71.

These authorities as we view the evidence in this case do not touch the point. It is not a question of privity between administrators of an estate in different jurisdictions, or what authority if any, one administrator may acquire by reason of some act of another administrator in a foreign jurisdiction, but the question is the right of an administrator to enforce the provisions of a contract made by his intestate.

When Schemel and Mrs. Paris signed the obligations in evidence, as joint guarantors, they agreed that should the maker of those obligations not satisfy them according to their provisions, the guarantors would; and they further agreed, under the provisions of the law of Venezuela, that should either be obliged to pay all or any part of said obligations, the others or his heirs or representatives, would repay to the one so paying, one-half the amount paid, with interest from the date of such payment.

That, we think, was the cause of action as between Schemel or his estate and Mrs. Paris.

True the right of Schemel or his estate to bring an action against the defendant was not complete until Schemel or his estate had paid out some amount as a consequence of his joint guarantyskip with defendant. His obligation to pay, however, was complete before his death, because the maker of the notes and account guaranteed had failed to pay,

Venezuela in discharging this obligation, did nothing more than carry out the provisions of the contract made by Schemel with the defendant. This we think could have no other effect upon the right of his administrator in this jurisdiction to maintain an action upon such contracts, than if Schemel had paid it himself.

Whereupon the following was stated upon the record:

Mr. Morris: I understand it is admitted by Mr. Gray that the Wilmington Trust Company did not make payment of these obligations and account current to the payees or obligees of those promissory notes or account current.

Mr. Gray: Yes, they did not actually make any payments.

Mr. Morris: Is it also admitted that Isabel M. R. de Paris was a resident and domiciled in Venezuela at the time of the death of Federico Evaristo Schemel, and has been there resident and domiciled at all times since?

Mr. Gray: Yes.

When both sides had rested, Mr. Gray asked the Court to charge the jury that the amount of liability of the defendant in this case, if the jury should find a verdict for the plaintiff, is, in American dollars, \$8,197.69, figured at the rate of exchange of 5.10 bolivars equal to one dollar, with interest at three per cent. per annum.

Mr. Morris requested the court to instruct the jury to return a verdict for the defendant.

Because:

(a) The evidence discloses that the obligations of Joseph J. Paris for which the said Federico Evaristo Schemel and the said defendant were surety were made and payable in the Republic of the United States of Venezuela and not in the State of Delaware.

(b) All the parties to each of the said obligations including the sureties were residents of the said Republic of the United States of Venezuela.

(c) The evidence discloses that the said obligations were paid by the heirs-at-law of the said Federico Evaristo Schemel about the third, fourth and fifth days of September, 1912, and that thereupon and thereby the title to the said supposed causes or rights of action became vested exclusively in the said heirs-at-law in the United States of Venezuela and that letters of administration upon the goods and chattels, rights and credits of the said Federico Evaristo Schemel within the State of Delaware were not granted to the plaintiff herein until more than a year thereafter.

(d) The declaration and evidence disclose that the title to the alleged causes or rights of action is not in the plaintiff.

(e) The declaration and evidence disclose that the title to the alleged causes or rights of action is in the heirs-at-law of the said Federico Evaristo Schemel in the Republic of the United States of Venezuela.

in the Republic of Venezuela and the title as administrator of the goods and chattels, rights and credits of the said Federico Evaristo Schemel in the Republic of Venezuela and the plaintiff as administrator of the goods and chattels, rights and credits of the said Federico Evaristo Schemel in the State of Delaware, and particularly the supposed causes or rights of action upon in this case.

(g) The record and evidence disclose the situs of the debts sued for is not State of Delaware.

(h) The record and evidence disclose the situs of the alleged debts sued for at the time said supposed causes or rights of action arose, and at all times since have been in the Republic of the United States of Venezuela.

(i) The record and evidence disclose the said supposed debts sued for are assets of the estate of the said Federico Evaristo Schemel within the State of Delaware.

HEISEL, J., charging the Jury:

Gentlemen of the Jury: On the fifth of January, 1914, upon proper affidavit by the plaintiff, The Wilmington Trust Company, as administrator of Federico Evaristo Schemel, a writ of foreign attachment issued out of this Court against the defendant, Isabel M. R. de Paris; upon which shares of stock of a certain corporation in this state, the property of the defendant was duly attached.

The plaintiff claims and has adduced evidence in support of such claims that on the year 1911, in the United States of Venezuela, the plaintiff's intestate, that is, Federico Evaristo Schemel, and the defendant, Mrs. Paris both of whom were residents of Venezuela, joint guarantors on certain obligations of the son of Mrs. Paris, one Joseph J. Paris, two banks in Maracaibo, Venezuela, the said Joseph J. Paris, having failed to make payments as required by these obligations, the representatives of the estate of Schemel in Venezuela were obliged to pay and discharge by reason thereof on the fourth of September, 1912, the sum of 72,426.58 bolivars of Venezuelan money, that under the law of Venezuela the defendant, Mrs. Paris, a joint guarantor was liable to contribute or pay back to the estate of Schemel one-half of said sum of 72,426.58 bolivars, with interest thereon from the said fourth of September, 1912, at the rate of three per centum per annum to the date of your verdict.

Defendant's counsel has offered no evidence to refute these contentions made by the plaintiff, but contends that the court should instruct you to render a verdict in favor of the defendant for the various reasons set forth in their prayers, which we deem un-

essary to state to you in detail. We decline to so instruct you, and we think it would be of no assistance to you in the performance of your duty in this case for us to inform you of our reasons for so doing.

We do say to you gentlemen, that it is necessary for the plaintiff to prove, first, that it is the administrator of Federico Evaristo Schemel; second, that Schemel's estate or representative of his estate in Venezuela, by reason of Schemel being a joint guarantor with the defendant upon the notes and current account in evidence, under the law in Venezuela, was or were obliged to pay, and did in fact pay, the sums of money claimed; third, that under the law of Venezuela one of two joint guarantors can recover from the other half the amount paid by one, in the satisfaction of such guaranty, with interest thereon from the date of such payment, at such rate as is provided by the law of Venezuela.

If these things are proven to your satisfaction, you should find a verdict in favor of the plaintiff, and for such amount as is shown by the evidence to be one-half of the amount paid by the Schemel estate under the conditions before stated, with interest thereon from the date of such payment, at such rate of interest as is shown by the evidence to be in accordance with the laws of Venezuela.

Otherwise you should find for the defendant.

If you find for the plaintiff, the amount of your verdict should be stated in the money of the United States of America. In converting the amount of said verdict from the money of the United States of Venezuela to money of the United States of America, you should use the present rate of exchange between those two countries as shown by the evidence.

Verdict for plaintiff.

Judgment being entered, the defendant took a bill of exceptions, and sued out a writ of error, argued in the Supreme Court before CURTIS, Chancellor, PENNEWILL, Chief Justice, and BOYCE, Associate Judge.

The case is in this court on a writ of error to a judgment entered in a suit in the Superior Court for New Castle County. The action was a foreign attachment case, under which shares of stock of a Delaware corporation owned by the defendant were attached and special bail was afterwards given by the defendant, and she appeared. From the declaration it appeared that in 1911 Joseph J. de Paris made in Venezuela three promissory notes and an account current (which was also an evidence of indebtedness), and these were held by certain banks there. Federico Evaristo Schemel and the defendant below, Isabel M. R. de Paris, bound themselves in writing jointly with the maker of the notes to the fulfill-

ment of the obligations, i. e. to the payment of the notes and account current. The obligations fell due in the lifetime of Schemel, and the principal debtor having made default in the payment thereof, demand was made upon Schemel to pay them. But no payment was made by him. On July 15, 1912, Schemel died intestate in Venezuela, leaving a widow and several children, as his heirs. It was alleged in the declaration that as such heirs the widow and children became "the legally constituted administrators and representatives of the said Federico Evaristo Schemel, deceased, in and for the jurisdiction of the Republic of the United States of Venezuela," and that under the laws of the Republic in the event of the death of a person intestate, the heirs to the extent to which they have assumed jurisdiction of the estate of the decedent stand in the place of the deceased, and succeed as such heirs to all the legal and equitable rights which the deceased may have enforced if he were alive and to all the liabilities for which the deceased would have been liable if he were alive. The notes and account current were not paid at maturity, but were paid by the heirs of Schemel in September, 1912, after his death.

By the Code of Venezuela:

"When many persons have given bond for the same debtor, for one same debt, the bondsman who has paid the debt has action against the other bondsmen for their respective parts." (See article 1811 of Venezuela Code of 1904.)

On September 12, 1913, the Wilmington Trust Company, a corporation of Delaware, was appointed administrator of Schemel, and claims that the defendant, the co-surety with Schemel, pay one-half of the money paid by the heirs of Schemel.

In addition to non assumpsit, the defendant filed two special pleas: (1) A special plea alleging that the situs of the chose in action is without the State of Delaware; that the chose in action did not constitute a part of the estate, rights or credits of the decedent within the State of Delaware, and that the plaintiff did not by virtue of its letters of administration acquire any claim, right, title or interest in or to the said chose in action. (2) That under the laws of Venezuela the payment of said obligations by the widow and children of the decedent in Venezuela was a payment by them in their individual and personal capacity and not as administrators of the decedent; that any right of contribution accruing to them under the Venezuelan laws was as a result of such payment accrued to them in their personal capacity and not as administrators and that title to the choses in action is not in the plaintiff.

At the trial, in addition to proof of the facts alleged as above, it appeared that all the parties were residents of Venezuela; and that the obligations were paid after Schemel's death by his heirs, and a demand made

on behalf of the heirs on the defendant below for contribution, but that she had failed to contribute and pay her part of the debts. There was testimony to the effect that the heirs of Schemel paid the principal debt as administrator of Schemel's estate, and as heirs they were administrators. A motion for a nonsuit was refused. The defendant later moved that the jury be instructed to find a verdict for the defendant on the grounds, (1) that the debt sued for was not an asset of the estate of the decedent within the State of Delaware; and (2) that the declaration and evidence disclosed no title in the plaintiff to the causes of action. This motion was refused, the court taking the position that it was not a question of privity between administration of an estate in different jurisdictions, but as to the right of an administrator to enforce a contract made by his intestate, and as the obligation of Schemel to pay the debt was complete in his lifetime, his Delaware administrator had as much right to bring the suit here on the contract as though Schemel had in his lifetime paid the debt, his Venezuela representatives by paying the debt having done nothing more than carry out the contract made by Schemel.

There was a verdict for the plaintiff for the amount claimed, and judgment was entered thereon notwithstanding a motion in arrest of judgment based on substantially the same grounds as the prior motions. A writ of error was sued out.

There are six assignments of error. The first assignment is that the court erred in refusing to instruct the jury to return a verdict for the defendant. The other assignments are that the court erred in sustaining objections made by the plaintiff to questions asked by the defendant in the examination of Julian A. Arroyo, a witness called by the defendant as an expert to testify as to the law of Venezuela. On his voir dire the witness had stated that though not counsel of record in the action, he had been acting as co-counsel with Mr. Morris, the attorney of record. The court ruled that counsel in the case should not be allowed to construe the laws of Venezuela, because the testimony was the basis for a resistance of the right of the plaintiff to recover.

CURTIS, Chancellor, after stating the facts, delivered the opinion of the court:

In brief, there were two guarantors of a debt, both residents in Venezuela, and after notice of the default of the principal debtor had been received by one of the guarantors he died in Venezuela with assets there. His personal representatives there, viz.: his widow and children, who as his heirs became administrators by the laws of Venezuela without appointment, paid the whole of the debt. Later the plaintiff below was appointed administrator in Delaware, and brought suit in Delaware against the other co-guar-

antor for contribution by attachment of property of the defendant in Delaware.

[1] The law of contribution as between two co-guarantors is well settled. If one pays the whole of the principal debt he may compel the other to pay one-half thereof. This is also the law of Venezuela. See article 1811 of Code of 1904. It is an equitable principle based on natural justice (*Eliason v. Eliason*, 3 Del. Ch. 260, 263), and was originally enforceable in equity only, but is now enforceable at law, the duty of one guarantor to reimburse his co-guarantor being the basis of an implied promise to do so. This promise is considered as made when the liability is assumed. *Miller v. Stout*, 5 Del. Ch. 259. In the same case Chancellor Saulsbury stated the further well established and undisputed rule, recognized by the court below, that the right to sue on the promise did not arise until the co-surety had paid the whole of the principal debt, or more than his share thereof.

A court of equity will under special circumstances protect the rights of one guarantor against his co-guarantor before payment of the debt. But this is usually done to prevent the consequences of fraudulent conduct of such co-guarantor. It does not tend to show that there is a right of action at law for contribution until payment of the principal debt.

The death of one co-surety does not affect the right to demand contribution; but the right may be enforced against the estate of a co-surety by the surety who has paid the debt. Conversely, where an executor of a deceased surety pays the debt, he may enforce contribution against the co-surety. 27 Am. and Eng. Enc. of Law, 494. When an administrator of a surety pays the principal debt, he may maintain an action in his own name against the principal debtor for repayment, and the amount recovered by him will be assets in his hands. In the case of *Mowry v. Adams*, 14 Mass. 327, the plaintiff was administrator of B., who was surety for A., the defendant, and after the death of B. paid the debt, brought suit in his own name and not as administrator of B. against A., the principal. The court said that the right to so sue depended on whether A., the defendant, was indebted to the plaintiff, or to the estate of B., and that this depended on the time and manner of his becoming liable. And further, that as B. had no right of action until he had paid the debt of the principal, and as he, B., died without paying, there was no promise by the defendant to him.

"His (B.'s) estate was, however, liable, and the administrator, if called upon was obliged to pay. The debt of A. accrued when M. (the plaintiff) paid the money; an implied promise then arising to repay, it being, in fact the debt of A. for which M. (B.) was surety, and which was paid by M. to the use of A. But the promise could not accrue to B., he being dead. It was, therefore, a promise to the administra-

tor. Now, it is settled that when a contract is made with an executor or administrator personally, after the death of the testator or intestate, or where money is received by the person sued after the death, in such cases the executor or administrator may sue either in his own name, or as executor or administrator. By suing in his own name, he becomes answerable to the estate for the amount recovered, and it is an implied acknowledgment of assets to the amount in his hands. The present is a case of that sort. The plaintiff takes money of the estate to pay a debt, for which the estate is answerable; he sues the principal debtor in his own name; he is chargeable with the amount of the debt as assets; and he may recover the amount * * * in his own name."

This case was cited in *Cobb v. Wood*, 8 Cush. (62 Mass.) 228; *Williams v. Moore*, 9 Pick. (26 Mass.) 432; *Moore v. Petty*, 135 Fed. 668, 68 C. C. A. 306.

The general principle was thus stated in *Moore v. Petty*, supra, though it should be noted that the suit in a foreign jurisdiction was by a domiciliary executor to recover proceeds of sale of property of the decedent received by the defendant who had made the sale as agent for the domiciliary administrator.

The fact that the principal debtor in this case had made default in paying his debt did not of itself cause a loss to either of those who had guaranteed payment of the debt, or give either a right of action against the other for contribution, for the principal debt might still be paid by the principal debtor, or be released, compromised, or abated as between the principal debtor and principal creditor. A notice to the guarantors of such default did no more damage to the guarantors, and gave no right of action for contribution. Thereafter either of the guarantors could pay the debt without waiting to be sued, and could then have recourse against the other. But until that payment be made there was no cause of action. No cause of action rose merely because of the relationship of the co-guarantors. It follows, then, that Schemel never had a cause of action against the defendant. If he had in his life no right to compel contribution, then his administrator could not acquire from him a right to sue therefor.

The court below erroneously considered that by the contract of guaranty there was a cause of action as between Schemel "or his estate," and Mrs. De Paris, the other guarantor. In other words, the court considered that there could be a cause of action without a right of action. But clearly that is impossible.

[2] If the widow and heirs of Schemel paid as heirs, then clearly the Delaware administrator had no right to sue. If they paid as administrators of Schemel, then the Delaware administrator cannot have the right to sue for contribution, unless there be privity between the Venezuela domiciliary administrators and the ancillary Delaware administrator. It is settled, however, that there is no privity between a domiciliary and

an ancillary administrator. There is but one estate, and both are in privity with the decedent and his estate, but not with each other in law or in estate. *Stacy v. Thrasher*, 6 How. 44, 12 L. Ed. 337; *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; *Hare v. O'Brien*, 233 Pa. 330, 336, 82 Atl. 475, 39 L. R. A. (N. S.) 430, Ann. Cas. 1913B, 624; *Merrill v. New England, etc., Co.*, 103 Mass. 245, 4 Am. Rep. 548; *Equitable, etc., Co. v. Vogel*, 76 Ala. 441, 52 Am. St. Rep. 344. If the legal title to a demand, or the possession of evidence of it, be in the domiciliary administrator, the ancillary administrator cannot sue thereon. *Merrill v. New England, etc., Co.*, 103 Mass. 248, 4 Am. Rep. 548; *Insurance Co. v. Lewis*, 97 U. S. 682, 24 L. Ed. 1114.

When a decedent has assets in more than one jurisdiction, there is unity of estate without unity of administration. But the estate of a decedent is not an entity, corporate or otherwise. *Stacy v. Thrasher*, 6 How. 44, 12 L. Ed. 337; *Anderson v. Louisville, etc., Co.*, 210 Fed. 689, 127 C. C. A. 277; *Davis v. Heralds of Liberty*, 39 Pa. Co. Ct. R. 399; *McGarvey v. Darnall*, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. (N. S.) 861; *Equitable Life, etc., Co. v. Vogel*, 76 Ala. 441, 52 Am. St. Rep. 344. This is a logical deduction from the principle of the lack of privity between an ancillary and domiciliary administrator. In *Stacy v. Thrasher*, supra, a leading case on the subject, a judgment had been recovered against the administrator of Lee in Mississippi, the domicile of the decedent, and was assigned to Thrasher. Later letters were granted in Louisiana to Stacy on the estate of Lee, and Thrasher sought to enforce in the United States Circuit Court in Louisiana payment of the judgment debt of which he was assignee by suit against the administrator of Lee in Louisiana. The court denied him the right to recover in that way. A judgment against one administrator in one jurisdiction furnished no right of action thereon against another person appointed administrator of the same decedent in another jurisdiction, because there was no privity between them, for that denotes mutual succession or relationship to the same rights of property. The Supreme Court said:

"It is for those who assert this privity to show wherein it lies, and the argument * * * seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situated, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is in rem, and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction."

This language was quoted with approval in *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112, and the court said

that a judgment against an administrator in one estate is *res inter alios acta* as an administrator of the same decedent in another state, "and cannot be even *prima facie* evidence of a debt."

A further illustration of the effect of the lack of privity between administrators of the same decedent appointed in different jurisdictions is the rule that an ancillary administrator cannot maintain suit on a judgment recovered in the domicile of the decedent by the domiciliary administrator for a debt due the decedent. This was so decided in *Davis v. Herald of Liberty*, 39 Pa. Co. Ct. R. 399, citing *Talmage v. Chapel*, 16 Mass. 71; 1 Freeman on Judgments, 163. The Philadelphia court based its view on the lack of privity and upon the fact that the domiciliary administrator could have sued in Pennsylvania on the judgment obtained by him as administrator in the domiciliary jurisdiction, and therefore that the ancillary administrator could not also sue, saying:

"If the foreign administrator has the right to sue here, how can the local administrator have the same right? The defendant cannot be required to answer the demands of two administrators accountable as they are to different jurisdictions."

There was, therefore, no cause of action for contribution vested in the estate of Schemel as an entity represented by two independent agents with no privity between them; but there was a right of action given to whichever agent paid the decedent's debt. If the ancillary administrator was not in privity with the domiciliary administrator, the former could not enforce a right of action which the latter had acquired because of something done by him. This conclusion is inevitable from the premises.

[3] Counsel for the defendant in error urged that injustice would be done to the estate of Schemel if the defendant in error be denied a right to maintain its present action in the court below. But there is, or was, clearly a way to enforce contribution from the plaintiff in error. The heirs of Schemel have had an action in Delaware for contribution for moneys paid by them as such. It is probably true that as administrator of Schemel they would also have had such right of action, though it is not in this case necessary to decide a point not argued. Certain it is that a judgment against the defaulting co-guarantor recovered in Venezuela, or elsewhere, by the widow and heirs of Schemel as individuals, or by them as administrators according to the law of Venezuela, would be enforceable here by attachment of property of the plaintiff in error. A domiciliary administrator may sue in his own name in another State on a judgment recovered by him in his representative capacity in the state of the domicile, because the judgment is his property. *Hare v. O'Brien*, 233 Pa. 330, 334, 82 Atl. 475, 39

L. R. A. (N. S.) 430, Ann. Cas. 1913B, 624, citing 1 Freeman on Judgments (4th Ed.) 217; 2 Wharton, Conflict of Laws (3d Ed.) 615½; 18 Cyc. 1239, and cases cited there; *Alley v. Caspari*, 80 Me. 234, 14 Atl. 12, 6 Am. St. Rep. 178; *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270; *Mowry v. Chase*, 100 Mass. 79.

[4] The court, therefore, are all of the opinion that the plaintiff had no right of action, because the right to enforce contribution was not due to Schemel in his life, and the payment of the principal debt having been made by the widow and children of Schemel, they could enforce payment either in their own names, or as administrators of Schemel; and further, that this excluded a right of action to the plaintiff, who was not in privity with them and obtained no right of action from or through them.

In view of the foregoing conclusion, it is not necessary in this case to decide whether the court below erred in excluding the testimony of Arroyo, who as counsel for the defendant, though not so of record, was not allowed to testify as to the law of Venezuela.

The court below having erred in refusing to instruct the jury to return a verdict for the defendant below, being the first assignment of error, when as hereinabove indicated it should have done so because the plaintiff below had no right to the action, the judgment of the court below should be reversed, and a mandate awarded to the court below to enter in the cause a judgment for the defendant below, with costs in this court and the court below upon the plaintiff below.

(117 Me. 371)

FEINGOLD et al. v. SUPOVITZ et al.
(Supreme Judicial Court of Maine. Oct. 10, 1918.)

1. PARTNERSHIP ⇐141—SALES OF PARTNERSHIP GOODS—AUTHORITY.

A partner has the right to sell samples belonging to the firm.

2. PARTNERSHIP ⇐156—ESTOPPEL TO DENY AGENCY.

If a partner led defendant to believe that an agent with limited powers was also a partner, defendant could rely on the agent's authority to sell samples belonging to the firm.

3. PRINCIPAL AND AGENT ⇐123(3)—POWERS OF AGENT—EVIDENCE.

In principal's action for price of samples sold by agent without authority, the price paid having been converted by the agent, evidence on issue of apparent authority held to sustain verdict for defendant.

4. TRIAL ⇐252(13)—INSTRUCTIONS—CONFORMITY WITH EVIDENCE.

In principal's action for price of samples sold by agent without authority, where the agent testified that he had previously sold other samples to defendants, instruction that, as there was no evidence of sale to defendants, mere sale of samples to others without defendants' knowledge was not a representation of authority, binding on plaintiffs, was properly refused, as passing on disputed facts.

5. APPEAL AND ERROR 1026 — HARMLESS ERROR.

Harmless error affords no ground for sustaining exceptions.

On Motion and Exceptions from Superior Court, Androscoggin County.

Action by Saul H. Feingold and others against Harry Supovitz and others. Verdict for defendants. Heard on plaintiff's motion and exceptions. Overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Frank T. Powers, of Lewiston, for plaintiffs. Harry Manser, of Auburn, for defendants.

CORNISH, C. J. The plaintiffs are manufacturers of women's garments in Worcester, Mass. The defendants are retail dry goods merchants in Lewiston, Me. One Edinburg was in the employ of the plaintiffs as a traveling salesman or commercial traveler from 1912 to August 8, 1917, empowered to solicit orders from the retail trade, and was furnished by them with samples of the various garments to be exhibited to the customers in soliciting that trade. Payment for goods so purchased was made directly to the plaintiffs on bills duly presented. The title to these samples was in the principals, and not in the agent. Edinburg in the course of his business was well acquainted with the defendants, and had taken their orders for goods at various times during his five years on the road.

On August 6, 1917, after he had practically finished his last trip for the sale of goods of that particular season, and was on his way back to Worcester, he called at the defendants' store and asked them if they desired to purchase any of his discarded samples. The defendants thereupon went to the hotel where the samples were, examined them, selected certain articles, of the list value of \$196.75, and gave Edinburg a check therefor, payable to his order, at the agreed price of one-third discount, and took the articles to their store. On August 19, 1917, Edinburg absconded, having disposed of all his samples, of the value of about \$500, and converted the proceeds to his own use. He was subsequently apprehended in Chicago, and returned to Massachusetts. On September 11, 1917, this action of trover was brought against the defendants to recover the value of the samples so purchased; the plaintiffs claiming that Edinburg had neither real nor apparent authority to sell the same.

The verdict was in favor of the defendants, and the case is before this court on plaintiffs' motion and exception.

Motion.

Two questions of fact were submitted to the jury under proper instructions: First,

whether the agent had actual authority from his principals to sell the samples under the existing circumstances; and, second, whether he had apparent authority, which the principals knowingly permitted him to assume, or held him out to the public to possess.

As to actual authority the evidence is conflicting. On this point the defendants, of course, could offer no direct evidence. The plaintiffs deny such authorization, but Edinburg, introduced by them as their witness, testified that his instructions were to return the samples to his employers, and that he had done so except in a few instances, where he had sold samples at the end of the season, which sales he had reported to the firm, and they had approved, and had themselves collected therefor.

But as this court has said:

"Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question: What did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal?" *Heath v. Stoddard*, 91 Me. 499, 504, 40 Atl. 547, 549.

That the defendants believed in the authority of the agent can hardly be controverted. They acted in good faith, paying for the samples what appears to be the usual price under the circumstances; the garments, through the season's use in display, and in packing and repacking, having become more or less worn and wrinkled, and needing pressing and repair. As further proof of their good faith it is admitted that in early September they sent to the firm duplicate orders from the purchased samples, on three different occasions, and it was from this information that the plaintiffs discovered to whom Edinburg had made the sale. They certainly would not have taken this course, had they been conscious of a dishonest transaction.

That they had a right to believe in Edinburg's authority the jury were justified in finding from the evidence. This was a matter of inference from all the facts and circumstances. The transaction itself was not a novel one. It may well be that in the ordinary course of commercial business the soliciting of orders from samples would not be held as a matter of law to carry with it the implied authority to sell the samples themselves and collect therefor. *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745; *Hibbard v. Stein*, 45 Or. 507, 78 Pac. 665. But the facts here show a different situation. The transaction was a natural one. It was the end of that particular season. The samples had, in a sense, outlived their usefulness, they were not in fresh and first-class condition. It was not an unusual

testimony that he had sold them before on several occasions, although the pay therefor had been made directly to the house, and one of the plaintiffs admits that he himself, on one occasion when on the road, and under like circumstances, sold a few samples at discount to these very defendants. It was obviously a businesslike proposition.

[1-3] But the most convincing proof in favor of the defendants' contention arises from the fact that between Edinburg and the plaintiffs there was not merely a business but a family connection, a fact which was well known to the defendants and which had been talked over between the plaintiffs and them. As early as 1914 Edinburg was attentive to the daughter of one of the plaintiffs, and on July 3, 1915, was married to her. He thereby became son-in-law of Saul H. Feingold and brother-in-law of other members of the plaintiff firm. The defendants testify that at one time one of the brothers-in-law, while on a business trip and in their store at Lewiston, told the defendants of the marriage and that Edinburg was then a member of the firm. This brother-in-law admits the conversation, so far as reporting the marriage is concerned, but denies that he said that Edinburg was a partner. If Edinburg was a partner, he had a right as a part owner to sell the samples. If one of the plaintiffs led the defendants to believe that Edinburg was a partner, even though in fact he was not, then the defendants had the right to believe in Edinburg's authority to make such a sale.

This question of disputed fact was within the province of the jury, and their finding under the testimony before us should not be disturbed. The motion must be overruled.

Exceptions.

[4] The plaintiffs requested the following instruction which was refused:

"That, as there is no evidence that the agent sold samples to the defendants, the fact that he might have sold a few samples before to other customers, Supovitz Bros. not knowing of the sales, this could not be a holding out of authority to them that would bind the plaintiffs."

This request was properly refused. It called upon the court to pass upon disputed facts as a basis for legal instruction; Edinburg himself having testified that he had occasionally sold samples to these defendants before the transaction of August 6, 1917.

[5] Moreover, in the light of all the evidence and of the full and comprehensive instructions in the charge, we do not think that the plaintiffs were harmed by the refusal. Harmless error affords no ground for sustaining exceptions.

Motion and exceptions overruled.

(Supreme Judicial Court of Maine, Oct. 10, 1918.)

1. BRIDGES \Leftrightarrow 20(2) — PRELIMINARY PLANS — PREPARATION BY CONTRACTOR — RIGHT TO COMPENSATION.

Town was not liable to bridge contractor for work in preparing preliminary plans to use at town meeting to convince voters as to wisdom and practicability of work, which they authorized; contractor submitting bid and securing contract.

2. BRIDGES \Leftrightarrow 20(3) — CONSTRUCTION OF BRIDGE — CONTRACTS — AUTHORITY OF COMMITTEE.

Where members of committee appointed by town meeting to supervise construction of bridge were dismissed by vote of town, their authority ceased, and all acts on their part, as employing contractor for bridge to make further plans to meet requirements of War Department, were void.

3. BRIDGES \Leftrightarrow 20(6) — COST OF PLANS — RIGHT OF CONTRACTOR — EVIDENCE.

In action by bridge contractor against town for cost of plans, evidence, including prior conduct of plaintiff in suing town three times without including any charge for plans, held to show his claim was in nature of an afterthought, and lacked merit.

Report from Supreme Judicial Court, York County, at Law.

Action of assumpsit by Edward B. Blaisdell against the Inhabitants of York. On report from the Supreme Judicial Court. Judgment for defendants.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Cleaves, Waterhouse & Emery, of Biddeford, and John C. Stewart, of York Village, for plaintiff. James O. Bradbury, of Saco, and E. P. Spinney, of North Berwick, for defendant.

CORNISH, C. J. This is an action of assumpsit, brought upon the following account annexed:

"York Village, Maine, Jan. 11, 1907.
"Town of York, to E. B. Blaisdell, Architect, Dr.
"To plan and specifications for new
bridge and way across York river
.....\$1,394.71."

The case is before the law court on report. It is an echo of the somewhat famous York bridge litigation, which has been before this court at various times and in various forms. Bliss v. Junkins, 106 Me. 128, 75 Atl. 386; Same v. Same, 107 Me. 425, 78 Atl. 478; Blaisdell v. York, 110 Me. 500, 87 Atl. 361; York v. Stewart, 110 Me. 523, 87 Atl. 372; Bliss v. Blaisdell, 110 Me. 527, 87 Atl. 374; Blaisdell v. York, 115 Me. 351, 99 Atl. 33.

A detailed history of the facts connected with the litigation may be found in Blaisdell v. York, 110 Me. 500, 87 Atl. 361. It is sufficient for the purposes of the present case to state that a special town meeting of the inhabitants of York was held on October 13, 1906, "to see if the town will vote to build

the bridge and approaches as laid out by the county commissioners across York river at York Harbor." The proposition was carried by a vote of 174 in favor to 123 opposed. At the same meeting—

"on motion of Mr. Gifford, a committee of four was chosen to act in conjunction with the selectmen in building the bridge; said committee, as suggested by Mr. Gifford, to consist of Charles H. Young, Joseph W. Simpson, Charles E. Weare, and T. Perley Putnam—said committee to serve without pay."

Trouble arose between the three selectmen on the one side and the committee of four on the other as to their respective powers and duties, and on October 22, 1906, the selectmen informed the other members that they would no longer act with them, and withdrew from all further participation in the matter. The committee of four, however, continued to serve. On December 5, 1906, a written contract in the sum of \$39,500 for the building of the bridge was entered into between the plaintiff and the town of York, signed in behalf of the town by the four members of the committee only. The selectmen sent various communications to the committee and to the contractor, protesting against the carrying out of the contract, denying its validity and all liability on the part of the town in connection therewith.

At the annual town meeting held on March 11, 1907, one article in the warrant read:

"To see what action the town will take relative to the committee of four appointed at a town meeting held October 13, 1906, in connection with the proposed construction of said bridge."

Upon this it was voted "that the committee be dismissed from further service." Neither the four members nor the contractor paid any attention to the protests of the selectmen, nor to this vote of dismissal. On October 17, 1907, a supplemental contract was entered into between the plaintiff and the committee, making a net increase of \$6,990.43 in the cost of the bridge, due to certain changes required by the War Department. The work progressed and the bridge was completed in May, 1908, but was not accepted by the town.

The plaintiff subsequently brought suit against the town for the balance alleged to be due him under the contract of December 5, 1906, and the supplemental contract of October 17, 1907, together with certain payments made by him to A. W. Gowen, the engineer in charge. This court held the town liable under the original contract, but not under the supplemental contract, nor for the payments voluntarily made by the plaintiff to the engineer. That decision was announced July 1, 1913. *Blaisdell v. York*, 110 Me. 500, 87 Atl. 361.

The plaintiff then brought another action of assumpsit to recover the amount claimed under the second contract, and judgment was ordered for the defendants November 2, 1916, on the ground that the claim was res ad-

judicata. *Blaisdell v. York*, 115 Me. 351, 99 Atl. 33.

The present suit was begun on November 13, 1912, and embraces a charge not contained in either of the other suits, namely, for plans and specifications, which the plaintiff claims were prepared and furnished by him as an "architect" to the committee, some of the plans and specifications at their request, shortly after their appointment, for use by them in securing proposals and bids for the construction of the work, and the remaining plans and specifications prepared by him for the committee later on, to conform to the changes as required by the War Department. This divides the claim into two branches, the plans and specifications at the inception of the work, and those prepared to meet the changes by the War Department. We will consider these branches separately.

It is obvious, as a matter of law, that under the appointing vote of October 13, 1906, the bridge committee were both authorized and instructed to build the bridge. As was said in the opinion in the former suit:

"They were to take the necessary steps to carry out the vote of the town and obey instructions by building the way and the bridge. It was their duty to select an engineer, obtain plans and specifications, advertise for bids, make the award, and execute a contract." *Blaisdell v. York*, 110 Me. 500, 513, 87 Atl. 361, 370.

And this is what the committee proceeded to do; but Mr. Blaisdell was not the man selected as engineer, nor to make the plans and specifications. His name is not mentioned in that connection. The records of the meeting of the committee held on October 25, 1906, which was the first meeting held after the controversy with the selectmen had resulted in their withdrawal, and only three days after that event, contain the following vote:

"The committee voted to engage Mr. R. W. Libby, of Saco, Maine, to take levels, prepare specifications, and make changes in the plans according to the ideas of the committee."

What is meant by the term "plans" is explained by the action taken at the next meeting, held on October 30, 1906, viz.:

"It was reported by the secretary of the committee that Mr. R. W. Libby declined to act as engineer for the committee.

"Voted, to engage A. W. Gowen to take levels, change plans, and take charge of the construction of the bridge.

"Voted, to adopt the plans, with some changes, that were offered for inspection at the special town meeting of October 13, 1906."

[1] This leaves no room for doubt or discussion as to the plans which the engineer, Mr. Gowen, was to modify. They were the plans offered for inspection at the special town meeting called for the purpose of ascertaining whether the town would or would not build the bridge. Those plans had been made by Mr. Blaisdell in anticipation of that meeting, and were exhibited by him there as sketches of his idea of how the bridge and approaches should be constructed. His purpose is evident. He wished to obtain the com-

tract for the construction, and the first step was to convince a majority of the voters as to the wisdom and practicability of the work. This is often done, but it is hardly to be expected that the town is to pay therefor. The plan or sketch which is before the court bears out this conclusion. It was Mr. Blaisdell's plan, not the town's. It was prepared at his own instance, for his own use at the town meeting, not at the instigation of the town, nor its committee, for the committee had not been appointed when the plan was made. It served its purpose, a favorable vote was secured, and the committee under that vote selected their own engineer, who was instructed to take levels and change plans and take charge of construction, and he continued in service until the work was completed.

On November 5, 1906, the committee voted to prepare proposals and advertise for bids. The plaintiff was one of the bidders, and to him the contract was awarded for \$39,500 on November 30, 1906. It would be strange indeed if the same person should be both the engineer or "architect" to act for the committee and the bidder to secure the contract.

It is evident that no such incongruity existed here. The plaintiff is not entitled to compensation for the preliminary plans.

[2] As to any plans made by the plaintiff to meet the requirements of the War Department, calling for certain changes in the work, another point in defense arises, in addition to what has been said above. The four members of the committee were dismissed by vote of the town on March 11, 1907. Their authority then ceased, and all acts on their part after that date were unauthorized and void. *Blaisdell v. York*, 110 Me. 500, 520, 87 Atl. 361. The changes were directed by the War Department after that date, and the committee had then no power to employ the plaintiff to make plans and specifications at the expense of the town, even if they had desired to do so. But it is difficult to conceive why they should have employed him for that purpose. The committee already had selected its own engineer, Mr. Gowen, who was still in service, and the interests of the plaintiff as the contractor were really adverse to those of the committee, in case of any controversy. The true situation is revealed by the vote of the committee passed October 17, 1907, viz.:

"The changes ordered by the War Department were further discussed, and the extra work and cost thereby entailed, as given by the engineer and the contractor, were considered. In view of the reduction made in the figures heretofore given, it was voted to proceed under the fifth and sixth articles of the contract of December 5, 1906, to instruct the engineer, A. W. Gowen, to require the contractor to make the changes made necessary by order of the War Department; said changes and the agreed price therefor being as hereinafter set forth in an order executed of which the following is a copy."

Evidently Mr. Gowen was the engineer who was preparing all necessary plans and speci-

fications, and who was representing the committee in dealing with Mr. Blaisdell the contractor. Mr. Blaisdell was not acting in the double and absurd capacity of contractor and "architect."

[3] It should be further observed that prior to the institution of the suit at bar the plaintiff has at different times brought three suits against the town of York to recover for services rendered, and in none of them has he included any charge for plans and specifications. The first suit was brought to recover the amount due under his contract, and in that case he took a voluntary nonsuit. A second writ was brought for the same cause, and included certain sums alleged to have been paid by the contractor to the engineer, Mr. Gowen. That suit recognized Mr. Gowen as the engineer in charge. These sums were disallowed, as were also his claims under the second or supplemental contract, and judgment was entered in his favor for the amount found due, with interest, under the first contract, \$44,536.99. Another suit was then begun to recover the amount claimed under the second contract, and in this judgment was rendered for the defendant.

Now, for the first time, is the claim made for services in preparing plans and specifications. We cannot resist the conclusion that, in view of all the facts and circumstances, and the prior conduct of this plaintiff, this claim is in the nature of an afterthought. It lacks merit, and is not substantiated by convincing proof.

Judgment for defendants.

(117 Me. 335)

STEWART v. INHABITANTS OF YORK.

(Supreme Judicial Court of Maine. Oct. 10, 1918.)

1. TOWNS \Leftrightarrow 37—VOTE AT TOWN MEETING—AUTHORITY TO COMMITTEE.

A vote at town meeting, in terms merely authorizing a committee, which should serve without pay, to build a bridge and approaches, does not empower it to employ counsel and incur expenses for legal services in behalf of the town.

2. TOWNS \Leftrightarrow 39(1)—COMMITTEE—UNAUTHORIZED EMPLOYMENT OF ATTORNEY—RIGHT OF RECOVERY.

Where, without authority to do so, committee assumed to employ attorney as counsel at expense of town, he was bound to take notice of their limited authority and dealt with them at his peril.

3. TOWNS \Leftrightarrow 80—COMMITTEE—APPOINTMENT AND DISMISSAL—SUBSEQUENT ACTS.

A committee appointed by a town meeting being dismissed from further service by a subsequent town meeting, its later acts on behalf of the town are void.

Report from Supreme Judicial Court, York County, at Law.

Action by John C. Stewart against the inhabitants of York. On report from trial court. Judgment for defendant.

Argued before CORNISH, C. J., and

SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

John C. Stewart, of York Village, for plaintiff. E. P. Spinney, of No. Berwick, and J. O. Bradbury, of Saco, for defendant.

CORNISH, O. J. This suit is brought by an attorney to recover for professional services alleged to have been rendered to the defendant town, and for expenses incurred in connection therewith, between November 17, 1906, and July 14, 1911, aggregating \$1,514.76. There is no controversy over the fact that the plaintiff was employed from time to time by the majority of a committee chosen by the town at a special town meeting held October 13, 1906, to construct a bridge and approaches across York river as laid out by the county commissioners, that he rendered the services charged for, and that the charges are fair and reasonable. The single point at issue is whether the town of York is liable therefor.

The building of this York bridge has been fruitful in litigation. It is apparent from the history of the entire transaction that the inhabitants of the town were divided into two earnest and at times warring factions over the advisability of constructing the bridge, and the proposition was bitterly fought step by step.

It is needless to enter upon the details, which have been set forth in full in *Blaisdell v. York*, 110 Me. 500, 87 Atl. 361, further than to say that at a town meeting held on October 13, 1906, the pro-bridge faction prevailed by a vote of 174 in favor, to 123 opposed, and a committee of four was chosen to act in conjunction with the selectmen in building the bridge; said committee to act without pay. This was the only vote passed by the town directing the construction of the bridge, and the only authority given to this joint committee of seven under this vote was to build the bridge. Friction at once arose between the selectmen, who were apparently of the anti-bridge faction, and the remaining four members who represented the pro-bridge faction, as to their respective powers and duties, and the result was the withdrawal of the selectmen on October 22, 1906, from further participation in the work of the committee. The remaining four, however, continued to exercise the authority given by the town, and on December 5, 1906, entered into a written contract with one Blaisdell to construct the bridge and approaches for the sum of \$39,500. The opposition seems to have gained in strength during the winter, because at the annual town meeting held on March 11, 1907, it was voted that the committee of four appointed on October 13, 1906, be dismissed from further service. This committee paid no heed to this vote, continued to act as before in pushing forward the construction of the bridge, and

made a supplemental contract in connection therewith on October 17, 1907, remaining in charge until the completion of the work in the spring of 1908.

Litigation arose in various forms and at various times, and for his professional services in connection with this litigation the plaintiff has brought this suit against the town.

[1] It is obvious that the action cannot be maintained because the plaintiff has failed to show his employment by the town or by any authorized agent thereof. The question of employment of counsel in this litigation was never considered by the municipality itself. The only action taken by the municipality is expressed in the vote of October 13, 1906, before recited, which merely authorized the committee to build the bridge and the approaches. This vote undoubtedly empowered the committee to take such steps as might be necessary and incidental to their main duty, the material construction of the bridge, such as the selection of an engineer, the obtaining of plans and specifications, the advertising for bids, and the awarding and executing of the contract of December 5, 1906, as was held in *Blaisdell v. York*, 110 Me. 500, 518, 87 Atl. 361. But by no stretch of legal intendment can that vote be held to authorize the committee to employ counsel and incur expenses for legal services in behalf of the town in connection with litigation which might arise in the future. That was no part of their duty, and was beyond the scope of the power conferred upon them. *Butler v. Charlestown*, 7 Gray (Mass.) 12; *Fletcher v. Lowell*, 15 Gray (Mass.) 103.

The very terms of the vote passed by the municipality negated the incurring of any expense outside the material construction of the bridge and approaches. It expressly provided that the committee should serve without pay. Care was taken to avoid expense. It cannot with reason be urged that such a restrictive vote conferred upon the committee the power to incur counsel fees at the expense of the town.

[2] The committee having no legal power to employ counsel, it is equally true that the plaintiff in dealing with them was bound to take notice of their limited authority. He dealt with them at his peril and as it was his duty to ascertain the extent of their power to bind the town, if the persons assuming to act did so without authority he cannot recover of the town. *Goodrich v. Waterville*, 88 Me. 39, 33 Atl. 659; *Blaisdell v. York*, 110 Me. 500, 521, 87 Atl. 361; *Morse v. Montville*, 115 Me. 454, 458, 99 Atl. 438.

[3] This rule of law applies to and annihilates the plaintiff's entire bill, but it should be observed that whatever limited power had been given to the committee by the vote of October 13, 1906, was revoked by the town by the vote of March 11, 1907, when the committee was dismissed from further serv-

void. *Blaisdell v. York*, 110 Me. 500, 520, 87 Atl. 361. The amount of the charges prior to March 11, 1907, is \$227.29, and the amount subsequent thereto is \$1,237.47. The plaintiff does not claim a single employment by the committee covering the entire time, but simply separate employments from time to time as the various occasions arose for legal services.

The foregoing principles would prevent recovery in this case as a matter of law, even if the services charged had been rendered in behalf of the town and had been beneficial to the town as a matter of fact. But the record shows the contrary. In part of the litigation, the town of York was not a party, and in those cases where the town was a party it was represented by other counsel, while the plaintiff appeared as counsel for the adverse party.

Thus the first litigation for which the plaintiff claims compensation was a bill in equity brought by the selectmen against the four members of the special committee in November, 1906, to restrain those members from proceeding. That was a controversy between the two factions in the joint committee of seven. The plaintiff appeared as counsel for the four, and other counsel appeared for the selectmen, the remaining three. The town was not a party.

The second group of charges cover services before a legislative committee February 14-18, 1907, in securing an act ratifying the action of the town at its meeting of October 13, 1906, and authorizing the construction of the bridge. The plaintiff admits that there was no vote of the town authorizing him to appear in its behalf, and it is evident from the history of the case that the securing of this legislation was the act of the pro-bridge faction of the joint committee.

The third group of charges embrace services and expenses in connection with a bill in equity brought in April, 1907, by Elizabeth B. Bliss, an abutting owner, against the county commissioners of York county, the selectmen of the town, the special committee of four, and the contractor Blaisdell, praying for an injunction. In this litigation the plaintiff admits that he represented the committee of four and Mr. Blaisdell. The selectmen had their own counsel, the county commissioners theirs, and no one appeared for the town of York, as it was not a party to the proceedings. This case found its way to the law court twice. *Bliss v. Junkins*, 106 Me. 128, 75 Atl. 386; *Id.*, 107 Me. 425, 78 Atl. 478.

The fourth group of charges relate to mandamus proceedings brought by Blaisdell, the contractor, against the county commissioners, in which the plaintiff appeared as

The fifth group pertains to services rendered in connection with mandamus proceedings brought by Blaisdell against the town clerk of York to compel him to change his record. In these proceedings the plaintiff represented the petitioner Blaisdell, and the town was not a party.

There are other small charges for services before the United States engineers in July, 1907, at the request of the committee after they had been dismissed, for services in a trespass suit brought by Bliss against Blaisdell in which the plaintiff appeared for Blaisdell (*Bliss v. Blaisdell*, 110 Me. 527, 87 Atl. 361), and in the first suit brought by Blaisdell against the town of York, in which also the plaintiff appeared for Blaisdell and against the town. All services and charges, however, come within the characterization above given. None were rendered in behalf of the municipality nor for its benefit. The plaintiff admits that he was counsel for the four of the committee during the entire period, and for Mr. Blaisdell continuously after July 17, 1907. He acted for Blaisdell in all his litigation against the town, recovering in one case a judgment in the sum of \$44,536.99. These parties were his clients, not the town of York, and the municipality should not be compelled to pay for the services rendered.

Judgment for defendant.

(117 Me. 391)

HARRIS v. MOSES et al.

(Supreme Judicial Court of Maine. Oct. 14, 1918.)

1. WILLS ~~§~~684(3)—TRUSTS—CAPITAL OR INCOME—STOCK DIVIDEND FROM EARNINGS.

In absence of indication of testator's intention as to whether stock dividend, from earnings, be distributed as income among life tenants or held as part of corpus of trust estate for remaindermen, it must be held for remaindermen, and not distributed, as dividends may be, as income among surviving life tenants.

2. WILLS ~~§~~707(3)—ACTION TO CONSTRUCT—COSTS AND EXPENSES.

Where testamentary trustee was justified in seeking instructions of court as to whether stock dividend was income or principal, fund from dividend should contribute towards costs of litigation, including counsel fees of complainant's and respondents' solicitors, to be fixed and allowed by the sitting justice.

Report from Supreme Judicial Court, Cumberland County, in Equity.

Suit by Benjamin F. Harris against Oliver Moses and others. On report to the Supreme Judicial Court. Decree in accordance with the opinion.

Argued before CORNISH, C. J., and SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Symonds, Snow, Cook & Hutchinson, of Portland, for complainant. Payson & Virgin

and John H. Pierce, all of Portland, for respondents.

BIRD, J. This bill in equity is brought by one of the trustees under the will of Oliver Moses, deceased, against his two co-trustees and the children, grandchildren, and the great and great great grandchildren of the testator, asking the instructions of this court as to the disposition of a stock dividend declared upon stock of the Worumbo Manufacturing Company held by said trustees as part of the trust estate.

Answers have been filed by all the defendants, except one of the remaindermen, against whom the bill has been taken pro confesso. The general effect of the answers is to admit the allegations of the bill, at least in so far as to enable the court to reach the conclusion at which it has arrived.

The case is reported upon the bill as amended, the answers of the defendants, the exhibits annexed to bill and answers, together with the stipulation of counsel as to facts and the order of court reporting the case.

The provisions of the will of Oliver Moses instituting and regulating the trust are as follows:

"6. All the rest and residue of my estate, real, personal and mixed, whether now in possession or hereafter acquired, I give, devise and bequeath unto the said Galen O. Moses, Frank O. Moses and Benjamin F. Harris in trust to the uses following; that is to say: I devise and direct that out of the net income remaining, after paying all proper charges and expenses, the trustees shall pay to my said wife such sums of money as she shall from time to time desire, and the residue thereof divide in quarter annual payments equally among my children, Frank O. Moses, Galen O. Moses, Harriet S. Knight, wife of George H. Knight, Annie E. Harris, wife of Benjamin F. Harris, and Wealthy O. Hinds, wife of Rev. John W. Hinds, so long as they all shall live.

"7. In case the share of the said income falling to each of my children living shall in any year fall below two thousand five hundred dollars, the trustees at the end of the year are to make the shares up to that sum out of the principal of the trust estate.

"8. If during the period of the said trust any of my said children shall die without issue the division of the income is to be made among the survivors of them. But if the child so dying without issue shall leave a husband or wife, I give, bequeath and devise unto such surviving husband or wife one-fourth part of that portion of the trust fund or estate corresponding to the portion of the income to which such deceased child was entitled at the time of his or her demise, the income of the residue to be divided as above provided, except as hereinafter to be provided."

Item 9 of the will provides for the disposition of the trust fund upon the decease of the children of the testator.

The trustees or their predecessors in the trust received from the estate of the testator and retained as part of the trust fund sundry shares of the corporation named above, which at the date of the vote of the stockholders, quoted below, numbered 886. On the 23d day of February, A. D. 1917,

the stockholders of the corporation passed the following vote:

"Voted: That five thousand (5,000) shares of new capital stock be issued at par to stockholders of record this 23d day of February, 1917, in proportion to their present holding, one share of new stock for each share now owned, and that an extra dividend of 100 per cent., payable in stock, be paid to stockholders of record of February 23, 1917, on March 15, 1917."

The vote was carried into execution, and the number of shares held by the trustees was 1,772 at the time of the filing of the bill.

The complainant claims that the stock dividend was declared from earnings of the corporation. This is not seriously questioned by respondents, and we find such to be the fact. The complainant urges that consequently the shares representing the stock dividend be so apportioned that the value of the trust fund be unimpaired and the remainder be divided among the life beneficiaries—the three and only surviving children of the testator.

The will gives no indication of any intention entertained by the testator as to whether or not a stock dividend declared from earnings of the corporation be distributed as income among the life tenants or held by the trustees as part of the corpus of the estate for the benefit of the remaindermen.

"In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares." *Gibbons v. Mahon*, 136 U. S. 549, 559, 10 Sup. Ct. 1057, 1058 (34 L. Ed. 525).

The complainant evidently relies upon the dictum in *Gilkey v. Paine*, to the effect that the integrity of the capital should be maintained and all surplus earnings, in whatever form distributed, be given to the life tenant. 80 Me. 319, 325, 14 Atl. 205. This expression was unnecessary for the determination of that case. See *Thatcher v. Thatcher*, 117 Me. 331, 104 Atl. 515.

The case under consideration cannot, we think, be distinguished from the case of *Thatcher v. Thatcher*, supra.

And the court takes this opportunity to state that, in the determination of that case, not only did the court have the assistance of the admirable and exhaustive brief of the solicitor for the complainant trustees, but also of the like briefs of the solicitors in the instant case.

[1] In conformity with the opinion in that case, we must hold that the stock dividend declared by the Worumbo Manufacturing Company is to be held by the trustees in trust for the remaindermen, and not distributed, as may the dividends thereon, as income among the surviving life tenants.

sets rule (see *Thatcher v. Thatcher*, supra, and the dictum with which the opinion in *Gilkey v. Paine*, supra, closes), we think the complainant was justified in seeking the instructions of the court, and that it is reasonable and, as and for the reasons stated in *Richardson v. Richardson*, 75 Me. at page 577, 46 Am. Rep. 428, that the fund arising from the dividend contribute towards the costs and expenses of the litigation, the latter to include the reasonable counsel fees of the solicitors of the complainant and respondents, to be fixed and allowed by the sitting justice. The respondents, however, are to be allowed but one bill of costs. See, also, *Bailey v. Worster*, 103 Me. 170, 178, 68 Atl. 698.

Decree accordingly.

(117 Me. 402)

McELWEE v. MAHLMAN.

(Supreme Judicial Court of Maine. Oct. 16, 1918.)

1. BOUNDARIES §46(1) — DETERMINATION — RIGHTS OF OWNERS.

Where land was platted into lots, all parties in interest could rearrange the lines, on completion of the survey, and a subsequent purchaser took to the new line and not the surveyed line.

2. DEEDS §38(3) — DESCRIPTION — AMBIGUITY.

Where land was platted into lots 1, 2, and 3, and the owners subsequently changed the lines, a deed of lot 2, calling for the line of lot 1, but giving distances showing invasion of lot 1, and a deed conveying "a certain lot" meaning "all our interest" in lot 1, giving distances corresponding to the new lines, were not ambiguous, but conveyed according to the new and not the platted lines.

3. DEEDS §112(1) — PLATS — INTENT.

Reference to a plan is only to aid in ascertaining the intention of the parties.

4. DEEDS §40 — REFERENCE TO PLAT — EFFECT.

If a plat is referred to in a deed as part of the description, it becomes a material and essential part of the conveyance with same effect as if copied into the deed.

Report from Supreme Judicial Court, Washington County, at Law.

Action by Lillian McElwee against Marietta Mahlman. Case reported. Judgment for plaintiff.

Argued before CORNISH, C. J., and SPEAR, HANSON, and PHILBROOK, JJ.

L. H. Newcomb, of Eastport, and J. H. Gray, of Lubec, for plaintiff. H. E. Saunders, of Lubec, and H. H. Gray, of Millbridge, for defendant.

HANSON, J. This is a real action, and is before the court on report.

The question at issue involves the location of the line dividing lots owned by the contending parties—the plaintiff's south line and defendant's north line.

All the land in question was originally owned by the heirs of Patrick Gillise, late

divided into lots by George W. Ross, an engineer, whose plan of the lots in question was introduced in evidence. The survey made in 1902. According to Mr. Ross, lot No. 1 was 70 feet wide on C street; lots No. 2 and No. 3 were each 70 feet wide on said street. The line remained as originally located until April 1904, when H. P. Gillise and Annie T. Gillise conveyed their two-thirds interest in lot 2 to F. N. Gillise, and in addition their 2 feet from the northerly side of lot 2 and at the same time changed the Ross line by drawing a new line upon the plan representing the north line of No. 1 and the line of No. 2. Up to this time no other conveyances had been made by the heirs. May 5, 1904, Frank N. Gillise purchased Archibald J. Black a small lot 12 feet wide, and 13 feet long, in the southeast corner of lot No. 2, to square the lot. On the same day, F. N. Gillise deeded a triangular strip of land from the north of lot No. 2, 2 feet wide on Gillise street running to a point 50 feet southeast on the north line, to Stephen Somers, the owner of lot No. 3.

The foregoing statement of title and history of the locus is presented for a better understanding of the real question involved. It will be noted that on May 5, 1904, the rights of parties other than the heirs of Patrick Gillise were not brought in question. The survey and plan had been made and accepted by the parties in interest; one deed between the heirs made, which involved a change in the plan. The change in the plan was made on July 1, 1904, Frank N. Gillise conveyed the land thus acquired, which for purposes of this case comprised all of original lot numbered 2, and 3 feet from the northerly side of lot No. 1, to Linda Ingalls, who occupied the land until March 24, 1914, when she conveyed the same to the plaintiff. That deed has the following descriptions:

"Commencing at the southeast corner of Stephen Somers' homestead lot (lot No. 3), thence in a course nearly south forty-seven feet and six inches to the north line of lot No. 1, as per the Gillise field, so called, by Geo. W. Ross, thence westerly on said north line of lot No. 1 sixty-six feet and eight inches to Gillise at so called, thence northerly along said G street fifty-three feet to the homestead lot of said Stephen Somers, thence easterly along Somers south line sixty-eight feet to the place beginning."

[1] It will be noted that, while the description refers to the plan made by George W. Ross, the distances given are specific, exact, and deliberate, and extend the width of lot No. 2, over the Ross line and into lot No. 1, where it had been relocated by the parties in interest after Mr. Ross finished his survey. This we think

owners had a right to do, especially as other interests had not intervened, and assuredly so as to the defendant whose title comes from the same source, and after the new line had been established for 12 years, and had been recognized by all concerned.

The defendant acquired title through a deed from Lella E. Gillise and Mary T. Gillise, by deed dated July 17, 1916, the description in which deed is identical with that in a deed from F. N. Gillise to them, and reads:

"A certain lot or parcel of land situated in said Lubec and more particularly bounded and described as follows, to wit, beginning at the southeasterly corner of said lot, where the westerly line, at the southwesterly corner of land owned by Charles or Mary Mulholland, of said Lubec, intersects with Main street, so called; thence running westerly fifty-five feet, more or less, to a new street, Gillise street, so called; thence northerly, sixty feet, more or less, to property formerly owned by F. N. Gillise, now owned by McElwee, thence easterly fifty-four feet, more or less, to said Mulholland's line; thence southerly sixty feet, more or less, to the place of beginning. Meaning and intending to convey all of my said interest in and to said parcel of land, known on a plan of the Gillise estate as lot No. 1, said plan having been drawn by George W. Ross, civil engineer, in 1902."

[2, 3] Counsel have asserted that there is ambiguity in the description; but none is perceived. On the contrary, this, the latest deed, contains in the description evidence of full knowledge of the parties as to the changes made in the original plan, and the widening of lot No. 2, and consequent decrease in lot No. 1. The grantors were not deeding lot No. 1. The description clearly states that they were conveying their interest in lot No. 1, and the Ross plan was not made a part of the deed, or referred to any further than to locate a certain lot No. 1, in which they were selling all their interest. That interest was an interest in lot No. 1 on the Ross plan, as changed by the parties, before any right had been acquired by the defendant. The wording of the description clearly shows the intention of the parties to be that the grantors were selling what they knew to be a parcel of land from lot No. 1, and not lot No. 1 as originally laid out. The description was indefinite, every mention of distance was qualified by the use of the words "more or less," and the northerly bound was "property now owned by McElwee." The language used is not ambiguous, and the defendant must be charged with knowledge of the change in the plan, and the new line by which the property "now owned by McElwee" was limited. The plan was made for the Gillise heirs. They had the right to change a line, or make smaller lots of larger ones, if they saw fit; and the rights of others were not interfered with by the change. Our duty under the report is to ascertain the intention of the parties, and so find that such intention shall be carried out. In reaching our conclusion the oral testimony has thrown some light,

but the deeds introduced, especially the deed to the defendant, considered in connection with the plan, clearly establish what the oral testimony tends to show, that the defendant is limited on the north by the new line fixed by the Gillise heirs, and not by a line fixed by Mr. Ross. The use of the plan in the case, as in all cases, is limited to the one purpose, as an aid to ascertain the intention of the parties. In considering the same subject, the text of volume 8, R. C. L. 134, states the law in these words:

"The words of reference usually serve merely to connect the deed with the plat, so that by applying the one to the other the former may be rendered intelligible. They give effect to the expressions of the deed, but they do not limit them. If there is that upon the face of the plat to which the expressions of the deed can apply, then the court will make the application, rather than reject the words of the deed as not expressing the intentions of the parties."

If it was the intention to convey the original lot, then it could have been done by deeding lot No. 1, as per plan, etc., or by giving the exact boundaries. This course was not taken. On the contrary, the opposite course, and one which most decidedly sustains the plaintiff's contention, was taken, and was adopted by the defendant, when every line and distance was qualified by the use of the words "more or less." These words, used in connection with the words "now the property of McElwee," can only imply that the defendant's north line must be the south line of the plaintiff's land, according to the deed under which she and her grantor had occupied the land many years, the bounds of which were definite and unqualified.

[4] This is not a case where a plan is referred to as a part of a description of a lot of land. *Danforth v. Bangor*, 85 Me. 423, 27 Atl. 268. Or where a grant of land is made with reference to a plan. *Heaton v. Hodges*, 14 Me. 66, 13 Am. Dec. 731, and cases cited. If so referred to in a proper case, the map or plan designated would become a material and essential part of the conveyance with the same force and effect as if copied into the deed. 8 R. C. L. 135, and cases cited, including *Kennebec Purchase v. Tiffany*, 1 Greenl. 219, 10 Am. Dec. 60; *Ripley v. Berry*, 5 Greenl. 24, 17 Am. Dec. 201.

Here the reference to the plan was solely for the purpose of locating a lot, out of which the land was deeded, and was not a part of the description of the land conveyed. Applying the rule by which our court has been guided since its formation, that the expressed intention of the parties gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions, must govern our action, we find for the plaintiff. *Perry v. Buswell*, 113 Me. 399, 94 Atl. 483.

Judgment for the plaintiff.

Parties to be heard in damages by the clerk.

(Syllabus by the Court.)

1. INSURANCE ~~65914~~—JITNEY BUSES—INSURANCE POLICY—BENEFITS.

Under the act P. L. 1916, p. 283, entitled "An act concerning auto busses, commonly called jitneys, and their operation in cities," a policy of insurance for \$5,000 is required to be delivered to the chief fiscal officer of the city when the consent and license to operate such auto bus is obtained. The policy is for the benefit of persons injured, as a result of an accident occurring from the operation of such auto bus upon the public streets of the city. *Held*, the injured person may sue directly the insurance company on the policy, as prescribed by the statute, on a judgment recovered against the auto bus owner, for damages occasioned as a result of an accident in the operation of the auto bus on the public streets. The injured person's rights are original and primary not derivative and secondary under the statute.

2. STATUTES ~~6121~~(1)—SUBJECT AND TITLE—JITNEY BUS LAW.

The above act does not offend against article 4, § 7, par. 4, of the state Constitution, which provides every law shall embrace but one object and that shall be expressed in the title.

3. INSURANCE ~~6626~~—JITNEY BUSES—ACTION ON INSURANCE POLICY—SERVICE ON CITY OFFICER.

The statute does not require process to be served on the chief fiscal officer of the city, in the original suit, between the person injured and the auto bus owner.

Appeal from District Court of Orange.

Action by Grace Gillard against the Manufacturers' Casualty Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1918, before BERGEN, KALISCH, and BLACK, JJ.

Pomerehne & Laible and Jacob L. Newman, all of Newark, for appellant. Arthur B. Seymour, of Orange, for respondent.

BLACK, J. The plaintiff in this case on June 28, 1917, was injured in a collision, between an automobile which she was driving and a jitney bus driven by John Bono, a chauffeur for Andrew Wanzkye. She sued Andrew Wanzkye on the 13th day of September, 1917, and recovered, in the Orange district court, a judgment against him, for her injuries, for the sum of \$100 and costs. This judgment was entered by default and has not been paid. At the time of the accident Andrew Wanzkye was operating a jitney bus, under a license or consent granted by the proper authorities of the city of Newark, along Elizabeth avenue, a public street in Newark, where the accident occurred. The license or consent was granted under an act of the Legislature entitled "An act concerning auto busses, commonly called jitneys, and their operation in cities," P. L. 1916, p. 283. Andrew Wanzkye filed with the chief

policy of insurance, issued by the company, in the sum of \$5,000. The plaintiff then sued the defendant, the company, upon the policy of insurance to recover payment of her judgment. The plaintiff was given for the plaintiff. The plaintiff that judgment is attacked in this. The record does not show the testimony. No point is made of that fact, on the judgment was recovered by Grace the plaintiff, against Andrew Wanzkye, dering him liable for negligence, the record of the suit in the Orange court was put in evidence, and the demand states a cause of action based on negligence in driving defendant's auto. The appellant files six reasons or contentions why it is dissatisfied in point with the determination of the district court. But they are argued in the appellant under three heads.

[1] The first ground of attack is that the rights of the plaintiff are derivative and not be no more extensive than the rights of the insured. This is a false assumption. The answer is, on the contrary, the rights of the plaintiff are original and primary under the statute, which provides (P. L. 1916, p. 283, § 2): There must be a consent of a board or body having control of the operation of such auto bus on the public streets, for the operation of an auto bus without such consent shall become effective and the operation shall be permitted, until the consent of such board or body is obtained. Of such auto bus in any city, shall be licensed and the chief fiscal officer of the city, in the original suit, between the person injured and the auto bus owner, for damages occasioned as a result of an accident occurring from the operation of the auto bus on the public streets of such city, and such insurance shall continue effective and such operation shall be permitted only so long as such insurance shall remain in force; such insurance shall provide for the payment of an amount equal to the judgment recovered by any person on account of the ownership, maintenance and use of such auto bus or any fault in respect to the ownership, maintenance and use of such auto bus and shall be for the benefit of every person suffering loss, damage or injury as a result of such accident. Then follows a provision for the appointment of an attorney to be executed by the owner of the auto bus to be delivered to the fiscal officer of the city for the purpose of acknowledging service of process of a court of competent jurisdiction to be served against the insured by virtue of the indemnity granted under the policy filed. By virtue of this provision of the statute, the plaintiff alone can sue on the policy required to be filed. This is an essential distinguishing feature,

that class of cases, where there is no right of action, because the parties to the suit are not parties to the agreement sued on, as in *Hall v. Passaic Water Co.*, 83 N. J. Law, 771, 85 Atl. 349, 43 L. R. A. (N. S.) 750; *Baum v. Somerville Water Co.*, 84 N. J. Law, 611, 87 Atl. 140, 46 L. R. A. (N. S.) 966; *Standard Gas Power Corp. v. New England Casualty Co.*, 90 N. J. Law, 570, 101 Atl. 281. The auto bus owner cannot sue on the statutory policy of insurance. It is true that, under the policy filed, the auto bus owner has certain defined rights. But a special policy is required to be filed by the statute, against loss from the liability imposed by law, upon the auto bus owner for damages, on account of bodily injury, etc.

The insurance policy cannot contain any provisions except those authorized by the statute, so as to affect any person suffering loss, as provided therein. Whatever other provisions the filed policy contains may be good as between the insurer and the insured auto bus owner, and may impose upon the latter certain duties and obligations toward the owner, for breach of which the insurer can maintain an action; but such provisions cannot deprive an injured person of the remedy given by the statute, nor can they in any way abridge the rights granted by the statute to such injured person. The policy of insurance is filed only for the benefit of persons who might suffer injury. It is not filed for the benefit of the city. The city is under no liability which the policy indemnifies it against. The statute was passed only for the benefit of the injured person. The sole beneficiary of the statute is the person injured. The injured person is the only one who can sue under the policy, and cite the statute in support of the action. The injured person's rights in the policy of insurance are original and primary, not derivative and secondary. The first ground of attack therefore falls, because the premise on which the argument is based is not true in point of fact.

[2] It is next argued that the act P. L. 1916, p. 283, is unconstitutional, because the title, which is in these words, "An act concerning auto busses, commonly called jitneys, and their operation in cities," offends against article 4, § 7, par. 4, of the state Constitution, which provides, every law shall embrace but one object and that shall be expressed in the title, the argument made is, if the act is intended to affect the contract of insurance, it cannot answer the test that the object expressed in the title must give notice of the effect of the legislation to one conversant with the existing state of the law, citing *Sawter v. Shoenenthal*, 83 N. J. Law, 499, 502, 83 Atl. 1004; but in that case, it was said, the validity of the title is not to be determined by mere distinctions of etymology or definition of words, but by the facts of the case and the history of the legislation. Language which at one time may

be quite inadequate to warn the public of the object of the legislation may at another, owing to custom or usage, be entirely sufficient. The title of the act is concerned with the operation of auto busses, commonly called "jitneys." This is the object of the law, the conditions prescribed, such as filing an insurance policy for the benefit of an injured person is germane to the subject of its operation. That is its product, as has been happily expressed by Mr. Justice Garrison, with quaint terseness:

"The object of every law, by force of the Constitution, must be single and be expressed in the title of the law; the product may be as diverse as the object requires and finds its expression in the terms of the enactment only. In fine, the title of an act is a label, not an index." *Moore v. Burdett*, 62 N. J. Law, 163, 40 Atl. 631.

There are many cases in our courts, illustrating the application of this provision to legislation. It would be profitless to go over them in detail. In *Newark v. Mount Pleasant Cemetery Co.*, 58 N. J. Law, 168, 171, 33 Atl. 396, it was said, the evil intended to be guarded against was not the inclusion in one act of more than a single matter, but the inclusion therein of matters not properly related among themselves. See *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52, 70, 24 Atl. 964, 17 L. R. A. 97; *Allen v. Board of Education*, 81 N. J. Law, 135, 141, 79 Atl. 101—in which many cases are cited.

We think there is no constitutional infirmity in the title of this statute, and therefore this ground of attack must fail.

[3] It is next urged that process should have been served on the chief fiscal officer of the city of Newark, in the suit between this plaintiff, Grace Gallard, and Andrew Wazyke, the auto bus owner; that the statute requires it, and such failure was fatal to the plaintiff under the statute. The answer to this is, the appellant misconstrues the provision of the statute, on which reliance is placed. The statute provides that a power of attorney shall be delivered to the fiscal officer concurrently with the filing of the policy wherein the auto bus owner shall nominate and appoint the fiscal officer his true and lawful attorney, for the purpose of acknowledging service of any process out of a court of competent jurisdiction, to be served against the insured by virtue of the indemnity granted under the insurance policy filed.

Process to be served against the insured does not mean process to be served against the insurer. This, also, is for the benefit of the person injured, so that the auto bus owner cannot escape the process of the courts. Nowhere in the statute is there any provision providing for service of process on the chief fiscal officer of the city in the original action against the auto bus owner the insured. This point is without legal merit.

The judgment of the Orange district court is affirmed, with costs.

(92 N. J. Law, 146)

GILLAND v. MANUFACTURERS' CASUALTY INS. CO.

(Supreme Court of New Jersey. Sept. 27, 1918.)

(Syllabus by the Court.)

INSURANCE §157—INSURANCE POLICY—"INJURY"—"DAMAGE"—"LOSS."

The words, "injury," "damage," "loss," in an accident insurance policy filed under Act March 17, 1916 (P. L. p. 283, c. 136), known as the auto bus or jitney act, include damages to personal property, such as damage to an automobile (citing Words and Phrases, First Series, Damage, Injury, Loss).

Appeal from District Court of Orange.

Action by Charles Gilland against the Manufacturers' Casualty Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1918, before BERGEN, KALISCH, and BLACK, JJ.

Pomerehne & Laible and Jacob L. Newman, all of Newark, for appellant. Arthur S. Seymour, of Orange, for appellee.

BLACK, J. The facts of this case are fully set out in the case of Grace Gillard against the same defendant, 104 Atl. 707, in an opinion filed the present term. In this case; however, there is an additional point, not involved in that case, viz. whether the policy of insurance filed by the defendant company covers damages to personal property. We think the contract of insurance is not limited to personal injuries. The words used by the insurance company to express its contract are as follows: Suits, "on account of injuries sustained by any person or persons"; "including suits alleging such injuries and demanding damages therefor"; "resulting in injuries or death sustained by any person or persons"; "shall be for the benefit of every person suffering loss, damage or injury as described in this contract or as described in the terms of the act" P. L. 1916, p. 283, c. 136.

There is nothing to suggest that by the use of the words "injuries," "damages," "loss," personal injuries, damages or loss were only intended; nor do these words in their definition exclude injuries or damage to property. These words mean destruction or impairment of value, injury or harm. "Injury" means any wrong done or suffered; thus, we speak of an injury or damage to the person, to character, or to reputation, as well as to property. 2 Words and Phrases, p. 1812; 4 Words and Phrases, p. 3613; 5 Words and Phrases, p. 4232. Sometimes the word "damage" is used to denote a partial destruction, while "loss" is more properly used to denote absolute or total destruction. It is quite true, the contract speaks of limiting the liability for one person injured to \$5,000, and the statute P. L. 1916, p. 283, c. 136, § 2, speaks of

"damages on account of bodily injury or death suffered." If these were the only words used in the contract or statute descriptive of the liability covered by the insurance, there might be some force in the contention that the policy covered only injuries to the person or death suffered.

We think the contract is broad enough to cover damages to personal property. The judgment is therefore affirmed, with costs.

(92 N. J. Law, 185)

STATE v. TAYLOR.

(Supreme Court of New Jersey. Aug. 21, 1918.)

1. CRIMINAL LAW §824(1) — REQUEST FOR INSTRUCTIONS.

Error cannot be assigned upon a failure to instruct the jury, in the absence of a request therefor.

2. CONSPIRACY §27—OVERT ACT.

A mere conspiracy to defraud a county board is insufficient to constitute a crime, unless some overt act charged in the indictment is committed.

3. CRIMINAL LAW §371(1, 12)—EVIDENCE—OTHER OFFENSES.

In a prosecution for conspiracy to defraud a county board, evidence tending to prove a distinct offense, unrelated to the offense charged, was not irrelevant as to motive and intent.

4. CRIMINAL LAW §380—EVIDENCE—REPUTATION—PARTICULAR FACTS.

In a prosecution for conspiracy to defraud a county board, a question as to whether witness and defendant had not put in considerable time in evolving a scheme for the drawing of jurors which would limit the chance for a fraud such as the one charged, was properly excluded, since particular facts and circumstances are inadmissible to show reputation.

5. CONSPIRACY §45—EVIDENCE—ADMISSIBILITY.

In a prosecution for conspiracy to defraud a county board, it was error to exclude evidence that a codefendant was for weeks mentally incompetent on account of the excessive use of liquor, as bearing on the probability of defendant entering into the conspiracy with such a person.

Error to Court of Quarter Sessions, Essex County.

Frank E. Taylor was convicted of conspiracy, and he brings error. Reversed.

Argued February term, 1918, before GUMMERE, C. J., and KALISCH, J.

Wilbur A. Helsley, of Newark, for plaintiff in error. J. Henry Harrison, Prosecutor of the Pleas, of Newark, for the State.

KALISCH, J. The record in this case discloses a conviction and judgment thereon of the plaintiff in error, indicted jointly with one James F. Cowan, of a criminal conspiracy to cheat and defraud the board of chosen freeholders of the county of Essex, of its moneys, goods, chattels, and property. Cowan pleaded non vult to the indictment, was called as a witness for the state, and gave testimony tending to establish the commission of the offense, by the defendants, as charged against them in the indictment. The indictment contains but a single count, which

charges that the defendants named therein did wickedly, corruptly, knowingly, and unlawfully conspire, combine, confederate, and agree together fraudulently and falsely to cheat and defraud the board of chosen freeholders of the county of Essex of divers large sums of money, to wit, etc. Here follow charges of the various fraudulent and unlawful means alleged to have been used by the defendants, and of the several overt acts committed by them to accomplish and to carry into effect the unlawful agreement. Five overt acts are laid in the indictment, in each of which is set forth the name of the person with whom the defendants acted, and through whom the defendants were enabled and succeeded in obtaining money unlawfully from the board of chosen freeholders.

The record is a voluminous one, containing 40 assignments of errors, and 13 specifications of causes for reversal. We propose to deal only with those which have been argued orally before us and those relied on in the brief of counsel of plaintiff in error. The first 15 assignments of error and all of the specifications of causes for reversal deal with the admission in evidence of acts not charged as "overt acts" in the indictment, and the rulings of the trial judge regarding the competency of such acts in evidence.

The precise point made by counsel of plaintiff in error, relating to this group of alleged errors, is that the trial judge, against the objection made by counsel, permitted the state to prove acts of 11 individuals, who were not named in the indictment, but whose acts were similar to the "overt acts" mentioned therein, and treated the same as "overt acts" upon which the plaintiff in error could be lawfully convicted, regardless of whether the state proved or did not prove any of the specified overt acts. This assertion is not supported by the record. It does appear that counsel of defendant objected to the introduction of testimony tending to prove other acts of the defendants, in pursuance of the unlawful agreement, with persons other than those mentioned in the indictment, but which acts were similar in character and occurred during the same period of time, whereupon counsel of the state said to the court that he intended to follow it up and connect these acts with those set forth in the indictment, whereupon and upon condition that proof would be made of one or more of the overt acts charged in the indictment, the court admitted the testimony. Proof was subsequently made of the overt acts laid in the indictment.

[1, 2] Counsel of plaintiff in error, in his brief, does not seriously contend that the testimony was inadmissible for all purposes, but frankly admits that it was admissible "for the purpose of proving the fraudulent purpose and intent of the persons involved." But he argues that, the trial judge having admitted such testimony, it became his le-

gal duty "to have expressly told the jury that the evidence of other acts should be considered by them only and solely for the purpose of determining whether Cowan and Taylor were corruptly and fraudulently inclined, as charged, and should have distinctly told the jury that they should not consider such acts as or in lieu of the stated overt acts in the indictment, and that, even if the jurors believed that these other acts were committed, but if they had any reasonable doubt as to every one of the overt acts mentioned in the indictment, the defendant should be acquitted." No request was made of the trial judge, by counsel of defendant, to instruct the jury to the effect as above suggested, and therefore, the trial judge was under no legal duty to do so. Counsel of defendant is in no position to complain of matters which the judge omitted to charge the jury, unless the judge's attention was directed thereto by a request, and such request was refused. Besides all this, however, it appears that the judge, in express terms, instructed the jury that "a mere conspiracy of the kind stated in this indictment is insufficient to constitute a crime, unless some overt act charged in the indictment is committed." This was an accurate statement of the law.

[3] It further appears that counsel of defendant moved to strike out the testimony of the witness Bender upon the ground of irrelevancy, and in that it tended to prove a distinct offense, unrelated to the offense charged in the indictment. The trial judge apparently ignored the application, for he made no ruling whatever. Construing the failure of the court to make a ruling equivalent to a denial of the motion (which is not to be considered as a precedent), we have considered the point raised, and upon examination of the testimony objected to conclude therefrom that the motion to strike out was without any merit. The testimony was relevant on the question of the motive and intent which actuated the defendants, and besides it was a proper procedure for the state to prove the character of the unlawful means adopted by the defendants to carry into effect the conspiracy charged on the indictment, even though those particular unlawful means were not set forth in the indictment, and in themselves constituted an indictable offense, and so long as they were related to the subject-matter of the indictment. The matters argued, under assignments 16, 17, 18, 19, and 20, we find, are without merit.

[4] The twenty-first assignment of error is founded upon the refusal of the trial judge to permit Harry V. Osborne, a witness produced by the defendant, to answer the following question:

"And haven't you and hasn't Mr. Taylor put in considerable time during the last three or four months in evolving a scheme for the drawing of jurors which would practically eliminate, or at least very much limit, the chances for a fraud

of this kind, which is embodied in this charge, being perpetrated upon the county?"

This question was properly excluded. It could only have a bearing upon the defendant's character for honesty. It is to be borne in mind, however, that it is firmly settled law that it is only the general reputation of a defendant which can, properly, be put by him in evidence. Particular facts and circumstances tending to establish honest dealings or conduct are inadmissible.

[8] Assignments 22, 23, 24, and 25 relate to the exclusion, by the court, of questions asked of the defendant, by his counsel, which sought to establish by this witness that Cowan was addicted to the excessive use of liquor, and to such an extent that he would be incapacitated for weeks at a time, during which he was mentally incompetent and incoherent, and that these facts were known to the defendant, before and at the time it is alleged that he entered into a conspiracy with Cowan to defraud the county. The purpose of offering this testimony, as stated to the trial court by defendant's counsel, was to have the jury pass upon the question, as a matter of fact:

"Whether or not it is probable that a man in his right senses would make such a combination with a man whom he knows to be for weeks at a time out of his head by the use of intoxicating liquors."

We think the testimony offered was competent, and that its exclusion was error prejudicial to the defendant. It may very well be that the probative force of such testimony is very slight. But that is not a proper matter for a court to deal with. The court cannot legally substitute its judgment for that of the jury, and exclude from the latter's consideration testimony, upon the theory that its evidential value is weak, without depriving a defendant of a constitutional right to the benefit of such testimony, and a jury of one of its most sacred functions—to weigh testimony and make deductions therefrom. If the testimony was competent, its potentiality was for the jury to determine. In the case sub judice there is no ground stated by the trial judge why he ruled the questions out. The nature of the case was such that the state was obliged to resort to the testimony of Cowan, an alleged coconspirator, and to proof of conduct between the defendants, in order to establish the unlawful agreement. Cowan testified as to the criminal compact that existed between him and Taylor to defraud the county.

If it be true that Taylor knew Cowan to be an irresponsible drunkard and given to other vices, the question might naturally arise: Would Taylor, who, according to the testimony, bore an excellent reputation for honesty, and who held an office of trust for many years, without stain, ally himself with a man whose drunkenness might, at any moment, have made him indiscreet, and there-

by disclose the fraud that was being perpetrated? Now, in order, for the defendant to have the benefit of the jury's consideration of that important question, it was incumbent upon the defendant to establish, first, as a fact, that Cowan's habits were what the questions put to the defendant aimed to prove, and that the latter knew of such habits before and at the time when the alleged conspiracy was formed. This the court erroneously refused to permit the defendants to do, and therefore the judgment must be reversed. We are not unmindful that it might be fairly argued that men do not seek among the virtuous and honorable for accomplices to commit unlawful deeds; but, even so, that circumstance can only affect the evidential value of the testimony offered, and not its competency, as we have already pointed out.

We have examined the questions raised by the remaining assignments of errors, and find them unmeritorious.

The judgment is reversed.

(89 N. J. Eq. 364)

LACOMBE v. HEADLEY et al. (No. 42/152.)

(Court of Chancery of New Jersey. Aug. 30, 1918.)

(Syllabus by the Court.)

TAXATION — 768 — TAX DEED — VALIDITY — RECORDING.

A tax collector's deed, given to a purchaser at a tax sale under the Tax Adjustment Act (P. L. 1898, p. 442; 4 Comp. Stat. 1910, p. 5246), is not invalid as against a bona fide purchaser from the prior owner without notice, whose deed is first recorded; the tax collector's deed not being within the purview of section 54 of the act concerning conveyances (2 Comp. Stat. 1910, p. 1553).

Bill to quiet title by August L. Lacombe against Hilda H. Headley and another. Decree advised for complainant.

W. Eugene Turton, of Newark, for complainant. Harold W. Headley, of Newark, for defendants.

LANE, V. C. This is a bill to quiet title. Complainant claims under a tax deed from the tax collector of Irvington, dated September 30, 1909. A sale of the property for unpaid taxes was held on or about February 11, 1909, under the provisions of an act entitled "An act concerning the settlement and collection of arrearages of unpaid taxes, etc., in towns, townships, boroughs, and other municipalities, etc." P. L. 1898, p. 442; 4 Comp. Stat. p. 5246. The deed was never recorded. The defendant Hilda H. Headley claims to be a bona fide purchaser for value, without notice, of the lands, and derives her title through a conveyance made by the heirs of the former owner subsequent to the tax sale. Her contention is that the deed from the tax collector is void as against her

under the provisions of section 21 of the act concerning conveyances. 2 Comp. Stat. p. 1541; section 54, 2 Comp. Stat. p. 1553.

The question is squarely presented whether the deed from the collector, given in pursuance of the Tax Adjustment Act, is within the purview of section 54 of the Conveyance Act. Section 21 is unquestionably broad enough to permit the record of a deed given by the collector, for that deed, under the provisions of the Adjustment Act, is to be proved according to law. Section 54 provides:

"Every deed or instrument of the nature or description set forth in the twenty-first section of this act shall, until duly recorded or lodged for record in the said clerk's office, be void and of no effect against subsequent judgment creditors without notice, and against all subsequent bona fide purchasers and mortgagees for valuable consideration, not having notice thereof, whose deed or mortgage shall have been first duly recorded."

Notwithstanding that a tax collector's deed given under the Adjustment Act seems to be within the express language of the statute, I have reached the conclusion that it is not within its purview. The act under which the sale took place provides for the adjustment of the tax by commissioners, confirmation of their report by the circuit court, and the sale of lands by public advertisement. Each stage of the proceeding is conducted with the utmost publicity. Section 6 of the act (4 Comp. Statutes, p. 5251) provides that after the sale the collector shall execute and deliver to the purchaser a certificate of sale; section 7, that any person having an estate in or lien upon the lands may, at any time, up to the expiration of six months from the date of the certificate of sale redeem the lands; section 8, that if the lands have not been redeemed within six months the collector of taxes, at the expiration of said six months, upon the surrender of the certificate, shall execute under the seal of the town, attested by the clerk of the said town and proved according to law, and deliver to the purchaser a deed or conveyance for said lands in fee simple absolute, free and discharged from any estate in or lien upon the same in favor of any person made a party to the proceedings. The deed is made presumptive evidence of title in the grantee. After the sale, the purchaser becomes the equitable owner of the property, subject only to the right of any person interested to redeem within a period of six months. He is entitled to immediate possession. Section 11, 4 Comp. Statutes, p. 5253. Upon the expiration of the six months period the right of redemption of the prior owner is cut off, and the prior owner has no further interest in the property.

During the time after the redemption has ceased, and prior to the delivery of the deed, where the naked legal title resides may be a question; but, if the naked legal title continues to reside in the prior owner, it is

such a title as that, by operation of law or proceedings taken under the law, the owner has been deprived of the power to convey or otherwise deal with. The only individual who has the power to execute a document which will evidence a transfer of title is the tax collector. When he executes a deed, he does not do it in the name of the prior owner, but under the seal of the town. The rights of the prior owner are not cut off by the delivery of the deed, but by the sale under the statute plus the expiration of the period provided for redemption. There is no time provided in the statute within which a deed must be applied for and given. It has not been contended that if, after the sale and the expiration of the period of redemption, but before the delivery of the deed, the prior owner should execute a conveyance of the property, such conveyance would be of any force or effect. How can the fact that the purchaser has received a deed which evidences his title and has withheld it from record enlarge the right of the prior owner? It is, of course, true that if the prior owner had (no tax sale intervening) voluntarily conveyed, and a bona fide purchaser had intervened prior to record, the first conveyance would be void as against the bona fide purchaser. But this is because, as to the bona fide purchaser, the act of the owner in divesting himself of title is considered nugatory, and that the title resided in the prior owner at the time of the conveyance to the bona fide purchaser. Assuming that the deed of the tax collector be considered null and void, the proceedings antedating the delivery of the deed, to wit, the sale and the delivery of the tax certificate, are not affected. The right to convey the land does not revert to the prior owner. The tax collector might, I think, if the deed were lost, be obliged by mandamus to execute a new one. It has been so held in the case of a sheriff's deed. *McMillan v. Edward*, 75 N. C. 81.

In *Glorieux v. Lighthipe*, 88 N. J. Law, 199, 96 Atl. 94, Ann. Cas. 1917E, 484, the Court of Errors and Appeals, in considering the language of section 53, that provision of the act making record notice (2 Comp. Statutes, p. 1552), held that the words "subsequent purchasers" referred to subsequent purchasers of the same land. I think that the words in section 54, "subsequent purchasers," must be confined to "subsequent purchasers" of the same land and of the same grantor, and that the grantor must, at the time of the making of the deed to the subsequent purchaser, have the right to make such conveyance, assuming the prior unrecorded deed to be void. A view opposite to that expressed by me has apparently been taken by the Supreme Court of Georgia in *Maddox v. Arthur*, 122 Ga. 671, 50 S. E. 668. The court said:

"The purchaser at the tax sale, relatively to the rights of a subsequent purchaser at sheriff's

sale, stands in no better position than if he were a purchaser from the landowner; and if he fails to file his deed for record until after one, without notice of his title, has purchased the property at a valid sheriff's sale, and duly recorded the sheriff's deed, he loses whatever title he may have acquired at the tax sale. For, as was said by Judge Lumpkin in *Ellis v. Smith*, supra [10 Ga. 253], in reference to a sheriff's sale: "The effect of a sale by the law in this respect is just the same as if made by the individual whose agent or trustee the officer becomes to make the transfer."

Under the statutes of Georgia, marshals' sales for taxes are held under general executions. Inasmuch as the matter is novel in this state (I cannot find any cases whatever bearing upon the subject), and as my conclusion is opposed to the text in 17 Cyc. title "Executions," page 347, and several adjudicated cases, it seems necessary to make a more extended inquiry as to whether it is consistent with the purposes and history of the recording acts than would otherwise seem proper.

The justification for the legislative fiat that deeds not recorded should be void as against bona fide subsequent purchasers for value is the assumption that if deeds are recorded careful purchasers will obtain notice by a search of the record. There is nothing in the Adjustment Act which requires that there should be inserted in the deed given by the tax collector the name of the prior owner. If it were not for the use in some counties of the Luck index system, a prospective purchaser, to obtain notice of tax collector's deeds, would be obliged to examine every tax collector's deed recorded, an intolerable burden. If record is to be of no substantial value, it is hard to imagine why it should be required, although it is quite apparent why it should be permitted for the purpose of perpetuating evidence and making a copy of the record evidential—this being the initial purpose of the registry acts.

It was not until 1820 (section 10 of the act of 1820; Revision of 1821, p. 747) that an alphabetical index was provided for. Nixon's Digest, title "Conveyance," p. 144, § 21. It was not until then that sheriff's deeds and deeds executed by other officers were referred to in any wise. That section provided that there should be indexed, in case the deed be made by a sheriff, the name of the sheriff and the name of the defendant or defendants mentioned in the execution; and if by executor or administrator, the name of such executor or administrator and the testator or intestate; and if by attorney or attorneys, the name of such attorney or attorneys and his or their constituents; and if by commissioners under a law of this state, or appointed by order of any of the courts of this state, the name of such commissioners and the name of the person whose estate has been conveyed. No provision has been made for an alphabetical index with respect to tax collectors' deeds.

It was not until 1864 (Laws 1864, p. 498) that provision was made requiring that sheriff's deeds should be executed in such manner as that they might be recorded. That section provided for the familiar affidavit as to the method of sale, and that upon the conveyance being approved by the court it might be recorded as if duly acknowledged, and further that such conveyance or the record thereof, or a certified copy of the record, should be evidence of a good and valid sale, and the conveyance of said land and real estate as if the same had been reported to and approved by the court in pursuance of whose decree, judgment, execution, or order the same was made.

Upon sale under execution (Paterson's Laws 1799, p. 371, § 12) the sheriff was directed to give a deed which should be "as good and sufficient a deed or conveyance for the lands, * * * as the person against whom the said writ or writs of execution were issued might or could have made for the same at or before the time of rendering judgment against him or her. * * *" So with respect to auditors' deeds. Paterson's Laws, p. 300, § 23. So with respect to executors' and administrators' deeds on sale of lands to pay debts. Paterson's Laws, p. 373, § 22. The law as it existed at the time of Nixon's Digest provided (page 854, § 11) that, upon the happening of certain contingencies the succeeding sheriff should "sign, seal and deliver to the said purchaser * * * a deed, * * * which deed * * * shall have the same force and effect as if the sheriff who made the sale had signed, sealed and delivered a deed of conveyance for the same in due form of law." There was no requirement of acknowledgment.

The title of the act of 1864 referring to sheriff's deeds is "An act for the better security of titles to land sold by sheriffs and other officers." It provides in its second section that the deed and the record thereof, or a certified copy of such record, shall be good and sufficient prima facie evidence of the truth of the recitals in the said deed or conveyance contained. It is significant that this is an independent act and was passed for the purpose of perpetuating evidence. There is no intimation that at that time it was considered that there was any requirement that sheriffs' deeds should be recorded.

Since it has been permissible to transmit title of real property by deed, there has always been recognized a distinction between the formalities which are necessary where the conveyance is made by the grantor voluntarily and where it is made by an officer of the law. See Kent's Comm. p. 446, lecture 57, and notes; Revised Edition by William M. Lacey, 1889, vol. 4, p. 472, notes.

The initial purpose of the recording statutes was to perpetuate documents and to make the records and copies thereof evi-

dence. As early as the days of Queen Anne (chapter 19, St. 13 Anne; Nevill, p. 37) it was provided (section 7) that exemplification of deeds, etc., proved and certified in a certain manner, and any of the public books of records of the province, should be received in evidence. In 1713 or 1714 an act was passed, section 1 of which provided that all deeds, conveyances, and evidences of land should be acknowledged by the grantor, or proved before an officer designated. The act provided that the record should be evidence, but did not provide a penalty for nonrecording. Allinson's Laws, p. 33. This act was annulled in 1721. It was re-enacted in substantially the same form and again annulled in 1731. Allinson's Laws, p. 80. In 1743 (Allinson's Laws, p. 132), an act was passed permitting deeds acknowledged or proved in a certain manner to be recorded; the record was made evidence, but there was no provision with respect to a penalty for failure to record. This provision was first introduced in the law, so far as I can ascertain, by the act of 1799. Paterson's Laws, p. 399, § 8. It provided that:

"Every deed * * * shall be void and of no effect against a subsequent bona fide purchaser or mortgagee, for a valuable consideration, not having notice thereof, unless such deed * * * shall be acknowledged * * * and be lodged, within six calendar months, * * * to be recorded."

The act also provided that the record should be evidence. The section with respect to acknowledgment and record is permissive only. The time to record was cut down to fifteen days by the act of 1820 (Revision of 1821, p. 747, § 1). The Revision of 1848 made no changes bearing upon the situation. Nixon's Digest, title "Conveyance," p. 146, § 18. The Conveyance Act was revised in 1874. Revision, p. 89. By section 13 it was provided that no deed, unless acknowledged or proved according to law, should be recorded. Section 14 provided that any deed not acknowledged, proved, recorded, or lodged for record within 15 days after its execution should be void as against subsequent purchasers. Section 33 provided for an alphabetical index. Subsequently an act was passed omitting the provision for 15 days. In 1898 the act was again revised. Laws 1898, p. 670. Section 21 permitted the acknowledgment or proving and recording of all conveyances affecting lands. Section 53 provided for the effect of such record as notice. Section 54 provided for the effect of their nonrecord as against subsequent purchasers. Section 52 contained a provision that no deed or instrument, unless acknowledged or proved and certified in the manner thereinabove directed, should be recorded.

It will be at once observed that it might well be claimed that the effect of section 52 was to repeal by implication the provisions of the act of 1864 providing for the method of execution of sheriffs' deeds. This was remedied by an act of 1904 (Laws of 1904, p.

70). Section 52 was amended to except conveyances by a sheriff or other officer or auditors in attachment in pursuance of a decree, judgment, or execution, or order of a court which it was provided might be recorded as theretofore. Section 2 of the act of 1904 validated the record of conveyances made by sheriffs and other officers, if they had been executed as in the thirteenth section of the act relative to sales of land under public statute (Revision of 1874) provided for. The history of this legislation demonstrates that its original purpose was to perpetuate evidence. Hence acknowledgment or proof and record were made permissive. The second purpose which was sought to be achieved was the protection of bona fide purchasers for value without notice. Since Paterson's Laws the permissive and mandatory features of the act have existed side by side, but in construing the act as it now reads consideration must be given to its double purpose. It is inconceivable to me that from 1799 and up until 1821 it should have been considered that sheriffs' deeds and the like were within the purview of the statute. There was no provision requiring that such deeds should be acknowledged, so that they might be recorded, and to make their record efficacious it would, as I have before indicated, necessitate an examination by a prospective purchaser of every sheriff's deed.

Nor do I think the fact that the Legislature in 1820 provided for an alphabetical index and directed that, so far as sheriffs' deeds and those of certain enumerated officers were concerned, the names of the prior owners of the property should be indexed, enlarged the scope of the act. Sheriffs' deeds, if acknowledged, might, at the option of the holder, be recorded, so that title deeds might be perpetuated. There was still no mandate requiring the sheriff to acknowledge. In the act permitting a deed to be given by a succeeding sheriff, the words used are that he shall sign, seal, and deliver. Nor do I think that the act of 1864 (P. L. 1864, p. 496) providing for the approval of sheriffs' deeds, and the record thereof, enlarged the scope of the penalizing section of the recording act. Its purpose was merely to compel the sheriff to deliver a deed which might be recorded, so that the purchaser might perpetuate his evidence of title. Nor do I think that the change in the phraseology of the penalizing section, so that it now specifically refers to the instruments enumerated in section 21, has enlarged its scope so far as this particular phase of the subject is concerned.

The words used in Paterson's Laws could not be broader. They refer to every deed or conveyance of land, tenements, or hereditaments. If a sheriff's or tax collector's deed were not within the purview of the section prior to the change in phraseology, I do not think that they are now. I have already pointed out that, if it be held that tax collectors' deeds be within the purview of the

deed it would be necessary for him, so far as any provision of the act is concerned, to examine every tax collector's deed that had ever been recorded in the county. It would also result in this: That although the purchaser is absolutely protected up to the time of obtaining his deed, yet the instant after he obtains it the prior owner may sell to a bona fide purchaser for value, and if the bona fide purchaser for value reaches the courthouse first his right takes precedence.

Some of the states by legislation specifically require the recording of tax collectors' and sheriffs' deeds, and generally the acts give a certain length of time within which the instruments may be recorded. *Lindley v. Mays*, 66 Iowa, 265, 23 N. W. 660; *Littlefield v. Prince*, 96 Me. 499, 52 Atl. 1010; *Humphrey v. Yost*, 10 Kan. App. 324, 62 Pac. 550; *Sintes v. Barber*, 78 Miss. 585, 29 South. 403; *Scott v. Conrad*, 24 Colo. App. 452, 135 Pac. 135. The court in *Pollard v. Cocke*, 19 Ala. 188, held that marshals' or sheriffs' deeds were within the recording act. The court said:

"But it is argued that there is no statute in this state requiring marshals' or sheriffs' deeds to be recorded. The statute is general, and we see no reason for exempting them from its operation. They certainly fall as much within the mischief intended to be remedied as other absolute deeds for lands sold at public auction. Under statutes of other states requiring registration of deeds generally, they have been held to be embraced. *Massey v. Thompson*, 2 Nott & McC. [S. C.] 105; *Scribner's Lessee v. Lockwood*, 9 Ohio, 184."

An examination of the opinion in *Scribner's Lessee v. Lockwood* discloses that it is not an authority for the position taken by the Alabama court. In the Ohio case it was held that where a person conveys land, which is afterwards taken in execution, sold, the sale confirmed, and deed ordered, before the first deed is recorded, the purchaser at the sheriff's sale is regarded a bona fide purchaser from the time of sale, and protected as such, though the first deed be recorded after the confirmation of sale, but before sheriff's deed is made. The court said:

"The plaintiff contends that, inasmuch as his deed was recorded before the execution and delivery of a deed by the sheriff, that the common principle of law, that notice received any time before the conveyance, as well as before the payment of the purchase money, has a direct application, and that its effect is to put aside the title of the defendant; and this would undoubtedly be true, as I before said, if the analogy between a sheriff's deed and a deed from a private individual was perfect throughout.

"It is a very common error, where there is a general resemblance between two things, so as to subject them, in some measure, to one common law, to suppose that this law is of universal applicability, and that it furnishes the governing rule where the resemblance fails as well as where it is preserved. The various steps of the process through which a judicial sale is perfected, are something very different from what takes place in a private sale. It is much more reasonable in the present instance to say that where a person has purchased at sheriff's

deed for a deed, that these steps not only constitute so many acts of public notoriety, but that they also contribute so completely to identify the land and consummate the sale that he whose title is perfect up to this period shall not be disturbed in consequence of the registry of another deed, before his own is actually delivered; that he is in truth a purchaser without notice, and that the registry of the other deed before he receives his own conveyance, which would be a circumstance of the greatest importance, if both deeds were private conveyances, is in reality of no moment in his case."

In *Fernyhough v. Rockwell*, 31 S. D. 75, 139 N. W. 780, the court said:

"Section 2216, Pol. Code, throws additional light on this subject. It provides that, when a tax deed is issued, the certificate of sale must be canceled and filed away. It is our opinion, therefore, that, when the tax deed was issued, the tax sale became canceled. Until the sale, the treasurer's duplicate tax list imparted notice of the unpaid tax. After the tax sale, the treasurer's sale book, together with the annotation on the subsequent tax lists and tax receipts, imparted notice of the sale. When the tax deed, whether valid or void, was issued, the sale book no longer imparted notice of the sale, and there was no longer any duty on the treasurer's part to note such sale on subsequent tax lists or tax receipts. The holder of the tax deed then stood in the same position as the holder of any other kind of deed, viz. in order to have surely protested his rights, he should have recorded his deed."

There is no provision in our Adjustment Act as to filing away the tax certificate, etc., as in the South Dakota statute. If the tax books are marked "Paid," it is not necessarily when the deed is delivered. It may be any time after the purchase price of the land is paid. The records in the tax office can no more be considered as notice before the delivery of notice before, and I can conceive of no good reason why they should not be so considered after, delivery. The fact that in the instant case the books were not so kept as to impart actual notice cannot alter the general rule.

I have examined the cases cited as authority by the court in support of its conclusion, and find none that fully support it, except, perhaps, *Maddox v. Arthur*, 122 Ga. 671, 50 S. E. 668. I have examined likewise all the cases which are cited in Cyc. as authority for its general statement of the rule, and there are none which I am willing to follow, which sustain it in the broad terms in which it is stated. In two early cases, two courts of equal repute, apparently took divergent views. In *Jackson ex dem. Merrit v. Terry*, 13 Johns. (N. Y.) 471, in 1816, the Supreme Court of New York decided, under an act providing that all deeds or conveyances of, or concerning, or whereby any of the said lands may be in any way affected in law or equity, shall be recorded, and that every deed, or conveyance, of such land, shall be adjudged fraudulent and void against any subsequent purchaser, for valuable consideration, unless the same be recorded before the recording of the deed or

conveyance under which such subsequent purchaser shall claim that a sheriff's deed must be recorded. The court considered that the object of the statute was to enable purchasers to ascertain the validity of title, and to determine whether they could purchase with safety, and that the law referred them to the record for this purpose; that, if the sheriff's sale is to defeat the purchaser, he would in vain seek for the evidence of the title. The court said:

"Upon the whole, therefore, we think it will best comport with the reason and policy of the statute, as it certainly does with the letter, to extend it to sheriff's deeds as well as to others."

In *Houghton v. Bartholomew*, 10 Metc. (Mass.) 138, the Supreme Judicial Court of Massachusetts, in considering their statute of 1783, which provided that deeds not recorded should only avail, as between the grantor and his heirs, said:

"Of all cases arising under the registry law, that of a sheriff's deed, upon a sale of an equity of redemption, would seem to be the last which requires a rigid construction of the registry law. Ordinary deeds are, in a good degree, private conveyances, and the transactions may be entirely unknown beyond the grantor and grantee. A levy of execution on real estate by appraisal is comparatively a private transaction; no public notice being given, and the proceeding being such as may take place remote from the public eye. But not so in the case of an equity of redemption, on execution, by an officer. Such sale cannot take place unless there shall have been public notice, both by publishing in a newspaper and by posting up notices in public places; and the sale is at public auction. Such, indeed, were the circumstances of publicity attending such sales that it had come to be doubted whether any registry was necessary of the deed from the sheriff to the purchaser of the equity. It was this very doubt that furnished the leading object for this new enactment, contained in Rev. St. c. 73, § 33, requiring such deeds to be recorded in three months, and this with a view to the protection of a bona fide purchaser. It was therefore made the subject of a positive enactment."

The court cites with approval the rule laid down by the Supreme Court of New York in *Jackson v. West*, 10 Johns. 466, that:

"Courts are to construe the Registry Act, not so literally as to work injustice, but so liberally as to prevent the mischief and advance the remedy."

I think that the doubt expressed by the Massachusetts court indicates the true rule. In *Goodman v. Sanger*, 1879, 91 Pa. (10 Norris) 71, the Supreme Court of Pennsylvania held that a deed made by a treasurer to commissioners of a county for lands sold for taxes is not void as against a subsequent purchaser from the former owner of the land. The court approved *Seechrist v. Baskin*, 7 Watts & S. (Pa.) 403, 42 Am. Dec. 251, in which case it had been held that sheriffs' deeds were not within the purview of the statute. The court said:

"Since the decision in *Seechrist v. Baskin*, the acts of 1846 (Pamphl. L. 124) and 1849 (Pamphl. L. 344) authorize deeds of sheriffs, treasurers, and county commissioners to be recorded in the office of the recorder of deeds in the county where the lands lie; and the records thereof, or duly certified copies, shall be

evidence where the original deeds would be. These acts appear to be solely for preservation of the deeds and making exemplifications evidence; they dispense with no proofs previously necessary to support the deeds. Nor is it their purpose to make the respective records notice of a sheriff's sale, or of a sale for taxes."

The Supreme Court of Appeals of West Virginia, in *Wildell Lumber Co. v. Turk et al.*, 75 W. Va. 26, 83 S. E. 83, held that their Recording Act applied to deeds made by court commissioners in the execution of decrees of sale of forfeited and delinquent lands; but it is significant that their Registry Act required every deed, without exception, to be proved, acknowledged, or certified according to law. Our Registry Acts do not, except in certain instances, require deeds to be acknowledged or proved, but merely permit them to be. It is significant that the two earlier acts which did not receive the assent of the crown (Allinson's Laws, 33, 80) required acknowledgment; whereas the act passed in 1743 (Allinson's Laws, 132), which received the royal assent, was in the permissive form.

I am convinced that it was not within the intent of the Legislature to vitiate unrecorded sheriffs' and tax collectors' deeds as against purchasers from former owners for value without notice; that until 1864 it was fully recognized that sheriffs' deeds need not be acknowledged or proved, so that they might be recorded. It is significant that there is no case in this state in which the question has arisen. It may be that this is so because sheriffs' deeds were so clearly within the wording of the statute that no one thought to raise the question; but it seems to me almost inconceivable that, if sheriffs' deeds were considered to be within the statute, a dispute should not have arisen during the long space of time that the Registry Acts have been in effect which would involve the rights of a holder of a sheriff's deed and a bona fide purchaser for value from a former owner.

It seems to me that, if the Legislature had intended that deeds of this nature should be within the purview of the statute, it would have, as most of the other states have, provided for a certain length of time in which such deeds might be recorded. In the General Tax Act of 1903 (P. L. p. 430, § 56) there is a distinct provision for the record of certificates of tax sales, etc. There is no such provision in the Tax Adjustment Act.

The logical reasoning which underlies my conclusion that a tax collector's deed is not within the purview of the fifty-fourth section of the statute, as I stated at the outset of this opinion, is that, even assuming it to be void, the prior owner still has no right to convey; his rights are cut off, not by the delivery of the deed, but by operation of law.

I will advise a decree in accordance with this opinion. Settle decree on three days' notice.

(39 N. J. Eq. 332)

DRIVER v. SMITH et al. (No. 45/259.)

(Court of Chancery of New Jersey. Aug. 24, 1918.)

*(Syllabus by the Court.)***1. INJUNCTION ⇐21—DENIAL—OBSTRUCTION OF WAR WORK.**

In an action strictly inter partes between individual parties the court may not deny to a party legal or equitable relief to which he is clearly entitled, merely because the effect of the granting of such relief will be to embarrass the party against whom the relief is granted in the performance of war work.

2. INJUNCTION ⇐21—DENIAL—PUBLIC POLICY.

In such an action relief cannot be denied upon contracts because the effect of the enforcement of the contracts will be to embarrass the government in war activities, unless the effect is such as renders the enforcement of the contracts improper as opposed to a well-defined rule of public policy.

3. INJUNCTION ⇐21—NEGATIVE COVENANTS—ENFORCEMENT.

Unless a contractor for the government can point to a special privilege which has been created by law, or executive or governmental regulations having the force of law, he stands before the court in precisely the same situation as any other person.

4. INJUNCTION ⇐127—ENFORCEMENT OF DECREE—CONSIDERATIONS.

The court may not, in determining what the effect of the enforcement of its decree will be, consider letters written by officers of the army.

5. INJUNCTION ⇐21—GROUND FOR DENIAL—INJUSTICE.

In an action brought to enforce negative covenants, under the provisions of which parties agree to work for none other than complainant, the court will consider all of the equities, will weigh the conveniences, and will withhold its injunction if to grant it would do more injustice than justice.

6. INJUNCTION ⇐21—ENFORCEMENT OF NEGATIVE COVENANTS — CONTRACT OF EMPLOYMENT—EFFECT UPON EMPLOYER'S BUSINESS.

In such an action the effect upon the business of an employer for whom the employes worked prior to the making of the contracts, and who would be entitled to a continuance of the services were it not for the making of the contracts, the employes being enticed away by the complainant as a part of a scheme to injure the prior employer's business, may be considered, notwithstanding that the complainant intended also to advantage himself as well as injure the prior employer.

7. INJUNCTION ⇐63—CONTRACT OF EMPLOYMENT.

Employers of labor at will have a property right in the services of their employes, and are entitled to protection against interference with no sufficient justification.

8. CONTRACTS ⇐108(1) — CONTRACT OF EMPLOYMENT—PUBLIC POLICY—SETTLEMENT OF LABOR DISPUTES.

At the time the contracts in suit were entered into, June 1, 1918, there was a well-defined public policy that labor engaged in war industries should remain static, and that disputes with respect to wages and conditions should be settled through government agencies.

9. CONTRACTS ⇐133 — PUBLIC POLICY — INTERFERENCE WITH WAR WORK—VALIDITY.

Contracts obtained as part of a scheme which, if successful, would have the effect of disrupting the organization of a plant engaged in the manufacture of war materials essential to

the prosecution of the war, are voidable as long as they remain executory, and this is so whether the parties intended to advantage themselves and had in mind no thought of injury to the government or not.

10. CONTRACTS ⇐133 — CONTRACT OF EMPLOYMENT.

Where such contracts are entered into between a prospective employer and employes, and the employes repudiate after realizing the effect of the performance of the contracts, they are entitled to a cancellation of the contracts.

11. CONTRACTS ⇐138(1)—INVALIDITY—PUBLIC POLICY.

In such cases the rule that the court will leave the parties to contracts void as against public policy where it finds them has no application.

12. INJUNCTION ⇐128 — PROSECUTION OF REMEDIES—GROUNDS.

The court will not enjoin a party from proceeding with remedies apparently open to him, upon the ground that the party is proceeding merely vexatiously, except in a very clear case.

13. INJUNCTION ⇐128 — PROTEST AGAINST ESTABLISHMENT OF BUSINESS—EVIDENCE.

Evidence considered, and held that the Driver-Harris Company, in protesting to the Secretary of State against the issuance of a charter to the Wilbur B. Driver Company, and to the War Industries Board, to the Capital Issues Committee, to the Priority Commissioner, and to various other governmental agencies against the business contemplated to be established by Wilbur B. Driver, did not proceed merely vexatiously, and prosecution of these protests will not be enjoined, the company having reasonable ground for its actions.

*(Additional Syllabus by Editorial Staff.)***14. CONTRACTS ⇐108(1)—"PUBLIC POLICY."**

"Public policy" is that principle of law holding that no person can lawfully do that which has a tendency to injure the public, or which is against the public good, and is sometimes designated as the policy of the law, or public policy in relation to the administration of the law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Policy.]

Bills by Wilbur B. Driver against Fred Smith, James Travers, and Howard Saylor to enforce negative covenants in contracts of employment, with answer and counterclaim by the individual defendants asking that the contracts be declared void, and with counterclaim by defendant the Driver-Harris Company seeking to enjoin complainant and others from enticing its employes or from interfering with or demoralizing its organization, with answer and cross-bill by complainant and such others against defendant the Driver-Harris Company, seeking to enjoin that company from interfering with complainant and others in the conduct of their business, and answer by the Driver-Harris Company. Causes and issues consolidated for hearing, and decree against complainant on his original bills, cancelling the contracts of the individual defendants, denying the application of defendant the Driver-Harris Company for an injunction, and denying injunction against the Driver-Harris Company from interfering with the business of com-

plainant and others in the manner set forth in their cross-bill.

Arthur T. Vanderbilt and Ralph Lum, both of Newark, for complainant. Arthur F. Egner, William P. Martin, and Robert H. McCarter, all of Newark, for defendants.

LANE, V. C. This is a final hearing. Three bills were filed by complainant against defendants Fred Smith, James Travers, and Howard Saylor to enforce negative covenants contained in contracts entered into between complainant and said defendants on June 1, 1918, under the provisions of which said defendants agreed to enter the service of complainant for a period of two years from July 1, 1918, and agreed that they should not, either directly or indirectly, be connected or concerned in any other business or person whatsoever during the said two years of service.

To the bills said defendants answered, admitting the making of the contracts, and alleging that prior to the making thereof they had for a considerable space of time been employes of the Driver-Harris Company, of which until the 28th day of May, 1918, complainant, Wilbur B. Driver, was a director; that prior to the signing of the contracts complainant had, while still a director of that company, by coercion, persuasion, and offers of greater returns, induced defendants to sign contracts similar to those in suit; that the obtaining of the contracts was a part of a scheme by which complainant sought to entice away from the Driver-Harris Company employes essential to its organization, so that its business might be disrupted; that the Driver-Harris Company was engaged in working on contracts for the government of the United States for war material absolutely essential to the making of gas-masks, and which material could not be manufactured at any other place; that defendants were engaged in this work, and that, were they to leave it, the organization of the Driver-Harris Company would be demoralized and production impeded. Although not so alleged in terms, the effect of the answer is that the contracts and the scheme of complainant were in direct violation of a rule of public policy of the United States. It is alleged that immediately after the signing of the contracts, and upon realizing that they were part of a scheme to injure the Driver-Harris Company and were contrary to a rule of public policy, defendants repudiated. By counterclaims they ask that the contracts be declared null and void.

The Driver-Harris Company was admitted as a party defendant, and filed a counterclaim, in which it set up the acts of complainant, Driver, and alleged that he had, while its officer and director, conceived the idea of establishing a rival business, after having a quarrel with the management, and forthwith maliciously proceeded to set out to injure the

company by enticing away members of its organization with the purpose of demoralizing its force, and alleged as overt acts the making of the contracts with the individual defendants, and the attempts of complainant to entice others of its important employes. It prays for an injunction restraining complainant from further undertaking to entice its employes, servants, agents, or officers, and from approaching them with a view of offering them higher wages, and from attempting by any other means to injure said defendant in the prosecution of its important government work, or from interfering with or demoralizing its organization.

To this counterclaim complainant answered, and also filed a counterclaim against defendant Driver-Harris Company, alleging that, prior to the making of the contracts with the employes of the Driver-Harris Company, he had informed the directors and officers that he intended to sever relations with it; that on May 14, 1918, he had formally resigned as vice president and general manager, and thereafter did no act on behalf of the company; that on May 25th he resigned as director, which resignation was accepted on May 28th; that he intended to go into the same business for himself; that he acquired the stock of the Murray Wire Company, which was then engaged in the wire-drawing business; that he determined to organize a corporation to take over the assets of the Murray Wire Company under the name of the Wilbur B. Driver Company; that he had approached employes of the Driver-Harris Company with offers of employment, but without malicious intent; that he and the individual defendants had entered into the contracts referred to in the bill of complaint; that the Driver-Harris Company, in order to annoy and impede him, had protested to the Secretary of State against the granting of a charter to the Wilbur B. Driver Company, to the War Industries Board, the Capital Issues Committee, the Priority Commissioner, and various other governmental agencies, against the establishment of the business contemplated to be established by complainant; that in these protests certain false representations were made; that the Driver-Harris Company, by threats and false representations, induced the individual defendants to break their contracts; that it made false representations to customers and prospective customers of complainant and the Murray Wire Company, with the result that the business of complainant had been seriously affected, and that the acts of the Driver-Harris Company tend to stifle competition. He denies any intent maliciously to injure the Driver-Harris Company, or that the effects of his efforts would be to demoralize its force, or to seriously interfere with the production of war materials. He prays for an injunction restraining the company from interfering with and obstructing the complainant and the Wilbur B. Driver Company and the Mur

to establish the same, or directly or indirectly attempting to embarrass them, or either of them, in their establishment of their business or the conduct of the same.

This cross-bill was filed by Wilbur B. Driver, Murray Wire Company, and Wilbur B. Driver Company, the latter two brought in as parties by the counterclaim of defendant Driver-Harris Company. To this counterclaim defendant Driver-Harris Company answered. The determination of the respective litigations depending upon the same facts, the causes and issues were consolidated for hearing.

There are four distinct issues to be determined: First, whether a court of equity will enforce the negative covenants contained in the contracts; second, whether the contracts should be canceled, or whether complainant should be permitted to seek such remedy as he may have at law; third, whether complainant should be enjoined from enticing employees of the defendant Driver-Harris Company; fourth, whether the defendant Driver-Harris Company should be enjoined from interfering with the business of the complainant and the Murray Wire Company and the Wilbur B. Driver Company in the manner set forth in the counter complaint.

[1-3] A preliminary objection was made to the granting of any relief to complainant on his original bills by this court for the reasons that, should relief as complainant desired be granted, it would result in detriment to the government in the progress of the war. As partial proof of this fact there was presented a letter addressed to the court under date of July 15th, written by William L. Sibert, a major general of the United States army, and director of the chemical and warfare service, in which he states that he would regard any action of the Court of Chancery which would result in preventing Smith working for the Driver-Harris Company as highly detrimental to the interests of the government at this time. There was also presented a letter addressed to the court, written by T. W. Sill, a captain of the sanitary corps, and commanding officer of the Astoria detachment of the gas defense service, under date of July 16, 1918, in which he, referring to Smith, states that he has been informed that Smith's services were indispensable in carrying out the completion of the orders the government had with the Driver-Harris Company, and that it is therefore essential to them from a patriotic standpoint as well as necessity that his services, utilized in the production of this equipment, be not interfered with; that it is also his understanding that the necessary production could not be secured with the necessary promptness without utilizing the present facilities of the Driver-Harris Company's equipment and organization. There was legal evidence before the court, including that of a lieutenant in charge of the Driver-Harris

pel the individual defendants to cease interfering for the Driver-Harris Company to a very appreciable extent cripple its and would result in delay of production which would be detrimental to the interests of the government. The Driver-Harris Company intimates that, this being so, the will, as matter of course, withhold its assent. This is a final hearing in an action *inter partes*. The government has not asked to intervene. I can readily conceive that preliminary applications, where the interests of the parties will not be substantially affected, or where the matters are such as to be left to the pure discretion, that the action of the court may be influenced by the effect of its action on governmental activities, and in such cases it may be that the court will take no action on matters affecting the public welfare, although communicated to it merely in writing. This is the statement of Judge Hough in *Murray Wire Co. v. Simon* (D. C. Fed. 906). What Judge Hough said on this branch of the case is purely obiter, and the court proceeded to consider the merits, and the merits dismissed the bill. The gist of the decision is summed up in his words on page 907.

"Simon did agree with the naval authorities to contribute toward what would ordinarily be considered an infringement, but the United States court could not find that Simon made such contribution as a licensee. Therefore Simon could not be considered a contributory infringer by assisting in doing a lawful thing. * * * On this view of the facts the conclusion urged by defendant is correct."

His determination was affirmed in the Circuit Court of Appeals for the Second Circuit (231 Fed. 1021, 145 C. C. A. 656), but there was a strong dissent by Ward, Circuit Judge. He concludes his opinion:

"Courts, out of regard for public policy, no doubt refuse to interfere in proper cases with government activities by enjoining independent contractors as a matter of discretion just as the District Judge has done, but this bill should not be dismissed even if the injunction be denied."

In a case in this court Vice Chancellor Backes is reported in the Law Journal (10 J. L. J. p. 163) to have said that this court would not grant a decree which would have the effect of interfering with governmental activities in time of war. The case before the Vice Chancellor, as gathered from the report, involved the right of the board of health of this state to enjoin the pollution of a stream as a nuisance, and it was brought to the attention of the court that if the injunction went there would be injury to the government in that the making of chemicals necessary for war purposes would be interfered with. It is significant that the action was not one between individual parties, but one in which on one side was an individual and on the other side a governmental department of this state. No supporting case can be found either in the opinion

Judge Hough or the reported statement of Vice Chancellor Backes that for the proposition in an action strictly between individuals the court will or can deny to a party legal or equitable relief to which he is clearly entitled, merely because the effect of the granting of such relief will be to embarrass the party against whom the relief is granted in the performance of war work. So long as the courts are open the rights of parties must be determined by the existing law. It would be an intolerable situation if each court before whom the rights of individuals were litigated were permitted to determine whether relief should be granted or withheld upon its opinion as to whether the granting or withholding relief would aid or injure the government in its war activities, and it would be still more intolerable were the courts permitted to base their opinion upon written statements of officers of the army, no matter how high their rank. The general government does not have to depend upon the favor of courts. Its power is limited only by such constitutional interdictions as remain in force during war. If the effect of a decree of the court, rendered under existing law, be to embarrass the government, the fault lies either with the Constitution or the legislative branch of the government for failure to confer sufficient power upon its executive or upon the executive for failure to have exercised power conferred. So far as the present case is concerned there is no lack of power to remedy any harm which may be occasioned to the government by the enforcement of a decree of this court if it should be granted. Under existing law it has full and complete authority to take over and operate through its own agents any essential war industry. The time has not yet arrived where courts will permit the appropriation of the property of one by another upon the plea that the other needs the property for war purposes. I cannot think it would be seriously argued that a court to whom application was made for process of attachment would be justified in withholding a writ upon the plea that the service of the writ might interfere with the property being sent abroad, and thus affect the government, nor can I think it can be seriously argued that a writ of ne exeat could properly be denied because the individual affected was engaged in important government work which required his absence from the state. In the one case the goods might be bonded and in the other the individual might be sworn into the service of the United States. Contractors with the government are entitled only to such privileges and preferences as are granted to them by the law as it exists. Unless a contractor with the government can point to a special privilege which has been created by law, or by executive or governmental regulations having the force of law, he stands before the court in precisely the same situation as any other person.

The language of Lord Cranworth in *Broadbent v. Imperial Gas Co.*, 7 D. E. G., M. & G. 436, quoted by Chief Justice Beasley in *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538, and by Vice Chancellor Backes in *Rowland v. New York Stable Manure Co.* (N. J. Ch.) 101 Atl. 521, at page 524, as follows:

"If it should turn out that this company had no right so to manufacture gas as to damage plaintiff's market garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on. * * * But, unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only to be compensated by bringing an action toties quoties. That would be a disgraceful state of the law, and I quite agree with the Vice Chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences in regard to the lighting of the parishes and districts which this company supplies with gas."

—is as applicable in time of war as in time of peace. Unless the contracts, by reason of the effect of their enforcement, are contrary to a well-established public policy, the court must grant the legal or equitable relief to which the parties may be entitled.

[4] I therefore disregard in the determination of this case the letters which have been addressed to the court by Captain Sill and Major General Sibert, and will proceed to determine the merits of the controversy unaffected by what the effect of the decree will be if granted, except in so far as that effect may be considered in determining what are the actual legal and equitable rules which govern the case.

The facts as I find them are as follows:

Frank L. Driver is the president of the Driver-Harris Company. His brother, Wilbur B. Driver, had been associated with him in business prior to 1905 or 1906. There then was a quarrel, and Wilbur B. Driver left the company. There was litigation between the parties. *Driver v. Driver-Harris Co.*, 70 N. J. Eq. 34, 62 Atl. 461. Wilbur B. Driver returned to the company in 1914, and in May, 1918, was the vice president and manager in charge of the production department. Prior to May 25th there was a disagreement between the brothers, with the result that on May 14th Wilbur B. Driver resigned as vice president and manager, and there was elected to succeed him Frank L. Driver, Jr., a son of Frank L. Driver. On May 25th Wilbur B. Driver sent in his resignation as director, which was accepted by the board on May 28th. At the time he left he was extremely irritated at the situation, and had conceived the idea of establishing a rival business. In order to accomplish this object, and to do as much damage as he could to the Driver-Harris Company, he intended to get as many as he could of the employees essential for the conduct of the

business of the Driver-Harris Company away from it. That concern was engaged in manufacturing material under contracts with the United States government which was essential to the conduct of the war. The material goes into the making or production of gas-masks, and the plant is the only one from which it can be obtained in sufficient quantity.

Wilbur B. Driver was perfectly familiar with the organization of the Driver-Harris Company, and knew exactly what effect the removal of certain of its employes would have upon that organization. He deliberately approached, with offers of higher wages and other inducements, those employes whose removal would do the greatest injury to the company. He went so far as to endeavor to get Frank L. Driver, Jr., who had secured deferred classification as a necessary assistant or associate manager of an industrial enterprise, upon affidavits signed by Wilbur B. Driver. In the affidavits Driver swore that there were no other employes in the plant in the same position as Frank L. Driver, Jr., and none qualified to perform the same duties; that Frank L. Driver, Jr., could not be replaced by any other person; that it would require two or three years of actual experience to become familiar with the work of the industry and special products; that a discontinuance of, or even a serious interruption in, the industrial enterprise in which Frank L. Driver, Jr., was engaged would result in substantial and material loss to the adequate and effective maintenance of the military establishment and the maintenance of the national interests during the emergency.

As indicating clearly that the purpose of Wilbur B. Driver was not only to benefit himself, but to injure the Driver-Harris Company, his actions with respect to the private secretary of Frank L. Driver, Mrs. Mildred Clark, are significant. Mrs. Clark's husband was a bookkeeper. Mrs. Clark for some time had been the private and confidential secretary to Frank L. Driver. She not only attended to his business in connection with the company, but managed his private affairs, and was to him all that the term "confidential secretary" implies. Some time in the early spring of 1918 she had mentioned her husband to Wilbur B. Driver, and had stated that if he could do anything for her husband she would be gratified. Immediately upon Driver's conceiving the idea of establishing a rival concern he approached Mrs. Clark, going to her home, and offering her husband a position as bookkeeper, bringing to Mrs. Clark's mind the fact that, if her husband accepted the position as bookkeeper, she could no longer work for the Driver-Harris Company. The circumstances under which this offer was made lead me to conclude that it was not for the advantage of Wilbur B. Driver, but for the purpose of

depriving Frank L. Driver, in a spirit of petty revenge, of the services of his confidential secretary.

Of the many employes approached by Driver he succeeded, while still a director of the company, in getting contracts from three, Smith, Travers, and Saylor. These contracts provided that the three should work for Wilbur B. Driver for a period of two years, to commence at once. Subsequently, and on June 1st, there were executed other contracts similar in form, except that the period of employment was to commence July 1st. I do not believe that the reason for the execution of the new contracts was as stated by Wilbur B. Driver, that it was desired that there should be a change in the date of the commencement of the employment. I think they were executed because of a feeling on the part of Wilbur B. Driver that the first contracts, executed at a time when he was still a director of the Driver-Harris Company, were invalid.

At the time of the execution of the contracts Wilbur B. Driver had no plant in which the services of the three employes could be utilized. He acquired control of the Murray Wire Company, and caused to be incorporated on June 25, 1918, the "Wilbur B. Driver Company." The contracts for employment provide that they may be assigned by Driver to a corporation to be formed to carry on the wire and foundry business. The Murray Wire Company, while a going concern, operates in a very small way.

The three employes, while essential to the organization of the Driver-Harris Company, are not at the present time essential to any work that Wilbur B. Driver is performing. His statement that he desires the services of Smith, in order that Smith might assist in the location of a plant, I do not believe. His purpose in insisting upon the withdrawal of the three employes from the Driver-Harris Company plant at this time I think is not that he may be substantially advantaged, but that the Driver-Harris Company may be substantially harmed. The three employes did not agree to go with Driver until after considerable persuasion. There were several meetings between Driver, the employes, and others whom Driver had approached. On May 24th, after Smith had agreed to go with Driver, he wrote Driver a letter in which he said:

"I have been thinking over very carefully the proposition which you mentioned to me, and it seems to me that I was a little hasty in stating that I would work with you as foreman of the foundry which you intend building. I have tried to look at it from all sides, and to consider my own interests and those of the Driver-Harris Company, for whom I am now working. As you, of course, know the company has a great deal of government work on hand, and it would not seem right to leave the company at this time, as the government is depending on every one of the men here to get the work out as fast as possible. In view of the above it will be impossible for me to accept the position which you offer at the present time."

Notwithstanding the receipt of this letter, Driver again approached Smith, and succeeded in finally getting him to sign the contract upon which his suit against Smith is grounded.

Subsequent to the execution of the contracts, and upon it being brought more forcibly to the attention of the employes what the effect of their withdrawal from the plant of the Driver-Harris Company would be, and upon the Driver-Harris Company offering them higher wages, all three repudiated the agreements and declined to serve thereunder.

Driver has not the capital to establish the business, or, if he has it, he does not desire to use it, for he is at the present time seeking capital from outside sources. He has not as yet secured permission from the Capital Issues Committee to issue securities. If he had the capital, and immediately commenced operations, it would be several months before the services of the three employes would be particularly advantageous to him.

The contracts of employment contain negative covenants, providing that the employes "shall not, either directly or indirectly, be connected with or concerned in any other business or person whatsoever during the said term of two years," and it is to enforce these negative covenants that Wilbur B. Driver's suits are brought.

First. Will a court of equity enforce the negative covenants?

[8] That the court will, under certain circumstances, enforce negative covenants of this nature is settled. *Myers v. Steel Machine Co.*, 67 N. J. Eq. 300, at page 314, 57 Atl. 1080; *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, at page 661, 69 Atl. 186; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348. In most of the cases which have been cited in which negative covenants have been enforced it will be found that failure to enforce them would cause loss or damage to complainant other than that occasioned by a mere deprivation of the services of the employes; for instance, cases in which employes under contract to serve for a certain length of time have obtained trade secrets, to permit a disclosure of which to rivals would cause injury to the employer. In the case sub judice there is no such element present. The sole purpose of the suit is to compel the employes to work for the complainant by preventing them from working for any one else. The suit, therefore, while not so in form, is actually one for specific performance. *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. at page 691, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753.

In *Brown v. Brown*, 33 N. J. Eq. 650, at page 655, the Court of Errors and Appeals said:

"Where jurisdiction exists (to enforce specific performance) the remedy is not of right; the court holds it in judicial discretion, controlled by principles of equity and justice. The ques-

tion is not what the court must do, but what it may do under the circumstances." *Radcliff v. Warrington*, 12 Ves. 332."

Again, the same court in *Blake v. Flatley*, 44 N. J. Eq. 228, at page 231, 14 Atl. 128, at page 129 (6 Am. St. Rep. 886), said:

"But it is also held that courts of equity will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree. Whether, therefore, the contract shall be enforced specifically, must rest in the sound and reasonable discretion of the court, depending on the equity of the particular case and the nature of the objections to it. It must determine what are the objectionable circumstances which will control its jurisdiction in such cases, within the established rules of equity, though none of these rules are of absolute obligation and authority in all cases."

In *Page v. Martin*, 46 N. J. Eq. 585, at page 589, 20 Atl. 46 at page 47, Justice Garrison, speaking for the same court, said:

"The attitude of courts of equity upon applications of this character (specific performance) may be summarized in two propositions: First, that the relief invoked is not a matter *ex debito iustitie*, but rests in the sound discretion of the court; and, second, that where a contract is certain in all its parts, and for a fair consideration, and where the party seeking its enforcement is not himself in default, it is as much a matter of course for courts of equity to decree the performance of the contract as it is for courts of law to give damages for the breach of it. That relief rests not upon what the court must do, but, rather, upon what, in view of all the circumstances, it ought to do, is a distinction which is of little or no practical moment. In every case of this character the court is chiefly concerned with the equities of the parties before it."

Subsequent to this decision this language was reiterated by the same court, again speaking through Mr. Justice Garrison in *Murray v. Skirm*, 73 N. J. Eq. at page 378, 69 Atl. 496, 17 Ann. Cas. 963. It is significant, however, that the same court in *Brisbane v. Sullivan*, 86 N. J. Eq. 411, at page 413, 99 Atl. 197, at page 198, cited the quotation as follows:

"Mr. Justice Garrison, speaking for this court in *Page v. Martin*, 46 N. J. Eq. 585 [20 Atl. 46], said: 'That relief rests not upon what the court must do, but rather what, in view of all the circumstances, it ought to do. * * * In every case of this character the court is chiefly concerned with the equities of the parties before it.'"

Subsequent to the decision of the Court of Errors and Appeals in *Page v. Martin*, Vice Chancellor Van Fleet, in *Ten Eyck v. Manning*, 52 N. J. Eq. 47, at page 49, 27 Atl. at page 900, said:

"The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require."

The Court of Errors and Appeals in *Pyatt v. Lyons*, 51 N. J. Eq. 308, at page 314, 27 Atl. 934, at page 937, said:

"The relief invoked (specific performance) is not a matter *ex debito iustitie*; the bill for specific performance is addressed to the extraordinary jurisdiction of a court of equity to be exercised according to its discretion. * * *"

I think probably the clearest and most succinct statement of the rule is that contained in *Blake v. Flatley*, 44 N. J. Eq. at page 231, 14 Atl. at page 129 (6 Am. St. Rep. 886), as follows:

"But it is also held that courts of equity will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree."

Mr. Justice Garrison, when he used the term, "a matter of course," in *Page v. Martin*, *supra*, could not have meant to overturn the rule that a court of equity will never make a decree against conscience or equity.

If after considering all the circumstances proper to be considered, and it then appears to this court that all the equities require that there should be a decree of specific performance, of course, as a matter of course, a decree goes. I do not think that *Page v. Martin* in any wise limits the effect of the prior decisions on the right of the court to look into all the surrounding circumstances.

In passing on this branch of the case I might say that I am in hearty accord with the language of Vice Chancellor Pitney in *Feigenspan v. Nizolek*, 71 N. J. Eq. 382, at page 394, 65 Atl. 703, at page 707, as follows:

"The practice of enforcing negative covenants by this court is well established, and is a part of the growth of equity jurisprudence to meet and keep up with the growth and development of business methods. The policy of the law is that business men should keep their contracts, and not turn the contractee over to the uncertain remedy of an action at law for damages for nonperformance. It is, in my judgment, one of the most important functions of courts of equity to prevent injuries which result in damages, in all instances where it is practicable to do so, and the tendency is toward extending the protecting power of the court to cases not formerly thought to be sufficient to invoke its action."

A like view, I think, was expressed by Mr. Justice Pitney for the Supreme Court of the United States in *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U. S. 581, at page 591, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, considered by me in *Allen v. Distilling Co. of America*, 87 N. J. Eq. 531, at page 543, 100 Atl. 620.

Vice Chancellor Van Fleet, in *Sternberg v. O'Brien*, 48 N. J. Eq. 370, at page 375, 22 Atl. 348, at page 350, in dealing with a case involving the enforcement of a negative covenant against working for another than complainant, said:

"A court of equity, in exercising its prohibitory power, must always proceed with the utmost caution, and see to it that its power is not so exercised as to do more harm than good. The power exists to prevent irreparable wrong, and should not, therefore, be used, in any case, when its use will produce the very result it was designed to prevent. The rule is fundamental that an injunction should never be granted when it will operate oppressively or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress under all the circumstances of the case, or when the benefit it will do the complainant is slight in comparison with the injury it will do the defendant. The great office

of the writ is to protect and preserve, not to destroy. * * * When, therefore, a court is asked either to deprive a person of this right (the right to labor) or to abridge it, it is its duty, before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of the consequences, do more injustice than justice."

Sternberg v. O'Brien has been cited with approval by the Court of Errors and Appeals in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, and in *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, at page 687, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753. The language which I have quoted from it was quoted by Vice Chancellor Leaming, in the case of *Marvel v. Jonah*, 81 N. J. Eq. 369, at page 377, 86 Atl. 968. While this case was reversed by the Court of Errors and Appeals in *Marvel v. Jonah*, 83 N. J. Eq. 295, 90 Atl. 1004, L. R. A. 1915B, 206, Ann. Cas. 1916C, 185, the language quoted of Vice Chancellor Van Fleet was not criticized. The appellate court found that the equities of the case required the enforcement of the negative covenants then under consideration. I am familiar with what Vice Chancellor Pitney said in *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374, reiterated by him in *Law v. Smith*, 68 N. J. Eq. 81, 90, 59 Atl. 327, and referred to by Vice Chancellor Backes in *Rowland v. the New York Stable Manure Co. (N. J. Ch.)* 101 Atl. 521. While the law may be that in the class of cases dealt with in these cases the court cannot, on final hearing, weigh the conveniences, yet I think it settled that in the class of cases with which I am now dealing the court may consider the consequences, and whether or not, on a careful comparison of the consequences, its decree may not do more injustice than justice. In the class of cases referred to by Vice Chancellor Pitney the ground upon which the English courts refuse to weigh consequences is that, until Parliament acts, private property in one cannot be taken for public use or the private use of another, and the ground upon which the courts in this state refuse is that the Constitution forbids the taking of private property for public use without compensation, and, in any event, the taking of the private property of one for the private uses of another. But at the time the Constitution was adopted the rules governing a court of equity in specific performance cases were well settled.

[6] In considering the consequences the interests of the *Driver-Harris Company* may be taken into account. The three individual defendants were, at the time their contracts were made with *Wilbur B. Driver*, employees of the *Driver-Harris Company*, and that company was entitled, as against others, to their continued employment and good will. That the employment was at will does not alter the situation. *Frank & Dugan v. Her-*

old, 63 N. J. Eq. 443, at page 451, 52 Atl. 152; *Noice v. Brown*, 39 N. J. Law, 569; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; *Quinn v. Leatham*, Ap. Cases 1901, p. 495; *Brennan v. United Hatters*, 73 N. J. Law, 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; *Jonas Glass Co. v. Glass Bottle Blowers' Association*, 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. (N. S.) 445.

The effect of granting the relief asked for by complainant will be to deprive the Driver-Harris Company of the services of its employes. While it has been held that the effect of injunctive relief upon others than the parties generally cannot be considered (*Rowland v. New York Stable Manure Co.* [N. J. Ch.] 101 Atl. 521, at page 524), yet it seems to me that the rule does not apply in cases of the nature with which I am dealing, where the effect of the injunction will be to destroy a property right.

As stated above, the larger part of the output of the Driver-Harris Company is war material which can be produced at no other plant. The three employes are essential to the organization. To deprive the Driver-Harris Company of the services of the employes at this time would result in great loss and damage to it. It might result in the taking over of the plant by the government. If the testimony before me is to be believed, in no other way could the government adequately protect itself. The scheme which resulted in the making of the contracts had its genesis at a time when Wilbur B. Driver was a director of the Driver-Harris Company and under a duty to it. The employes signed the contracts only after persistent persuasion. The public interests require that they should continue employment with the Driver-Harris Company.

Vice Chancellor Van Fleet in *Sternberg v. O'Brien*, 48 N. J. Eq. 372, at page 372, 22 Atl. 348, at page 349, quoted with approval Chief Justice Best in *Homer v. Ashford*, 3 Bing. 322-326, as follows:

"The law * * * 'will not permit any one to restrain a person from doing what the public welfare and his own interests require that he should do.'"

Assuming now that the complainant has shown that the services of the employes are of so special, unique, or extraordinary character as that they will be of great advantage to complainant, this court is without power to compel the employes to render to the complainant those special, unique, or extraordinary services. By restraining the individual defendants from laboring for the Driver-Harris Company, it is hoped by the complainant that they will be compelled to work for him, but there is no certainty of this.

I am not, however, convinced that the services of the employes are of such a special, unique, or extraordinary character, considering the situation of the complainant, as that

an injunction should issue. It is true that the services are essential to the conduct of the business of the Driver-Harris Company, but it does not necessarily follow that they are essential to the conduct of the business of complainant. Complainant has not yet established such a business as that the services of the individual defendants are required. I do not believe that the services are required for the establishment of the business contemplated to be established. It may be many months before complainant is in a position where the special, unique, or extraordinary services will be of benefit to him. If this court should at this time grant an injunction it would be in effect, I think, enforcing by injunction a contract for ordinary personal services, the right to grant which was at least questioned by the Court of Errors and Appeals in *Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684, at page 691, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753.

Considering all of the circumstances, I am of the opinion that the decree asked for by complainant would do more injustice than justice, and this relief will be denied.

Second. Will the contracts be canceled or will the complainant be permitted to seek such remedy as he may at law?

The individual defendants and the Driver-Harris Company insist that the contracts were obtained under such circumstances as that they are void or voidable, both at law and in equity, and should be canceled by the court.

[7] It must be taken as settled that the employer has a property right in the services of his employes, and is entitled to protection against interference with no sufficient justification. *Lumley v. Gye*, 2 E. & B. 216; *Quinn v. Leatham*, Ap. Cases 1901, 495; *Noice v. Brown*, 39 N. J. Law, 569; *Frank & Dugan v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152; *Jonas Glass Co. v. Glass Bottle Blowers' Ass'n*, 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. (N. S.) 445; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461. And it is likewise true that an employe at will may at any time leave his employer, and that a stranger may, by an offer of higher wages, induce him to leave his employment and become employed with the stranger. A stranger may not, however, interfere with the employment for no justifiable reason.

In this class of cases motive plays a most important part. It is insisted by Wilbur B. Driver that his purpose in inducing the employes to leave the Driver-Harris Company was to advantage himself, in that he intended to establish a business and that the employes were essential to him. While this may have been one of his purposes, I have already held that he also deliberately purposed to injure the Driver-Harris Company.

Whether, considering all the circumstances

or voidable I find it unnecessary to decide, because I have reached the conclusion that the contracts are voidable, at least, upon another ground.

[8] At the time the contracts were entered into the nation was at war, and all of its energies were directed toward the successful prosecution of the war. It was necessary, of course, that war materials should be produced, and that such production should not be interfered with. In order that this production might be accomplished, it was essential that the plants engaged in the production of war material should have an adequate supply of labor. The policy of the government necessarily was that labor engaged in war industries should remain static; that disputes with respect to wages and conditions should be settled through government agencies. This public policy had been announced by various government boards established under the authority of acts of Congress. The situation became such that prior to the hearing of this case a government regulation had been issued under which, after the 1st of August, the government took control of the supply of ordinary labor. The fact that it did not act, however, until August 1st, does not indicate that there was not in existence at the time these contracts were made a distinct public policy which must be recognized and considered by the court.

[14] Public policy has been defined as that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be designated, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law (13 Corpus Juris, tit. "Contracts," § 360, and cases cited).

While it may be too much to say that there was any public policy which prevented labor from moving from plant to plant of its own volition, induced by offer of higher pay or what not, yet I think it safe to say that there was a public policy which was offended when a person, for his own advantage, deliberately proceeded to demoralize an organization the continuance of which was essential to the production of necessary war material.

I agree with Jessell, Master of the Rolls, in *Sun Printing Registering Co. v. Sampson*, 19 Eq. 462, 465, 21 E. R. O., 696, who said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than any other public policy requires it is that men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

should be permitted to live his own life, unhampered by any restrictions except such as are necessary for the public welfare. Applying the test which I think must always be applied to a sumptuary rule, i. e. its necessity for the public welfare, not its tendency toward the public good, I find that the rule of public policy I conclude exists is grounded upon a public necessity just as urgent, certainly, as that which renders contracts involving an immoral consideration void.

It is, of course, recognized that, in order that the freedom to contract may be preserved, in national emergencies it must be abridged. Ordinarily this is accomplished by direct action of the government through the Legislature or executive. I think, however, that contracts, even if not contrary to any express statutory enactment or governmental regulation, may be so opposed to a definite public policy, which may be gathered from the laws and regulations in effect, as that it may be at least voidable.

At the time the contracts were entered into, and it was contemplated by Wilbur B. Driver that a new business should be established, the government had officially discouraged the establishment of new industries in New Jersey and certain adjoining states because of the fuel situation. It had, as above stated, taken control of the issuance of securities for capital for new business because of the money situation. The establishment of the new business contemplated by Wilbur B. Driver was one within the government regulations.

It is said (13 Corpus Juris, tit. "Contracts," § 362) that there are many things which the law does not expressly prohibit or penalize which are so mischievous in their tendency that on grounds of public policy they are not permitted to be the subject of an enforceable agreement; that public policy varies with the time and place; and that the mere fact that a precedent cannot be found will not prevent a court from declaring a contract void as against public policy. Upon its being brought clearly to the attention of the individual defendants that the effect of their performance of their contracts would operate to the disadvantage of the government they forthwith repudiated them, and the contracts remained wholly executory. I think that under the circumstances they were within their legal rights, and that no action can be brought upon the contracts, either in law or equity.

I must not be considered as intimating that it is a complete defense in law or equity, in an action brought upon a contract, that the effect of the performance of the contract would be to injuriously affect the government in a war activity. Nor do I intimate an opinion as to whether there may be a recovery upon an executed contract for the sale of merchandise such as sugar, for instance, in violation of government regula-

tions. Nor do I intimate that in the instant case, if the employes had worked for Driver, there could be no compensation recovered by them for their services. Principles of law which I am not now considering would in such instances have their application.

[9-11] What I hold, and all that I hold, is that contracts obtained as a part of a scheme which, if successful, would have the effect of disrupting the organization of a plant engaged in the manufacture of war material, essential to the prosecution of the war, are voidable so long as they remain executory. And this is so, whether the parties intended to advantage themselves and had in mind no thought of injury to the government or not.

The rule that, where a contract is void as against public policy, the parties will be left by the court in the situation in which the court finds them when they are in *pari delicto*, has no application in the case at bar. In the first place, the parties are not in *pari delicto*. The contracts on their face are valid. The purpose of injuring the organization of the Driver-Harris Company was in the mind of Wilbur B. Driver alone. It was not in the minds of the employes. If the rule referred to applied to this class of cases at all, the instant case would be within the exceptions referred to in 13 Corpus Juris, §§ 474, 475.

While ordinarily the question as to whether a contract is contrary to public policy is to be determined by the court, yet there have been cases in which, where the question depended upon the circumstances under which the contract was entered into, it has been left to the jury as a question of fact. 6 Ruling Case Law, tit. "Contracts," § 118.

At the time the employes entered into the contracts they had no knowledge that the contracts were part of a plan contrary to public policy. Either the complainant had such knowledge or he had not. If he had knowledge he was guilty of fraud, and there was fraud on one part or mistake on the other. If he had no knowledge, there was mutual mistake. In either event, the jurisdiction of this court, about which there has been raised no question, is complete.

The employes in repudiating the contracts did only that which a sound public policy required them to do at the time. The entire issue has been submitted to the court. I am determining this case not only upon the ground that the contracts are unenforceable in equity, but upon the ground that the contracts are unenforceable either in law or in equity. Equity, having assumed jurisdiction, will determine the entire controversy in order to prevent a multiplicity of suits. I think the individual defendants are entitled to a cancellation of their contracts.

Third. Should complainant be enjoined from enticing away employes of defendant Driver-Harris Company?

In view of the fact that the government has taken over the supply of labor in such industries as the Driver-Harris Company,

and inasmuch as it does not appear that Wilbur B. Driver intends to, or that, if he did so intend, he could, pursue the tactics complained of, I think there is no necessity for the relief asked for under this head, and will deny the application for an injunction without prejudice, expressing no opinion upon the merits.

[12, 13] Fourth. Should Driver-Harris Company be enjoined from interfering with the business of the complainant and the Murray Wire Company and the Wilbur B. Driver Company in the manner set forth in the cross-bill of said defendants?

The charge is that, in order to annoy and impede Driver, the Driver-Harris Company protested to the Secretary of State against the granting of a charter to the Wilbur B. Driver Company, to the War Industries Board, to the Capital Issues Committee, to the Priority Commissioner, and to various other governmental agencies against the establishment of the business contemplated to be established by Driver; that in these protests certain false representations were made; that the Driver-Harris Company also, by threats and false representations, induced the individual defendants to break their contracts; and that it made false misrepresentations to customers or prospective customers of the complainant or the Murray Wire Company with the result that the business of the complainant has been affected; and it is said that the actions of the Driver-Harris Company tend to stifle competition.

So far as the protest to the Secretary of State is concerned, it was justified. The similarity of the name "Wilbur B. Driver Company" to the name "Driver-Harris Company," under the circumstances, is sufficient to warrant a protest. Whether the use of the name will be enjoined or not is another question. The protests which were made to the government boards and officials were made to boards and officials created by law for the very purpose of passing upon the subject-matters referred to in the protests.

There is no direct proof of express malice on the part of the Driver-Harris Company. There is no proof that any statements made by the Driver-Harris Company were so false, and knowingly false, as that malice can be implied. Most of the statements are backed up by the testimony of the government officials in charge of the particular work. The only statement that is contained in any of the letters that is at all out of the way is that Driver's actuating motive was revenge. It may be that his actuating motive was not revenge, but I cannot say that one of his motives was not revenge. I think the Driver-Harris Company had reasonable grounds to suppose that his motive was revenge. The officers of the Driver-Harris Company may have made the statement or statements that Driver had failed, and that he had not performed his obligations to per-

sons whom he was morally obligated to protect when he returned to the Driver-Harris Company. These statements, if made, were not sent broadcast. They were made, if at all, by employer to employé. I cannot say that they were sufficient to warrant any injunctive relief. It would have to be a strong case, indeed, before this court would enjoin a defendant with proceeding with remedies apparently open to him, and that is what I am asked to do on this branch of the case. I do not mean to say that the exercise of legal remedies may not be so vexatious as to warrant this court intervening, but no such situation has developed here. The relief asked for will be denied.

I will advise a decree in accordance with this opinion. Settle the decree on three days' notice.

(39 N. J. Eq. 378)

CROSS v. PRINTING CORPORATION.
(No. 45/177.)

(Court of Chancery of New Jersey. Aug. 31, 1918.)

(Syllabus by the Court.)

1. CORPORATIONS ⇨887—RIGHTS AND POWERS—ATTACK ON CHATTEL MORTGAGE.

A receiver of a foreign corporation, whether appointed under the statute or the general equity power of the court, may, in the right of creditors, attack a chattel mortgage for defects in recording.

2. CHATTEL MORTGAGES ⇨63—AFFIDAVIT—CONSIDERATION.

An affidavit annexed to a chattel mortgage, reciting merely that the consideration is so much money, is fatally defective, and the mortgage is invalid as against a receiver of a foreign corporation.

3. CHATTEL MORTGAGES ⇨17—MORTGAGE BY AGENT OF CORPORATION—VALIDITY AS AGAINST CREDITORS.

When goods are purchased by a corporation for its use, and are delivered to it, but paper title lodged for an instant in the name of an agent of the corporation who gives a chattel mortgage to the vendor, all with the knowledge of the vendor, the chattel mortgage is void as against the creditor of the corporation, the agent never having any present interest, actual or potential, in the goods.

(Additional Syllabus by Editorial Staff.)

4. CHATTEL MORTGAGES ⇨192—DELAY IN RECORDING.

Chattel mortgage not recorded until one month after its date was invalid as against all of the mortgagor's creditors who had claims existing at the time of the recording of the mortgage.

Bill by Covert Cross against the Printing Corporation, a Maryland corporation, to determine the validity of two chattel mortgages. Chattel mortgages decreed invalid, and claims of mortgagees allowed as general claims.

Joseph Kraemer, of Newark, for complainant and receiver. George Porter, for estate of Daniel H. Tolman. Nathan Erlich, of Newark, for Louis Modell. Hartshorne,

Inley & Leake and John O. Muller, all of Jersey City, for Conner, Fendler & Co.

LANE, V. C. [1] The question to be determined is the validity of two chattel mortgages, one purporting to be made by the Printing Corporation to Daniel H. Tolman, dated December 31, 1917, to secure the sum of \$1,200; the other purporting to be made by A. E. Sumner to Conner, Fendler & Co., dated March 15, 1918, to secure the sum of \$570. The validity of the respective mortgages is challenged by the receiver of the Printing Corporation, as well as by Modell, a judgment creditor of A. E. Sumner and the Printing Corporation. The receiver was appointed under the statute. The corporation is a foreign corporation. I think that he was properly appointed under the statute (*Atwater v. Baskerville*, 104 Atl. 310, and *Dolan v. Universal Fire Brick Co.*, 104 Atl. 86), and that he may attack the chattel mortgage in the right of creditors. *Graham v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571. Even if it be assumed that he was appointed under the general equity power of the court, I think he may attack the chattel mortgages upon the reasoning of *Brockhurst v. Cox*, 71 N. J. Eq. 703, 64 Atl. 182, affirmed 72 N. J. Eq. 950, 73 Atl. 1117.

[2] I will deal with the Tolman mortgage first. The affidavit of consideration recites merely that the true consideration of the mortgage is the sum of \$1,200. This is fatally defective, under *Chattel Mortgage Act*, § 4 (1 Comp. Stat. page 468); *Ehler v. Turner*, 35 N. J. Eq. 68; *Collier v. Tully*, 77 N. J. Eq. 439, 77 Atl. 1079, affirmed 78 N. J. Eq. 557, 80 Atl. 491, Ann. Cas. 1912C, 78. The chattel mortgage is therefore void, against the receiver.

The claim of the Tolman estate will be allowed as a general claim for the amount actually advanced by Tolman to the corporation. The amount of the usury or bonus will be deducted, and for this reason: The loan was authorized at a meeting of the board of directors. The meeting was not properly called. One of the directors was not notified. While the corporation is liable, I think, for the amount of money actually received by it and expended for its benefit, I do not think it is liable for the usury. Payment of the bonus would be justified only by express contract, and there is no evidence from which I can find that Sumner was authorized, either expressly or impliedly, to make such a contract.

[4] With respect to the claim of the Conner-Fendler Company, I find the facts to be that arrangements between a representative of Conner, Fendler & Co. and Sumner for the purchase of certain goods; that it was contemplated by both parties that the goods should be purchased by the corporation; that Conner, Fendler & Co. knew that

the goods were to be installed in the plant of the corporation; that at the last minute the suggestion was made by the representative of Conner, Fendler & Co. that the goods should be sold in the name of Sumner and that Sumner should give the chattel mortgage. The chattel mortgage was dated March 15, 1918, and was not recorded until April 15, 1918. There is no doubt but that the chattel mortgage is invalid as against all creditors of Sumner who had claims existing at the time of the record of the chattel mortgage, April 15, 1918. *Roe v. Meding*, 53 N. J. Eq. 350, 30 Atl. 587, 33 Atl. 394; *Brockhurst v. Cox*, supra; *Wilkinson, Gaddis & Co. v. Bohlen*, 88 N. J. Law, 680, 97 Atl. 279. But with the creditors of Sumner I have no concern.

[3] I find that, although the goods were nominally purchased in the name of Sumner, they were actually purchased, with the knowledge of all parties, by and for the corporation; that Sumner acted as the agent of the corporation at the time he purchased the goods, and at the time he gave the chattel mortgage; that the chattel mortgage, not being given in the name of the corporation, is invalid as against its creditors. To permit parties to purchase goods and to have apparent legal title lodged for an instant of time in an agent, and have that agent give a chattel mortgage, which, upon being recorded, would be valid, as against creditors of the purchaser would open the door to fraud, and would in effect nullify the recording provisions of the Chattel Mortgage Act. The goods sold never were the property of Sumner, but were from the time of purchase the property of the corporation. Sumner never had a present property, either actual or potential, in the things mortgaged. *Looker v. Peckwell*, 88 N. J. Law, 258; *Smithhurst v. Edmunds*, 14 N. J. Eq. 408; *Cumberland National Bank v. Baker*, 57 N. J. Eq. 231, 40 Atl. 850.

The question as to the ownership of these goods as affecting the rights of Modell, has also been submitted to me, and the foregoing disposes of this feature of the case. The claim of Conner, Fendler & Co. will be allowed as a general claim against the assets of the corporation.

I will advise an order in accordance with foregoing conclusions. Settle order on three days' notice.

(89 N. J. Eq. 409)

CLARK et al. v. PAINTED POST LUMBER CO. (No. 43/373.)

(Court of Chancery of New Jersey. Aug. 19, 1918.)

1. CORPORATIONS §—682—FOREIGN CORPORATIONS—INSOLVENCY—PREFERENCES—DOMESTIC CREDITORS.

Domestic creditors are not entitled to a preference over foreign creditors in case of dissolu-

tion or insolvency of a foreign corporation, in view of Corporation Act, §§ 58, 85, 86.

2. CORPORATIONS §—688—INSOLVENCY—DISTRIBUTION OF ASSETS—FOREIGN CREDITORS.

The courts of this state cannot force a foreign creditor of a foreign corporation to submit his claims to domestic tribunals under penalty of losing the right to a participation in the distribution of the assets of such corporation on its insolvency, but such foreign creditors may be forced to submit their claims as to assets within the state.

3. CORPORATIONS §—688 — DISTRIBUTION OF ASSETS—FOREIGN RECEIVERSHIP.

Where a foreign receiver has been appointed for a foreign corporation, and an ancillary receiver has been appointed in this state, domestic creditors, who have filed claims in this state, may have the validity of their claims settled here, whereupon such assets may be removed to the foreign tribunal for distribution.

Proceeding by William H. Clark and Charles H. Brewster against the Painted Post Lumber Company for the appointment of a receiver. On motion to pay over funds to foreign receiver. Motion granted.

Robert M. Boyd, Jr., of Montclair, for New Jersey receiver. Lloyd Thompson, of Westfield, for foreign creditors. Mark Townsend, Jr., of Jersey City, for Omer G. Russell, a domestic creditor.

LANE, V. C. Painted Post Lumber Company is an insolvent corporation of the state of New York. After a receiver had been appointed in New York, application was made to this court, under the provisions of the Corporation Act, § 65, as amended (P. L. 1912, p. 535), for the appointment of a receiver in this jurisdiction. Such receiver was appointed. He gathered in all the assets in this state, and now has in his hands as the proceeds thereof some \$6,000. An order was made on June 12, 1917, requiring creditors to file their claims within two months of the date thereof. Claims of domestic creditors, as filed with him, aggregate some \$2,000; claims of foreign creditors, as filed with him, aggregate approximately \$10,000.

The receiver now seeks to settle his accounts as receiver under appointment by this court, and prays for an order that he may pay the balance over to himself in his capacity as receiver appointed in New York. The New Jersey creditors object, insisting, first, that they are entitled, so far as the assets in this state are concerned, to a preference; and, second, that, if not, this court should so control the assets within this state as that domestic creditors will not be forced into another jurisdiction to obtain payment of the amounts to which they may be entitled from the assets of the estate upon a general distribution.

[1] First. Domestic creditors are not entitled to a preference. The policy of this state, expressed in its statute law is not to prefer domestic creditors over foreign creditors, in any case of dissolution or insolvency. Section 58, Act Concerning Corporations,

Revision of 1896 (2 Comp. Statutes, p. 1637); sections 85 and 86, same act (2 Comp. Statutes, p. 1652). The New Jersey creditors rely upon the language of Chief Justice Beasley in *Hurd v. Elizabeth*, 41 N. J. Law, 1, at page 3, in which case the Chief Justice, speaking of the power of a receiver to sue in a foreign jurisdiction, said:

"It [the power] could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied."

But the Chief Justice, I think, did not mean, by "satisfied," "paid in full." What he meant was that the court would not permit the exercise of power by a foreign receiver, unless it were certain that the legal rights of domestic creditors would be protected. In *Irwin v. Granite State Provident Association*, 56 N. J. Eq. 244, 38 Atl. 680, Reed, Vice Chancellor, held that the assets within this state did not change in the least the proportion to which the New Jersey shareholders would be entitled; that the assets here were to be taken into account as a part of the fund to be distributed. In *Stone v. N. J. & Hudson River Ry. Co.*, 75 N. J. Law, 172, 66 Atl. 1072, the Supreme Court, through Mr. Justice Swayze, said:

"It is urged, however, that the present plaintiff is a foreign receiver, and the defendant a New Jersey corporation. We are unable to see why these facts should be allowed to give the New Jersey creditor an advantage over other creditors. We do not allow a foreign receiver to exercise his powers in our jurisdiction to the disadvantage of creditors resident here; but, subject to this restraint, comity requires that he should be acknowledged and aided. *Hurd v. Elizabeth*, 12 Vroom [41 N. J. Law] 1. Where it is necessary, our courts will appoint an ancillary receiver; but the assets will be so administered that creditors in this state and in the foreign jurisdiction shall fare alike. *Irwin v. Granite State Provident Association*, 11 Dick. Ch. Rep. [56 N. J. Eq.] 244 [38 Atl. 680]."

Second. While the receiver was appointed here after the appointment of the receiver in New York, he was appointed under the provisions of the statute. Section 65, as amended, P. L. 1912, p. 535. The statutory procedure was followed. Under the provisions of section 75 of the Corporation Act (2 Comp. Statutes, p. 1648), an order was made directing creditors to bring in their claims within two months of the date of the order. Notice of such order in pursuance thereof was mailed to all of the creditors of the company. In speaking of such an order the Court of Errors and Appeals, in *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 376, said, *arguendo*:

"As far as we know, the only authority for such a proceeding is section 75 of the Corporation Act (C. S. p. 1648); but this can only apply to a New Jersey corporation. Our courts cannot force a New York creditor of a New York corporation to submit his claim to our tribunals under penalty of losing all right to participate in the distribution of the assets."

It was not necessary for the determination of the cause then before the court that the point should be determined, and I think it must be considered dictum. It has been contended that the effect of the decision in *McDermott v. Woodhouse* is that this court cannot appoint a receiver of a foreign corporation under the statute, and that any receiver appointed of the assets of a foreign corporation within this jurisdiction, under the general equity power of the court, is merely ancillary, and that his sole duty is to gather in the assets and turn the proceeds over to the receiver appointed in the place of the domicile of the corporation, assuming that such a receiver has been appointed, and that, if no such receiver has been appointed, the court is powerless to act. The result would be either that, before a receiver had been appointed by the courts in the domicile of the corporation, the courts of this jurisdiction would be powerless to act, and the creditors would be left to their legal remedies, and the assets would be subject to seizure and distribution among those who acted first (there would be no way of preventing preferences), or, if the court might appoint a receiver, then, after gathering in the assets, there could be no distribution until a receiver had been appointed in the jurisdiction of the domicile of the corporation, which might be never.

The courts of this state certainly would not force its citizens to apply to a foreign tribunal, which might have control of nothing but the corporate entity, to set in motion a proceeding to the end that a decree might be made directing the method of distribution of assets within this jurisdiction. Indeed, a situation is not hard to imagine in such event where the creditors would be absolutely powerless. The jurisdiction of the domicile might not have a procedure which could be set in motion by creditors. My understanding of the New York law is that no receivership of a corporation is possible, except at the instance of the Attorney General. I have two cases now before me. *Dolan v. Universal Fire Brick Co.*, 104 Atl. 86, and *Cross v. Printing Corp.*, 104 Atl. 727, one a Delaware and the other a Maryland corporation. All the assets of both were here. Receivers were appointed here. They have gathered in the assets and are ready to distribute. No receivers have been appointed in the places of the domiciles. Must this court wait until such receivers are appointed? I think not.

I considered the situation in *Atwater v. Baskerville*, 104 Atl. 810, and *Dolan v. Universal Fire Brick Co.*, not yet officially reported, and held that the court might appoint a receiver under the statute, and that the procedure would be as nearly as practicable the same as if the corporation were domestic. If I am wrong in this, and if the receiver must be considered as appointed under the general equity power of the court, still I think the situation will not be chang-

ed, for under such a proceeding the assets within this jurisdiction may be gathered in and their proceeds distributed. The court would adopt a course which would be fair to all creditors and would follow the statutory procedure by analogy as nearly as practicable. The contention referred to above ignores the following, as stated by Chief Justice Beasley in *Hurd v. Elizabeth*:

"That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this state the assets of the debtor, is a proposition that appears to be asserted by all the decisions."
* * *

This remark of the Chief Justice was quoted by Vice Chancellor Green in *Falk v. Janes*, 49 N. J. Eq. 484, at page 489, 23 Atl. 813. At page 490 of 49 N. J. Eq., at page 815 of 23 Atl., the Vice Chancellor said:

"Such limitation is based, then, on the principle that the first duty of the state is to its own citizens."

Vice Chancellor Reed, in *Irwin v. Granite State Provident Association*, 56 N. J. Eq. 244, at page 250, 38 Atl. 680, said that the citizens of this state should not be driven into the court of another state to obtain their distributive shares.

To the extent that there are assets within this state, domestic creditors are entitled ordinarily to have their rights settled by the judicial tribunals of this state. I do not mean to infer that there may not be cases where the claims of creditors here have arisen under such circumstances as that, in cases of insolvency, they will be remitted to the foreign jurisdiction. I am now considering the ordinary relationship of debtor and creditor, created under such circumstances as that the law of this state would apply in the determination of their legal rights. Were it not for the appointment of a receiver in this jurisdiction, domestic creditors might, if the corporation were a foreign corporation, not recognized under the laws of this state, have proceeded by attachment. If the corporation was one recognized by the laws of this state and authorized to do business here, they might sue at law. By the intervention of this court the creditors have been deprived of their ordinary legal remedies. For the remedies of which they have been deprived there must be substituted, so far as assets within this state are concerned, another remedy. If section 75 of the Corporation Act does not apply, then there is no doubt in my mind but that the court, before it permitted the assets, gathered in by an ancillary receiver, to be paid over to a foreign receiver, would devise a procedure by which domestic creditors would be notified of the situation and permitted to assert their claims in this jurisdiction. In no other way could the duty of the state toward its own citizens, which has been repeatedly held to be to retain within its own hands property of a debtor until domestic

claims against it have been satisfied, and to refrain from driving its citizens into the courts of another state to litigate claims with respect to assets within this state, be subserved.

[2] But I think there is adequate provision made in the statute. It is indeed true that our courts cannot force a New York creditor of a New York corporation to submit his claims to our tribunals under penalty of losing the right to a participation in the distribution of the assets; but neither should our courts force our own citizens into a foreign tribunal to litigate their claims with respect to assets within this jurisdiction, and our courts *can* force foreign creditors to submit their claims to our tribunals under penalty of losing the right to participate in assets within this state. I am speaking now of abstract power. The policy of this state is well stated by the Supreme Court in *Stone v. N. J. & Hudson River Ry. Co.*, 75 N. J. Law, 174, 66 Atl. 1072, to be to see to it that the assets here are so administered that creditors in this state and in the foreign jurisdiction shall fare alike. If the sole duty of an ancillary receiver appointed in this state is to gather in assets and to remit to a foreign jurisdiction the proceeds thereof, as it is claimed is intimated by the following language of the Court of Errors and Appeals in *McDermott v. Woodhouse*:

"It is manifestly quite as necessary to ascertain the total assets of the corporation as its total liabilities in order to fix the amount needed to pay creditors, and these assets can only be finally ascertained in the courts of the domicile to which assets may be remitted by courts of other forums acting through ancillary receivers"

—then the reasoning indulged in by the courts in *Hurd v. Elizabeth*, *Stone v. N. J. & Hudson River Ry. Co.*, and *Irwin v. Granite State Provident Association* was unnecessary, for, if the duty of an ancillary receiver is thus limited, the foreign receiver himself might as well be permitted to act.

The question is one of far-reaching importance. In the instant case, the domicile of the corporation is in New York, and the policy of its law is similar to that of ours with respect to a ratable distribution among creditors. But it is not beyond the range of possibility that in some of the other states there may be laws with respect to priorities quite opposed to the policy of our law, and it seems to me to be inconceivable that this court, having control of assets within this state, would remit its citizens to a foreign tribunal, which might have control only of the entity of the corporation, and compel them to submit themselves to a method of distribution in conflict with the policy of this state under laws having no extraterritorial force. Comity does not extend so far. *Hurd v. Elizabeth*, *supra*, at pages 4 and 5, and cases cited; and see *Catlin v. Wilcox Silver Plate Co.*, 125 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338. If domestic cred-

as; and it may be contended that the effect of such a determination does not stop here. The foreign corporations, which may be authorized to do business in this state, are not only those incorporated under the laws of a sister state, but also those incorporated under the laws of any foreign state, kingdom, or government. Can it be thought possible that the courts of this state will, as against the protests of domestic creditors, direct its receiver to transmit the proceeds of assets to the foreign jurisdiction, which happens to be that in which the corporation was created, and remit its citizens to their remedies there? And yet it may be so contended.

[3] It seems to me to be clear that the creditors who have filed claims in this jurisdiction are entitled to have the validity of their claims settled here; that this court must retain control of the assets until it is assured that the validity of the claims, as settled here, will be recognized by the foreign tribunal, and the creditors paid their ratable proportion of all the assets. Upon the court being so assured, the assets may be removed to the foreign tribunal for distribution there. It is conceivable, if the assets were to be directed to be turned over without condition, that the domestic creditors would never be paid. There may be settlement, and the company permitted to resume its business. In the meantime, the assets in New Jersey will have been removed, and the New Jersey creditors left helpless, unless they actively intervene in New York and subject themselves to the provisions of the New York law. Vice Chancellor Reed, in *Irwin v. Granite State Provident Association*, 56 N. J. Eq. at page 251, 38 Atl. 680, pointed out that either of two courses might be pursued in a similar case; that the assets might be paid over to the foreign receiver upon his giving a bond in this state to pay the New Jersey shareholders their distributive shares, or the order might be that sufficient assets be retained here to be distributed through the hands of the receiver in this state, but according to the proportion fixed by the decree of the foreign court.

I think that the proper course of procedure in the instant case is to require the receiver to act upon the claims filed with him in this jurisdiction, either to allow or disallow them, to present these claims in the New York receivership, and to secure the action of the New York court upon them. The assets may then be turned over to the New York receiver, upon his giving bond that he will repay to the New Jersey receiver the amount of the assets now turned over to the New York receiver, unless within a reasonable time there be paid to the claimants whose claims are filed with the New Jersey receiver their fair

share. The form of the bond is not settled definitely. I will hear counsel. It is not the policy of the court to interfere to any greater extent than necessary in the winding-up proceedings pending in a foreign jurisdiction. The result to be accomplished is to protect the domestic creditors to the extent of the assets within the jurisdiction, so that they may not be obliged to submit to the foreign jurisdiction the question of the validity of their claims, and so that they may not be driven into a court of another state to obtain their distributive shares. Of course, if the domestic creditors desire to share in the general distribution, the foreign court may compel them to come within the foreign jurisdiction. If so compelled, the creditors may elect to take whatever they can get from a distribution of the assets within this jurisdiction. If they so elect, I think there is nothing that this court can do but to distribute the assets here, unless it can be assured that the claimants here will be permitted to share in the general distribution without being obliged to litigate in the foreign tribunal.

Settle order on five days' notice.

(261 Pa. 485)

JENNINGS v. MALEY.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. JUDGMENT \S 554—BAR—EJECTMENT SUIT.

Under Act May 8, 1901 (P. L. 142), providing that defendant in ejectment, in addition to plea of not guilty, shall set forth the ground of defense, with an abstract of title, and Act June 7, 1915 (P. L. 887), authorizing judgment on the pleadings, where answer did not aver any defense on the merits, but set up a former judgment for plaintiff for the same land, the court properly entered judgment on the pleadings.

2. EJECTMENT \S 75—ANSWER AS DEMURRER.

Where defendant filed no abstract of title, nor plea of "not guilty," as required by Act May 8, 1901 (P. L. 142), but merely set up in bar the judgment in a prior ejectment action between the same parties, involving the same premises, such answer or special plea may be regarded as a demurrer to plaintiff's suit.

3. EJECTMENT \S 120(3) — RECOVERY BY PLAINTIFF — RE-ENTRY BY DEFENDANT — SECOND ACTION.

Under Act Feb. 1, 1834 (P. L. 26) § 1, in case of eviction and re-entry by defendant on lands recovered in ejectment after execution and return of writ of habere facias possessionem, the plaintiff must bring new ejectment, unless alias or pluries writ can be issued within three years from return day of preceding writ.

Appeal from Court of Common Pleas, Columbia County.

Action by Bridget Jennings against Annie Maley. From a decree refusing defendant's motion for leave to file a plea in abatement, defendant appeals. Affirmed.

The following is the opinion of Evans, P. J., in the common pleas:

Briefly, the docket entry shows the following in this case:

The *præcipe*, plaintiff's statement, and abstract of title, filed October 25, 1915. Same day, summons in ejectment issued for land described in *præcipe*, etc. Returned served on defendant by copy, etc.

December 1, 1915, *præcipe* for appearance for defendant filed.

January 3, 1916, plea in abatement filed.

February 5, 1916, answer to plea in abatement filed.

February 14, 1916, ruled for argument at March argument court—argue.

April 3, 1916, opinion of the court filed—plea in abatement disallowed. Same day, exception to opinion of the court filed, exception noted, and bill sealed.

May 23, 1916, petition for rehearing filed. Same day, petition denied, and reargument refused.

June 7, 1916, bond in the sum of \$200 with surety filed. Same day, bond and surety approved.

June 7, 1916, certiorari from Supreme Court, returnable second Monday of April, 1917, filed.

March 7, 1917, certificate, showing amount involved exceeds \$1,500, filed.

April 10, 1917, remittitur from Supreme Court filed. Appeal quashed.

April 13, 1917, rule granted on defendant to file answer, plea, and abstract of title within 30 days from service or judgment.

May 19, 1917, defendant's answer to rule filed.

May 25, 1917, rule granted (the rule now for determination) on defendant to show cause why judgment should not be entered for plaintiff for land described in writ for want of a sufficient answer, plea, and abstract of title.

[1] Ejectment is a possessory action, and the method of procedure is governed solely by the acts of May 8, 1901 (P. L. 142), and June 7, 1915 (P. L. 887). Section 2 of the act of May 8, 1901 (P. L. 142), provides that the plaintiff in ejectment shall file a declaration, which shall consist of a concise statement of his cause of action with an abstract of the title under which he claims the land in dispute, and in addition to the plea of "not guilty," now required by law, the defendant shall file an answer in nature of a special plea in which he shall set forth his grounds of defense, with an abstract of the title by which he claims. Section 1 of the act of June 7, 1915 (P. L. 887), amending section 2 of the act of May 8, 1901 (P. L. 142), goes one step further and authorizes the court on rule to enter such judgment on the pleadings, in favor of either party, as it may appear to the court the party is entitled to.

The defendant in the case at bar has not filed an abstract of title by which she claims nor entered the plea of "not guilty" as required by section 2 of the act of May 8, 1901. In the answer filed she has contented herself merely by filing an answer which may be regarded as a special plea setting forth her grounds of defense as follows:

(1) That the said Bridget Jennings was the plaintiff in No. 100, December term, 1910, in this court, and that the deponent, Annie Maley, was the defendant in said action, and that the subject-matter in this action and the prior action are identical.

(2) That the plaintiff proceeded to final judgment, in this court to No. 100, December term, 1910, thus recovering a judgment against the defendant and in favor of the plaintiff for the identical cause of action now on trial and that said judgment is at the present time in full force and effect as a judgment of this court in favor of the plaintiff and against the defendant for the subject-matter in controversy.

(3) The defendant for further answer thereto avers and says that the prior action, to wit No. 100, December term, 1910, being in full force and effect as a judgment at law in favor of the plaintiff and against the defendant for the same matter in controversy is a bar to the proceedings in this case, wherefore the defendant respectfully prays for judgment.

[2] The defendant's answer or special plea may be regarded as a demurrer to the plaintiff's suit, and as such all the facts averred in the plaintiff's declaration, statement, and abstract of title should be regarded as true. Assuming that the facts are true as therein averred, the plaintiff is *prima facie* entitled on the pleadings to judgment for the land described in the writ.

[3] It is averred in the plaintiff's abstract of title: That she was peaceably in possession of the premises as owner in fee simple and that on or about the 31st day of March, 1915, the defendant forcibly and without right took possession of the same and still continues to hold the unlawful and wrongful possession of the same. It is likewise true that the plaintiff brought ejectment against the defendant for the identical land described in the writ in this suit to No. 100, December term, 1910, and recovered judgment January 9, 1911: that on January 11, 1911, a writ of *habere facias possessionem* issued, and the sheriff by virtue thereof put the plaintiff in possession of the land January 25, 1911. More than three years later, viz. on March 31, 1915, the defendant again unlawfully took possession of the premises from the plaintiff. In case of eviction and re-entry by a defendant on lands recovered in ejectment, after the execution and return of a writ of *habere facias possessionem*, the plaintiff is obliged to resort to a new ejectment, unless an alias or pluries writ can be issued within three years from the return day of the preceding writ. Section 1, Act Feb. 1, 1834 (P. L. 26; Stewart-Purdon, p. 1302, pl. 27).

And now, December 3, 1917, in accordance with the views herein expressed, judgment is directed to be entered for the plaintiff for the land described in writ.

The lower court dismissed defendant's motion for leave to file plea in abatement. Defendant appealed.

Argued before BROWN, C. J., and POTTER, MOSCHISKER, FRAZER, and WALLING, JJ.

James F. Minogue, of Ashland, and Edward J. Flynn, for appellant. William H. Rhawn, of Catawissa, and Christian A. Small, of Bloomsburg, for appellee.

PER CURIAM. Defendant's motion to file a plea in abatement was properly denied, and the judgment which followed its disallowance is affirmed, on the opinion of the learned court below disallowing it.

(261 Pa. 504)

COMMONWEALTH ex rel. BROWN, Atty. Gen., v. GROVE et al., County Com'rs.
(Supreme Court of Pennsylvania. June 3, 1918.)

1. BRIDGES & 21(2)—MAINTENANCE.

By repealing Act March 15, 1911 (P. L. 21), duty of maintaining county bridge upon a state highway was reimposed upon county in which it was located, and continued under Act May 31, 1911 (P. L. 468); it being immaterial

whether bridge became a county bridge by proceedings under Act June 13, 1836 (P. L. 551), or by reversion to county on condemnation of turnpike.

2. MANDAMUS — 94 — REPAIR OF BRIDGES — COUNTY OFFICERS.

Where county commissioners failed to properly repair county bridges located upon a state highway, as required by Act May 31, 1911 (P. L. 468), mandamus compelling them to make repairs was properly awarded at instance of Attorney General.

Appeal from Court of Common Pleas, Centre County.

Mandamus by the Commonwealth, on relation of Francis Shunk Brown, Attorney General, against Daniel A. Grove and others, Commissioners of Centre County. From a judgment awarding a peremptory writ defendants appeal. Affirmed.

The facts appear from the following opinion by Quigley, P. J., in the common pleas:

The commonwealth of Pennsylvania prays that a peremptory mandamus may issue commanding the commissioners of Centre county to repair two certain bridges along what is known as route 56 of the system of state highways, as defined and described in Act May 31, 1911 (P. L. 468), said bridges being immediately west of the village of Lemont, Centre county, one of which is over Slab Cabin branch of Spring creek, and the other over the main branch of Spring creek. It is admitted that these two bridges are in bad and unsafe condition and repair, and are unsafe and insufficient to accommodate the public with the usual means of travel, and that said bridges are necessary for the safe and convenient travel of the public in, along, and over said highway. It is also admitted that the part of said route 56 between Lemont and State College is laid out over what was formerly known as the Agricultural College and Junction turnpike road, and that the same was duly condemned by proceedings in the quarter sessions of this county, entered to No. 2, December sessions, 1907; the final decree of condemnation having been entered January 27, 1908, and the damages assessed thereunder having been paid by the county. It is also admitted that at the time of the passage of the act of May 31, 1911, aforesaid, no duty or responsibility rested upon the supervisors of College township to build, repair, or maintain the said bridges, or either of them.

The question before us is whether the burden of repairing and putting in good order and condition these two bridges is upon the board of commissioners of Centre county or upon the highway department of the commonwealth of Pennsylvania. As we view it, the recent case of Commonwealth of Pennsylvania ex rel. v. Bird, appellant, 253 Pa. 364, 98 Atl. 648, controls this case. Judge Maxwell there held that the burden of building and maintaining county bridges that were located upon the state highways under the act of May 31, 1911, was upon the county.

The defendants urge that the difference in the nature of the bridges raises a distinction; that the bridge involved in the Bird Case was established as a county bridge by proceedings under the thirty-fifth section of the act of June 13, 1836 (P. L. 560), while the bridges in question were not so established, but reverted to the county upon condemnation of the turnpike, and, because of the fact that they were not formally declared county bridges under the act of 1836, ingeniously argue that there is a clear distinction. In effect they argue that a county bridge, within the meaning of the act, is one

that is created by due process of law and requires the joint action and approval of three different bodies, viz. the grand jury, the court of quarter sessions, and the county commissioners, and unless so created they should not be treated as county bridges.

By the acts of April 20, 1905 (P. L. 237), April 25, 1907 (P. L. 104), and March 15, 1911 (P. L. 21), the repair and maintenance of the road, including these bridges between Lemont and State College, formerly the Agricultural College and Junction turnpike road, rested at the passage and approval of the Sproul Act of May 31, 1911, upon the county of Centre, and, this being the case, the bridges in question were to all intents and purposes county bridges. If this is a proper conclusion, and we think it is, the duty of the county to maintain these bridges is clear, under the ruling in Commonwealth v. Bird, supra, part of which we quote as follows: "The duty to maintain a bridge forming part of a state highway built under the act of May 31, 1911 (P. L. 468), rests upon the county, and not the commonwealth, where the duty to maintain it rested upon the county at the time of the passage of the act and mandamus will properly issue against the county commissioners to compel them to construct and maintain a suitable bridge."

The lower court awarded a writ of peremptory mandamus, directing defendants to immediately repair the bridges in question and put the same in good order and condition, suitable and safe for public travel. Defendants appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Ellis L. Orvis and N. B. Spangler, both of Bellefonte, for appellants. William H. Keller, First Deputy Atty. Gen., Francis Shunk Brown, Atty. Gen., and Harry Keller, of Bellefonte, for appellee.

PER CURIAM. [1,2] By the repealing act of March 15, 1911 (P. L. 21), the duty of maintaining the two bridges involved in this proceeding were reimposed upon the county of Centre, and that duty continues to rest upon it under section 34 of the act of May 31, 1911 (P. L. 468). Commonwealth of Pennsylvania ex rel. v. Bird, 253 Pa. 364, 98 Atl. 648.

Judgment affirmed.

(351 Pa. 499)

DE HAAS v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. CORPORATIONS — 503(1) — SUIT AGAINST CORPORATION — VENUE.

The common-law rule that a corporation can only be sued in the jurisdiction where it had its legal domicile or chief place of business has been enlarged by Act June 13, 1836 (P. L. 579) § 42, Act March 21, 1842 (P. L. 145) § 8, and Act March 17, 1856 (P. L. 388).

2. CORPORATIONS — 508(1) — SUIT AGAINST CORPORATION — VENUE.

In view of Act March 21, 1842 (P. L. 145) § 8, a domestic corporation exists in any county where it has property and exercises its corporate franchise, and, if lawfully served, must re-

spond to any transitory action there brought against it.

3. CORPORATIONS ¶499—**SUIT AGAINST CORPORATION.**

A corporation is an artificial person, and there is no reason in principle why it should enjoy an immunity from suit not common to natural persons under like circumstances.

4. DAMAGES ¶173(2)—**DECREASED EARNING CAPACITY—EVIDENCE.**

In passenger's action for personal injury, evidence for plaintiff, who had just completed a course in forestry but had not taken up forestry work, as to minimum salary of graduate forester, was admissible as bearing on loss of earning power, where he was disabled from following such work.

5. DAMAGES ¶173(1)—**DECREASED EARNING CAPACITY—EVIDENCE.**

In a negligence suit, decreased earning capacity in any actually available occupation may be shown by proper and satisfactory proof.

6. APPEAL AND ERROR ¶977(5)—**NEW TRIAL** ¶6—**DISCRETION OF COURT.**

The denial of a new trial is a matter within trial court's discretion, and Supreme Court cannot interfere except to prevent a manifest abuse of discretion.

Appeal from Court of Common Pleas, Clearfield County.

Trespass for personal injury by George M. De Haas against the Pennsylvania Railroad Company. Verdict for plaintiff for \$6,086.88 and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

James P. O'Laughlin, of Clearfield, for appellant. A. H. Woodward, of Clearfield, for appellee.

WALLING, J. This is an action for personal injuries sustained by plaintiff on July 30, 1913, while a passenger on one of defendant's trains in Blair county. Defendant is a railroad corporation duly organized under the laws of Pennsylvania with its principal office in Philadelphia. This suit was brought in Clearfield county where defendant has and operates branch railroads, and where a part of its corporate property, including tracks, stations, etc., is situated. Defendant entered a special appearance and pleaded in abatement to the jurisdiction of the court, which plea was overruled, and the case went to trial, resulting in a verdict for plaintiff. From judgment entered thereon defendant has brought this appeal.

[1-3] At common law a corporation could only be sued in the territorial jurisdiction where it had its legal domicile; that is, where it had its chief place of business. *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453, 54 Atl. 334. This was enlarged by the Act of June 13, 1836, § 42 (P. L. 579), so as to authorize suit against a corporation in any county where the cause of action arose. The Act of March 21, 1842, § 8 (P. L. 145), provides, inter alia, that, "When any action is commenced by any person or per-

sons, or bodies corporate, against any incorporated railroad or canal company, in any county in which the corporate property of such company is wholly or in part situated, it shall be lawful," etc., directing the manner of service of process in such cases. The Act of March 17, 1856 (P. L. 388), contains a like provision as to commencing suits against corporations in general. In our opinion, under the act of 1842, this suit was properly brought in Clearfield county. There is nothing to indicate that it was intended merely as a service act. A corporation of this state exists in any county where it has property and exercises its corporate franchise, and, being lawfully served, must respond to any transitory action brought there against it. A corporation is an artificial person, and there is no reason in principle why it should enjoy an immunity from suit not common to natural persons under like circumstances. The suit seems to have been brought in accordance with a common practice of long standing and one recognized in numerous decisions of this court. These statutes are quoted at length and discussed in the opinion by Mr. Justice Dean in *Bailey v. Williamsport, etc.*, R. R., 174 Pa. 114, 118, 34 Atl. 195, and the conclusion there is that the action must be brought in a county where the corporate property is in whole or in part situated. See, also, *Jensen v. P. M. & S. St. Ry. Co.*, 201 Pa. 603, 51 Atl. 311; *Hawn v. Pennsylvania Canal Co.*, 154 Pa. 455, 26 Atl. 544; *Centofanti v. Pennsylvania R. R. Co.*, 244 Pa. 255, 280, 90 Atl. 558. While the defendant in *Elme v. Western Maryland Ry. Co.*, 253 Pa. 204, 97 Atl. 1078, was a foreign corporation, governed largely by the Act of April 8, 1851 (P. L. 353), yet the opinion there by Brother Moschzisker comprehensively embraces both classes of corporations and fully supports our conclusion in the present case. It is fair to assume that the acts of 1842 and 1856 were intended to serve some purpose, but it is difficult to discover what, unless they extend the jurisdiction of the courts to counties where corporate property is situated, for as to the method of service of process they are not substantially different from the act of 1836. In our opinion the trial court was right in overruling the plea in abatement, hence it is not necessary to consider the effect of the defendant thereafter going to trial upon the merits.

[4, 5] When injured, plaintiff was 44 years of age, and the year previous (1912) had completed a four years' course in forestry at State College, but had not taken up that work. He was permitted to offer evidence as to the minimum salary of a graduate forester, in connection with evidence that the accident had disabled him from pursuing that occupation, as bearing upon loss of earning power. The trial judge submitted this evidence to the jury with guarded instructions, and withdrew from them the evidence as to

what plaintiff had been earning as a real estate salesman during the year preceding the accident, because that was not shown to be a permanent employment. The minimum salary of a forester was approximately what plaintiff had been earning as a teacher and much less than the excluded evidence indicated he had received as a real estate salesman. As plaintiff was a graduate forester and capable of entering upon that work, it was not error to show its minimum wage, although he had never actually been so employed. He had not abandoned that profession. Should a graduate nurse be disabled before entering upon her profession, we believe it would be competent to show the income of that occupation as bearing on the question of loss of earning power, and, if so, why not in this case? "Lessened capacity to earn in any actually available occupation may be shown * * * by proper and satisfactory proof, and not left to mere conjecture," from opinion by Mr. Justice Potter in *Helmstetter v. Pittsburgh Rys. Co.*, 243 Pa. 422, 428, 90 Atl. 203, 204. We find no error in the action of the trial judge in the admission of testimony on this branch of the case or in his instructions to the jury with reference thereto.

[8] The refusal to grant a new trial is, as we have often held, a matter within the discretion of the trial court, with which we cannot interfere except to correct a manifest abuse of discretion, which is not shown in this case.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 561)

In re WEBER'S ESTATE.

(Supreme Court of Pennsylvania. June 11, 1918.)

1. TRUSTS ⇐156—EXECUTOR AS TRUSTEE OR TENANT.

Under will directing that three sons of testatrix should continue business owned by her, and pay rent of factory to other children, including two daughters, and pay existing debts of business and divide profits, a son and executor, acquiring whole interest in business, was not a trustee, but a tenant.

2. WILLS ⇐573(2)—CONSTRUCTION—INTERESTS OF DEVISEES.

Under will directing three sons of testatrix to continue a business owned by her, to pay rent to other children, including two daughters, and divide profits, and on its discontinuance to sell it and turn proceeds into estate, the daughters had no interest in business, but merely a right on its cessation to require payment to estate of its value at death of testatrix.

3. WILLS ⇐565(1)—CONSTRUCTION—"BUSINESS."

Under a will directing that testatrix's business be continued by her sons, who should pay rent, existing debts, and divide profits among other children, and proportional proceeds of any sale thereof, the word "business" was an un-

certain and equivocal expression, which might mean property, or might mean simply good will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

Appeal from Orphans' Court, Berks County.

Petition by Hattie M. Weber and another for a citation to require an executor of the estate of Anna Weber, deceased, to account for profits of decedent's business conducted by him. From a decree dismissing the petition, petitioners appeal. Appeal dismissed, and decree affirmed.

Argued before POTTER, STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Cyrus G. Derr and Walter B. Freed, both of Reading, for appellants. Isaac Hlester and John B. Stevens, both of Reading, for appellee.

STEWART, J. Anna Weber, the testatrix, a widow, at the time of her death was the owner of a lot of ground in the city of Reading, on which was erected a building in which she conducted on her own behalf two distinct enterprises, one the manufacture of paper boxes, the other the manufacture of badges; she owning all the machinery employed in each. Inasmuch as the present controversy relates exclusively to the management, control, and final disposition of this item of testatrix's property, it can be understood only as we here produce so much of the will of testatrix as expresses her direction in regard thereto. Testatrix died in 1905, leaving to survive her five sons and two daughters. In the first item of the will we find this provision:

"They [the reference being to her three sons, Henry C., James A. and Daniel, as will later appear] shall collect all the debts due the factory and with the proceeds and the factory's moneys in the banks pay all the debts of the factories, and should there not be sufficient money arising from the collections of the bills and the moneys in the banks, the deficiencies shall be assumed by my sons, Harry C. Weber, James A. Weber and Daniel Weber, and should there be a balance over after making the collections and the factories' moneys in the banks, and after paying the debts of the said factories, that balance shall be equally divided among my children."

Why this provision that the three named of her five sons should assume any deficiency in the assets of the factories to meet the liabilities of the factories will later appear. In the next following item we find this direction:

"Item. I direct that the factories shall be run as follows. The upper factory shall be in charge of my son, Harry C. Weber, and the lower factory shall be in charge of my sons, James A. Weber and Daniel Weber. The profits of said factories shall be equally divided among the said three children, Harry C. Weber, James A. Weber and Daniel Weber, who shall pay a rental sum to my sons, Herman Weber and

Walter Weber, each the sum of twelve dollars per month, and to my daughter, Maud E. Weber, the sum of fifteen dollars per month, until she shall marry, thereupon the said payment to my daughter, Maud E., shall cease. However, if at any time the said factories shall be idle for more than one month, then the above-mentioned rents shall not be paid during the time the factories are idle. My sons, Harry C. Weber, James A. Weber and Daniel Weber, shall each receive fifteen dollars per week for their labor out of the profits of the factories. I do hereby order and direct that the sum of fifteen dollars per week, as hereinbefore provided, shall be paid to my son, Daniel Weber, as long as he is connected with the factory or factories and not able to work in the said factory or factories on account of illness.

"I do hereby order and direct that my son, Harry C. Weber, shall have the sole management of the financial matters connected with the said factory or factories and the business thereof. All contracts to be approved of by him and all moneys to be received and deposited by him and all checks and other obligations to be signed by him only. In case of the death of my son, Harry C. Weber, then the surviving sons running the factory or factories shall decide amongst themselves who shall assume the duties of my deceased son, Harry C. Weber. If at any time my son, Harry C. Weber, shall desire to withdraw from the firm, then my sons, James A. Weber and Daniel Weber, shall have the first right to purchase the share of my son, Harry C. Weber, the amount to be determined by an honest appraisement of three disinterested persons.

"However, should any or either of my sons, Harry C. Weber, James A. Weber or Daniel Weber die, then from the date of such death the share of the profits of such deceased son or sons shall be paid unto his or their widow or widows, and if there be no such widow or widows surviving and there be children surviving, then such aforesaid share or shares of such deceased son or sons shall be paid unto his or their respective children, as the case may be; the foregoing is subject to the proviso that the aforesaid factory or factories are being run by my said mentioned sons as aforesaid or by any or either of them surviving as aforesaid and to continue as long as the factory or factories are run by the survivor or survivors of them, and also should it happen that any or either of my said three sons be not connected with the running or business of the said factory or factories at the time of his death or their death, then the aforesaid bequest of the share or profits shall not apply to the widow or children of such deceased son or sons dying not connected as aforesaid.

"If at any time my three sons, Harry C. Weber, James A. Weber or Daniel Weber, or the survivor or survivors of them, decline to continue the manufacturing business, or my said three sons are deceased, it is my will that the factory or factories shall not be sold as long as any of my other sons wish to run the factory or factories, and if my sons, Harry C. Weber, James A. Weber and Daniel Weber, decline to run the factory or factories, and if Herman Weber and Walter Weber or either of them wish to run the factory or factories, they shall pay a monthly rental sum of twelve dollars per month to each of my said sons if living, or if dead, to their widows or children of such deceased son or sons as aforesaid, and to my daughter, Maud E. Weber, a rental sum of fifteen dollars per month in the manner and period of time as heretofore provided. Should neither of my said sons desire to run the said factory or factories, I do hereby direct my hereinafter named executor to sell the said factory or factories at public or private sale for the best price obtainable, and I do hereby authorize and empower my hereinafter named ex-

ecutor to sign, seal, execute and acknowledge all such deed or deeds of conveyance as may be requisite and necessary for the granting and assuring the same to the purchaser or purchasers thereof in fee simple, and the proceeds of said sale shall be equally divided among my children, Herman Weber, Walter Weber, Harry C. Weber, James A. Weber, Daniel Weber, Hattie M. Moyer and Maud E. Weber, share and share alike, or their heirs, share and share alike."

The rest and residue of testatrix's estate she devised and bequeathed to her above-named children, share and share alike. Nothing in these several provisions relating to the factories gave rise to dispute or any expressed dissatisfaction. On the contrary, the disposition of the factories was acquiesced in, and the three sons appointed by the will to have them in charge and run them, accepted under the will, though under no requirement to do so, and entered into possession and control, thereby taking upon themselves the burden and duty of observing such conditions and regulations in connection therewith as directed by the will. One of the sons, Harry C., was made sole executor of the will; but it is to be kept in mind that he was charged with no duty as such executor in connection with the several factories so long as they were operated by any of the sons; it was for the sons to operate them in accordance with the directions of the will and no responsibility rested on Harry C. as executor in connection therewith. The firm, as testatrix speaks of the three sons thus associated, were to share equally in the profits and bear equally the indebtedness. There is not a suggestion in the will that testatrix's estate was to be liable for any loss or indebtedness, or to be otherwise interested in the enterprise. Harry C. later on acquired by purchase the shares or interests of his brothers, James A. and Daniel, who were associated with him in the business, with the result that the sole and exclusive management and control of the factories thereafter was in himself. Later on he purchased the shares of Walter and Maud, so that as the case then stood the only outstanding interests were those of Herman and Hattie Moyer, and of these Herman, now deceased and represented by his widow, was under the will to receive as rental \$12 per month and Hattie \$15 a month until her marriage. These were the parties in interest when the present proceeding was begun.

By petition filed in 1916 by Hattie M. and Mary A., widow of Herman, it was represented to the court that (1) by the terms of the will the factories, machinery, and business continued part of the estate of the testatrix; that when all the sons were unwilling to operate the same, or had died, they might be sold and the proceeds divided, and that the taking possession of the factories, etc., constituted Harry a trustee; that (2) Harry during his custody of the business and property, had tried to make the patronage and

good will his own, to that end purchasing the adjoining building, connecting it with the estate's property, installing machinery therein which he called his own, adding other lines of business, blending the original business therewith, so as to make the original business difficult or impossible of discrimination, keeping bank books and bank accounts in his individual name, declaring and advertising the business as entirely his own, and recently offering the real estate for sale without the business, and generally pursuing a line of conduct calculated to transfer the good will and patronage to himself, with the intent that when the time arrives for sale there will be nothing to sell but the property and building; that (3) he is wasting and mismanaging the estate, whose interests are likely to be prejudiced by his continuance in the trust, his interest being hostile, and that, James having sold his interest, and Daniel and Herman having died, and Harry having ceased to operate the factories in accordance with the directions of the will, the latter should be sold as directed and the proceeds divided. The petition prayed (1) that, if sold, Harry be restrained from making use of the patronage and good will to avoid irreparable injury to the petitioners; (2) that Harry be removed from the executorship and trusteeship; (3) for a decree that circumstances have arisen whereby under the terms of the will the property is to be sold and proceeds divided; (4) for a decree of sale and an injunction restraining Harry from taking benefit of good will; and (5) that Harry be required to account for profits and damages.

To this petition Harry C., under rule, made answer, expressly denying every averment in the petition that charges him with a purpose in his management and control of the factories to prejudice the right and interest of the estate therein, if any such right or interest remains. He admits the main facts set out in the petition relating to the purchase by himself of an adjoining building wherein at his own cost and expense he has placed new and more improved machinery. He denies that he is at present, or has been at any time, a trustee of the factories or business therein conducted, but asserts that he holds the former as tenant under a fixed rental, and is now the sole owner and proprietor of the business carried on, not denying his liability to account for the machinery that was in the factories, appraised at \$1,275, when he first entered into possession, but insisting that he is the owner of the new machinery introduced at his own cost and expense, that he is the sole owner of the business, entitled to all the profits of the business, and that the will making it optional for him to continue the business requires him to account as executor for said factories only when he has ceased to exercise his option in connection therewith.

[1-3] Certain testimony was taken which

we have neither time nor space to review. Sufficient to say that it neither adds to nor detracts from the strength of either side as exhibited in petition and answer. Upon these alone the case might well have been decided. The learned judge of the orphans' court, in an opinion amply justifying his conclusion, held the case to be with the respondent, and accordingly dismissed the petition. The assignments of error on the appeal are 14 in number, the first of these presenting the real controversy, and except as this can be sustained the remaining assignments may be passed without consideration, since they stand or fall with the first, which reads as follows:

"The court erred in not construing the will of Anna Weber in accordance with the contention of the exceptants, viz. that the testatrix intended that the factories and businesses thereof should be and remain part of her estate to be operated by her sons, Harry C., James A. and Daniel, who, while operating the same, were to receive salaries and the net profits, and when none of her sons should be willing to operate the said factories and businesses in accordance with the terms of the will, the same should be sold and the proceeds of the sale equally divided among her children."

Unquestionably the whole case turns on the construction to be given the will of the testatrix. A manifest objection to the construction contended for by appellants is not only that it supplies too much in addition to what is expressed in the will, but that it gives to what is expressed a meaning much out of the ordinary, and that without apparent reason. The word "business," as here introduced and so much relied upon by appellants, while occurring twice in the will, is not there used in such connection as to show any intention thereby to indicate the extent of the gift to the three sons. The word is an uncertain and equivocal expression; it may mean property, or it may mean simply good will, depending on the connection in which it is used. As used by the testatrix in her will, it is without significance in the present controversy, since in the connection it is used it can have no reference to the subject of the gift to the three sons. Reduced to simplest terms, what is given by the will to the three sons was an option to lease upon certain expressed and definite terms, including a fixed rental, payable, not to the legal representatives of testatrix, but to certain of her children, the several factories which she was operating at the time of her death and as they then stood; that is to say, with their then present equipment. By their acceptance of the option a contract resulted, and the three sons thereby acquired possession and control of the building and the machinery therein, nothing here involved being reserved. The testatrix's entire interest passed to the lessees, who alone became responsible for all debts incurred and entitled to all profits earned. What conceivable property interest remained in the testatrix or her estate in connection with the conduct

of the factories? Without any right to share in the profits, and without any liability for indebtedness thereafter incurred, the only right not parted with by her was the right upon the determination of the lease, however brought about, to a surrender of the estate and property leased. If this be the proper construction of the will, and as to this we are left in no doubt, then it must follow that so long as the sons, or any of them, are rightfully in possession of the premises, observing the terms of the contract—that is, performing those things required by the contract and abstaining from those things forbidden—they are entitled to be free from disturbance by any one.

The contention of appellants is that they, being entitled to share in the proceeds of the sale of the property when that period arrives, and as a distinct element of value that will enter into the price obtained will be what they choose to denominate the "business," as distinguished from the real estate and the machinery that passed under the gift of the three sons, have such interest as gives them standing now to complain. If the premises be admitted, perhaps the conclusion could not well be denied; but, as we have said, we find nothing in the will that even suggests a reservation of any kind in the gift to the sons, whether of business, whatever that may mean, or anything else. It follows that, when the lease shall terminate, the demands of the estate will be fully met by a surrender of the real estate and such machinery as the sons derived under the will, together, perhaps, with what, if any, has meanwhile been substituted for such as was worn and rendered useless. It follows that appellants are without standing to complain, the lease is still in force, and we discover nothing in the manner in which it is being conducted that is in violation of any of its terms.

The appeal is dismissed, and the decree is affirmed.

(261 Pa. 599)

HUFNAGLE v. WILKES-BARRE RY. CO.
(Supreme Court of Pennsylvania. June 11, 1918.)

1. WITNESSES §=367(1)—INTEREST.

One who has no personal interest in a pending suit is not an interested witness merely because he has a suit growing out of the same accident against both plaintiff's employer and defendant.

2. DAMAGES §=208(2)—PERSONAL INJURIES—QUESTION FOR JURY.

In action against street railway company for personal injuries, it was for jury to say on the medical testimony whether plaintiff's curvature of the spine was the natural and probable result of his occupation, or was due to the accident.

3. APPEAL AND ERROR §=730(2) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error complaining of a fraction of the charge, and quoting one sentence thereof and part of another, and leaving

out the remainder, was insufficient, as assignments of error must fully quote all that court said on matter as to which complaint is made, though they may aver which part thereof was objectionable.

4. APPEAL AND ERROR §=256(14)—CHARGE OF COURT—INTEREST OF WITNESSES.

Failure to explain the difference between interested and disinterested testimony is not error, where appellant remained silent when asked if there was anything further which he desired to have called to the jury's attention.

Appeal from Court of Common Pleas, Luzerne County.

Trespass for personal injuries by Charles Hufnagle against Wilkes-Barre Railway Company. Verdict for plaintiff for \$2,040, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MOSCHZISKER, FRAZER, WALLING, and SIMPSON, JJ.

Paul Bedford, Frank A. McGuigan, and John T. Lenahan, all of Wilkes-Barre, for appellant. Abram Salsburg, Mose H. Salsburg, and E. B. Morgan, all of Wilkes-Barre, for appellee.

SIMPSON, J. Plaintiff alleged that while driving along a public highway he was injured by being run into by a car of defendant. Each party avers that the accident was caused by the careless and reckless driving of the other. The case was submitted to the jury, which rendered a verdict in plaintiff's favor, and from the judgment thereon defendant now appeals, and assigns errors in the charge of the court.

[1] The first assignment alleges error because of the denial of the fourth point of defendant, viz:

"Plaintiff's witness Courtright is an interested witness."

There were two witnesses of that name, and the point does not disclose which was referred to. Assuming that it was James Courtright, it appeared that he was a pedestrian on the highway at the time of the accident, claimed to be injured as a result of the collision, and had sued both plaintiff's employer, and the defendant. He had no interest in the present suit, and was not an interested witness, unless the existence of his two suits made him so. We do not think it did. Moreover, the trial judge had charged the jury to consider which witnesses were and which were not interested in the result of the case, and had particularly inquired of counsel whether there were any other points they desired him to mention to the jury. Defendant's counsel remained silent, and cannot now be heard to complain because the court relied on that silence.

[2] The second assignment complains because defendant's ninth point was refused, viz.:

"All the medical testimony accounts for plaintiff's curvature of the spine as the natural, prob-

able result of his occupation and not due to the accident."

It was for the jury to say whether the medical testimony did "account" for that curvature. Even if every doctor had so said, and there was no other evidence to affect their opinion, the question was one of fact for the jury, and not of law for the court. *McGlinn Distilling Co. v. Dervin*, 200 Pa. 414, 103 Atl. 872. Moreover, there was evidence that before the accident plaintiff was a healthy, straight man, weighing 210 pounds; whereas, after being confined in bed for five months, as a result of the accident, he weighed but 110 pounds and had curvature of the spine. Under those facts it would have been error to affirm the point.

[3] The third assignment complains of a fraction of the charge relating to an argument of plaintiff's counsel on one of the points in the case. It quotes one sentence of the charge and part of another, leaves out a large part of what the court said on the subject, in immediate connection with that which is assigned, and is now overruled for that reason. Assignments of error must fully quote all that the court said on the subject regarding which complaint is made, but may then aver, if desired, which part thereof is objectionable. Fairness to the court below, as well as to this court, requires an enforcement of this rule.

[4] The fourth and last assignment complains that the trial judge did not carefully explain to the jury the difference between interested and disinterested testimony. He was not asked to do so; and, as pointed out above, he did caution the jury to consider which witnesses were and which were not interested. He also told them that the plaintiff and his wife were interested, and that their evidence should be carefully scanned and weighed in the light of that fact. If defendant wished additional light given to the jury, it should have so requested when asked to call the court's attention to anything omitted.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 593)

COMMONWEALTH v. CORSINO.

(Supreme Court of Pennsylvania. June 11, 1918.)

1. CRIMINAL LAW §776(4)—CHARGE—CHARACTER.

Where defendant admitted the killing and set up self-defense, a charge that evidence as to his good reputation as a peaceable man was not offered on theory that such a man would not commit a crime, and stating that character evidence was to be considered with the other evidence, gave defendant the full benefit of his character evidence, and was proper.

2. CRIMINAL LAW §822(13)—INSTRUCTION—SELF-DEFENSE—SUFFICIENCY OF EVIDENCE.

In a trial for murder, a charge on self-defense, requiring such defense to be shown by "satisfactory proof," was not reversible error,

where the charge further showed that it did not require the defense to be established beyond a reasonable doubt.

3. CRIMINAL LAW §761(3)—INSTRUCTION—ASSUMPTION OF FACT.

In trial for murder, where killing was admitted and the only defense was that of self-defense, it was not error for court to tell the jury that "the defense is self-defense."

4. WITNESSES §267, 282½—CROSS-EXAMINATION—DISCRETION OF LOWER COURT.

The extent to which a cross-examination will be allowed is largely in the discretion of the trial judge, and where a question has been fully answered his refusal to allow its repetition is not error.

5. CRIMINAL LAW §856(3)—STATEMENT OF ISSUE.

In trial for homicide, where it appeared that defendant had signed a written statement relating thereto, which was offered in evidence, it was not error for court to remark that question was whether it was read to defendant or whether he accepted it as his statement.

6. CRIMINAL LAW §636(1)—TRIAL—PRESENCE OF DEFENDANT.

It is an inherent right of a prisoner in a capital case to be present at every stage of the proceedings from his arraignment to the rendition of the verdict, and neither court nor judge can take any step affecting his rights in his absence.

7. CRIMINAL LAW §636(1)—TRIAL—ABSENCE OF DEFENDANT.

Where original indictment could not be found when jury retired, action of assistant district attorney in preparing a copy varying from the original, and of the trial judge at chambers in ordering it filed in place of original, without notice to defendant or his counsel and in his absence, which copy was given to jury, was reversible error.

8. WITNESSES §227—INTERPRETER—OATH.

An interpreter is a witness and should be sworn.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Witness.]

9. CRIMINAL LAW §1158(4)—INTERPRETER—QUESTION FOR JURY.

Whether testimony given in a foreign language was correctly interpreted is a question of fact with which an appellate court will not interfere, except in case of manifest error.

Appeal from Court of Oyer and Terminer, Luzerne County.

Angelo Corsino was convicted of murder in the first degree, on which sentence of death was passed, and he appeals. Reversed, and a venire facias de novo awarded.

Argued before BROWN, C. J., and STEWART, MOSCHIZSKER, FRAZER, and WALLING, JJ.

W. Alfred Valentine, of Wilkes-Barre, and Frank L. Pinola and William H. Gillespie, both of Pittston, for appellant. Frank P. Slattery, Dist. Atty., and John H. Dando and A. L. Turner, Asst. Dist. Attys., all of Wilkes-Barre, for the Commonwealth.

WALLING, J. [1] The defendant, Angelo Corsino, was convicted of murder of the first degree for the killing of Augustino Shendra. The firing of the fatal shot was admitted and defendant interposed self-defense. Evidence was offered tending to establish his good reputation as a peaceable man, and it is urg-

ed that the trial judge erred in his charge upon that question. He told the jury in brief that such evidence was not offered on the theory that a man of good reputation would not commit a crime, for frequently such a man has become involved in crimes that belied his reputation. He then explained the difference between character and reputation and said:

"Evidence of reputation for good character is substantive evidence, and is to be considered with the other evidence in the case. Sometimes it is the only evidence available to a defendant, and therefore it has been said in some instances it may of itself create a reasonable doubt of the defendant's guilt. Such evidence is applicable as well to the degree of the crime as to the general question of guilt under the entire indictment. It may, therefore, where the proof of guilt has been established, lead the jury to doubt whether a first degree crime was committed, and thus bring the jury to a verdict of second degree, or even manslaughter, and where it continues in the mind as to guilt in any degree, or of any crime, it should lead to general acquittal."

He also affirmed without qualification defendant's twelfth and thirteenth points, where the law on this branch of the case is stated fully and as favorably to defendant as can be found in any of the authorities. Defendant had the full benefit of his character defense, and there is no error in the general charge as to that; hence the rule that misstatement of the law in the charge cannot be cured by answers to points does not apply. But on the question of adequacy the points and answers are a part of the charge, and it is not necessary to repeat elsewhere principles fully stated in requests that are granted.

[2, 3] We find no substantial merit in the criticism of the charge as to self-defense. True, the judge did say it should be established by satisfactory proof, but thereafter clearly showed that he did not thereby mean evidence beyond a reasonable doubt; for he affirmed defendant's point that:

"The burden of proving self-defense is not placed heavily upon one accused of taking life. Sacred as is human life, the defendant is not bound to show beyond all doubt that he was compelled to take it, but is humanely permitted to satisfy the jury by a fair preponderance of the testimony that he killed under circumstances justifying his belief that his own life would not otherwise have been saved"

—and then said:

"And that brings to my mind that I failed to refer, in my general charge, to the measure of proof which is required of the defendant who sets up the defense of self-defense"

—and fully explained the correct rule and told the jury that such defense need not be established beyond a reasonable doubt, but by what is called in law the fair preponderance or weight of the evidence. He also instructed the jury that if, on the whole case, they had a reasonable doubt as to defendant's guilt they should acquit him. While the term "satisfactory proof" was not happily chosen, we are sure that, taking all the judge said, the jury could not have under-

stood him to mean by that term proof beyond a reasonable doubt. It was not error to tell the jury that "the defense is self-defense," for there was no other. A man who, standing near another, intentionally fires at him with a revolver, and with such deadly aim as to pierce his heart, cannot escape by testifying that he did not intend to kill him; but such statement may be competent on the question of the degree of the crime.

[4, 5] The extent to which a cross-examination will be allowed is quite largely committed to the discretion of the trial judge; and, where a question has been fully answered, his refusal to allow its repetition is not error. On the day following the homicide, the defendant had signed a written statement relating thereto, which was offered in evidence, and it was not error for the trial judge to remark that:

"The question is whether it was read to the prisoner, or whether the prisoner accepted it as his statement. That is the question."

[6, 7] As the jury retired to consider the case, the indictment could not be found; neither could the district attorney, who had inadvertently carried it away; so his assistant prepared a copy which the trial judge at chambers ordered filed in place of the original until the latter could be found. The copy was then given to the jury. This order was made without notice to defendant or his counsel, and in their absence. The names of 10 of the commonwealth's witnesses were indorsed on the back of the original indictment, while the copy contained but one, and defendant's plea of "not guilty" entered on the original was omitted from the copy; aside from this they were alike. It is the inherent right of the prisoner in a capital case to be present at every stage of the proceedings from the arraignment to the rendition of the verdict. Neither court nor judge can take any step affecting his right in his absence. See Sadler's Criminal Procedure, p. 412; also 10 R. C. L. pp. 90, 91. "It is better that this case should be tried a third time than that such a precedent should be established." Per opinion of President Judge Rice in Commonwealth of Penna. v. House, 6 Pa. Super. Ct. 92. When, during a trial, it becomes necessary to amend an indictment, or substitute a copy, the application therefor should be made in open court in presence of the defendant and on notice to his counsel that all rights may be safeguarded. The right of the court to permit a copy to be filed in place of the original indictment is not the question. It may be that no harm was done defendant; the same might be said of answering questions propounded by jurors, giving them additional instructions or taking their verdict, and yet no one would urge that such could be done in the absence of defendant. The law so jealously guards the prisoner's rights, when on trial for life, that it will not tolerate any false step that might result to his prejudice, even when tak-

granted a new trial; the sixth assignment of error relating thereto is well taken.

[8] The evidence of some witnesses on each side, unable to speak English, was taken through Mrs. Mary Sardoni, an Italian interpreter. As a reason for a new trial it was urged that she had not been properly sworn. An interpreter is a witness and should be sworn. See Wharton's Criminal Evidence (10th Ed.) § 449; 1 Thompson on Trials (2d Ed.) § 366; 7 Encyclopedia of Evidence, p. 657. Mrs. Sardoni had not been appointed or qualified as interpreter under the act of May 8, 1918 (P. L. 170), but had acted as such in the court below for 25 years, and whether properly sworn, or, if not, whether defendant can avail himself of that fact after having used her as his own interpreter and after verdict, are questions not necessary now to determine. As the case goes back for a new trial, that objection can be eliminated by administering an oath to the interpreter, a precaution that would not be amiss in any case. The court below, after a careful investigation, found in effect that the testimony had been interpreted with substantial accuracy, so the complaint as to that is without merit.

[9] Whether testimony given in a foreign language was correctly interpreted is a question of fact, with which an appellate court will not interfere, except in case of manifest error.

The sixth assignment of error is sustained, and thereupon the judgment is reversed, and a venire facias de novo awarded.

(261 Pa. 539)

CORONA COAL & COKE CO. v. DICKINSON et al.

(Supreme Court of Pennsylvania. June 11, 1918.)

1. MINES AND MINERALS § 70(3) — COAL LEASE—LIABILITY FOR MINIMUM ROYALTY.

Under lease of coal seam requiring immediate mining and payment of a minimum royalty until all merchantable and workable coal should be exhausted, the fact that vein had become thinner and more difficult to work, and that coal was of less value, did not excuse lessee from duty to pay minimum royalty.

2. CONTRACTS § 308(1)—BREACH—EXCUSE.

Inconvenience or cost making compliance a hardship cannot excuse a party from performance of absolute unqualified undertaking to do a thing that is possible and lawful.

3. LANDLORD AND TENANT § 189—LIABILITY OF LESSEE—CHANGE IN PROPERTY.

As a general rule a lessee is not relieved from liability by subsequent developments or changes in the property.

4. MINES AND MINERALS § 70(1) — COAL LEASE — ACCEPTANCE OF ROYALTIES — WAIVER.

Under coal lease requiring lessee's payment of minimum royalty, the lessor's acceptance of the royalty on the amount actually mined, which was less than the minimum royalty, was not a

waiver.

Mere delay of suit or neglect to rigorously exact money is not evidence of waiver.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

Appeal from Court of Common Pleas, Clearfield County.

Replevin by the Corona Coal & Coke Company against Margaret A. Dickinson and others for properties seized by landlord's warrant. From a judgment on a verdict for defendants for \$4,662.68, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Roland D. Swoope, of Clearfield, for appellant. A. R. Chase, of Clearfield, for appellees.

WALLING, J. This is an action of replevin for property seized by landlord's warrant for royalties on a coal lease. In 1908 defendants, as owners of a tract of 250 acres of land in Clearfield county, made a lease to plaintiff of a certain vein of coal therein, known as B seam, which provides, inter alia:

"Third. The lessee shall proceed at once to open and develop said coal and shall commence shipping coal on or before the 1st day of April, A. D. 1909, and shall ship during the year, to be computed from said date, not less than 20,000 gross tons of coal, and the next following year 20,000 gross tons, and each and every year thereafter during the continuance of this lease not less than 25,000 gross tons, until all of the merchantable and workable coal in said seam, in or under the above-described lands, shall be exhausted, and in default thereof the said lessee agrees to pay to the said lessors the royalty on said minimum amount of coal agreed to be mined at the aforesaid rate, the same to be payable at the end of each period of three (3) months, subject, however, to a proportionate deduction in said minimum amount of coal agreed to be mined as aforesaid when a general labor strike or other causes beyond the control of said lessee shall prevent mining operations. It is understood that if rent or royalty shall be advanced and paid on the minimum quantity for coal not mined, the lessee shall have the right to mine the coal thus paid for, next two succeeding years, without again paying royalty therefor."

And also:

"Ninth. It is covenanted and agreed that this lease shall continue until all the merchantable and workable coal in said B seam or vein has been mined, as hereinbefore provided."

The plaintiff (lessee) took possession of the property and proceeded to mine and remove the coal, and for the first five years paid the defendants (lessors) the full minimum royalty, although that was slightly more than for the amount of coal actually mined. As the operation extended, the vein became thinner and the coal more dirty, which added to the work of its removal and to the difficulty of mining the stipulated minimum quantity. Of this condition plaintiff made repeated complaints to defendants,

and, after the five years, in making settlements paid the royalty only on the amounts actually mined, which was much less than the minimum. Defendants retained the payments, but never agreed to treat them as in full, or to waive any rights under the lease, or to modify any of its provisions. This continued for about three years, when defendants issued the warrant in question to collect the difference between the minimum royalty and the amount actually paid, which amounted to \$4,662.63; then the lessee brought this replevin. The trial court held that defendants were within their rights and directed a verdict in their favor. Plaintiff appealed.

[1] We find nothing that calls for reversal. Plaintiff is still mining the vein of coal, and has never surrendered the lease, nor offered to do so, and there is yet therein a large amount of merchantable workable coal, as about one-half of the tract has not been mined. There is no guaranty in the lease as to the thickness of the vein or quality of the coal. During but two months of the entire time have mining operations on the premises ceased, and for them plaintiff has received credit. We agree with the court below that so long as the mine is in operation the minimum royalty must be paid, and that the fact of the vein being lighter in some places, or of the coal containing an unusual amount of dirt, rendering it difficult to secure miners to work therein, is no defense. The parties did not stipulate as to those contingencies. By the terms of the lease the only available excuse is a general labor strike or other cause beyond the control of the lessee which prevents mining operations, and there has been no such cause. There is no allegation that it is not practical to mine the coal as it is; in fact, it is being mined, and the conditions complained of do not prevent it. No fraud is alleged, and there is no ambiguity in the contract.

[2-4] Had the vein turned out richer than expected, it would have been plaintiff's gain; that it turned out poorer is its loss, but does not excuse performance of the contract. The lessors could not repudiate it because of the increase in value of unmined coal, neither can the lessee because of the increased difficulty in or expense of mining it. "Inconvenience, or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. The rights of the parties must be measured by the contract which they themselves made. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform." 6 R. C.

L. p. 997. And see *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236; *Lehigh Valley Coal Co. v. Everhart*, 206 Pa. 118, 55 Atl. 864; *Steele v. Maher*, 38 Pa. Super. Ct. 183; *Shafer v. Senseman*, 125 Pa. 310, 17 Atl. 350. "As a general rule a lessee is not relieved from liability by subsequent developments or changes in the property." 18 R. O. L. § 99, p. 1192. The lessors' acceptance of the royalty on the amount actually mined was not a waiver of the balance, nor did it constitute an estoppel. *Tustin v. Philadelphia & Reading C. & I. Co.*, 250 Pa. 425, 95 Atl. 595; *Hillside Coal & Iron Co. v. Sterrick Creek Coal Co.*, 239 Pa. 359, 86 Atl. 865; *Powell v. Burroughs*, 54 Pa. 329.

[5] A debtor cannot discharge himself of a clear legal liability for a fixed amount by paying a part of it. Mere delay of suit or neglect to rigorously exact money is not evidence of waiver. *Atkinson, Assignee, v. Walton*, 162 Pa. 219, 222, 29 Atl. 898. And see *Teufel v. Rowan*, 179 Pa. 408, 36 Atl. 224.

There is no ambiguity in the lease; hence the fact that the lessee paid the entire minimum royalty for the first five years, and thereafter declined to do so, is not important as tending to show the parties' own construction of the contract. Plaintiff's various offers of evidence as to the dirty condition of the coal, the difficulty of securing miners by reason thereof, etc., if admitted, would have constituted no defense to the lessors' claim for the minimum royalty; therefore their rejection was not error. There is here an abundance of unmined workable coal of merchantable quality, and no question as to the exhaustion of the vein or of the lessee's inability to mine the minimum amount by reason thereof; hence the authorities cited as to that do not apply.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 554)

BONE v. DETROIT NAT. FIRE INS. CO.
(Supreme Court of Pennsylvania. June 3, 1918.)

1. INSURANCE — 146(3) — FIRE INSURANCE — CONSTRUCTION OF POLICY.

Where the terms of a policy are capable of two meanings, or where the true meaning is doubtful, the law favors such construction as will protect the insured, and not such a construction as will avoid the policy.

2. INSURANCE — 328(3) — FIRE INSURANCE — "PREMISES."

Fire insurance policy, covering a hotel and the goods therein, with riders forbidding keeping of over 50 gallons of gasoline on premises, to be contained in tank 5 feet from any building, and more than one automobile on premises, was not violated by keeping over 100 gallons 200 feet from hotel, or by keeping two automobiles in barn 400 feet away, as "premises" did not include land, or the barn which was not insured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Premises.]

3. INSURANCE §328(13)—FIRE INSURANCE—“CHANGE OF POSSESSION”—POSSESSION UNDER PROCESS.

Under fire insurance policy, in terms void on any change in interest, title, or possession, by legal process, act of insured, etc., sheriff's levy on insured hotel and goods, in possession of tenant, subject to levy, was not a change of possession, avoiding the policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Change.]

4. INSURANCE §328(13)—OUSTER OF TENANT—FIERI FACIAS.

A fieri facias is not such a writ as, ex necessitate, would immediately oust a tenant from his possession or right of possession, within a fire policy stipulating as to effect of change of title or possession of the property.

5. EVIDENCE §155(3)—VALUE OF PROPERTY.

In action on policy covering hotel and goods, wherein insured offered evidence as to offers he had had for the premises, on the question of property's market value, the defendant's evidence as to its market value was admissible.

Appeal from Court of Common Pleas, Crawford County.

Assumpsit in a fire insurance policy by Max Bone and Max Bone, to use of D. E. Kelley, trustee, against the Detroit National Fire Insurance Company. Verdict for plaintiff for \$1,697.25, and defendant and plaintiff both appeal. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WAL-LING, JJ.

Albert L. Thomas, of Meadville, for plaintiff. Frank J. Thomas, of Meadville, for defendant.

MOSCHZISKER, J. The present suit was instituted upon two policies of insurance issued by defendant company, in certain proportions, upon “the four-story, frame, slate-roofed building occupied as a hotel, on Main street, * * * Cambridge Springs, Pa.,” and the “goods” contained therein. Plaintiff, owner of the property in question, rented it to his son, Joe Bone; the latter had as a business partner, in the possession and management of the hotel, one J. M. Manheimer. This hotel was located upon a 40-acre tract of land, and 400 feet distant from the site of the insured building there was a barn, where Bone & Manheimer kept two automobiles, employed in the conduct of their business, a gasoline tank, with a capacity of 400 gallons, was located about midway between the barn and hotel, gasoline therefrom was used to supply these automobiles, and from time to time small quantities were taken to the hotel building; but neither the location of the tank nor this use of its contents was in any way connected with the fire which caused the loss. Several judgments were entered against plaintiff, and August 9, 1915, executions were placed in the hands of the sheriff, who, August 10, 1915, levied upon the insured premises and personal property; within a few hours thereafter, a fire was

discovered in the linen closet on the third floor of the hotel, which resulted in the destruction of the building and part of its furnishings. Plaintiff recovered a verdict, upon which judgment was entered; both sides have appealed. Defendant's paper book shows but three “questions involved”; all of these relate to alleged breaches of warranties, any one of which, appellant claims, is sufficient to avoid the contracts in suit.

[1, 2] The premises insured are described in the policies as hereinbefore stated. In an attached printed rider, marked “dwelling and barn form,” the following clause among others, appears:

“Not to exceed fifty gallons of gasoline * * * shall be kept on the premises, * * * to be contained in an air-tight metal tank, stored underground and located at least five feet from any building herein insured. All gasoline shall be conveyed to building by means of a return draining pump.”

Defendant contends the provision just quoted was violated by “keeping more than 100 gallons of gasoline in a tank, above ground, located 200 feet from the insured building.” The above-mentioned rider also contains a stipulation that “not more than one automobile using gasoline shall be stored or kept on the premises,” and defendant contends this was violated by keeping two such automobiles in the barn, 400 feet from the insured building.

In disposing of the points to which we have just called attention, the learned court below correctly states:

“Where the terms of a policy are capable of two meanings, or the true meaning is left in doubt, the law favors such construction * * * as will protect the insured, * * * and does not lend a willing ear to an interpretation that will avoid the policy. * * * Cases might be multiplied in favor of the construction that [the term] ‘premises,’ as used in the policy, does not include the land included in the farm upon which the hotel stood. * * * To adopt the contention of * * * defendant that the automobiles and gasoline tank * * * were on the [insured] premises, would be to hold that any point on the forty-acre farm operated with the hotel would be on the ‘premises,’ within the meaning of the policy. * * * If the insurance company intended the ‘premises’ to include a distance of 200 to 400 feet from the hotel, it could very easily have said so, and very likely would have done so. * * * The fact that the stipulations concerning the tank and automobiles appear in the rider, which is a printed form intended for ‘dwelling and barn,’ and so specifies, accounts in our judgment for the stipulation as to automobiles; naturally, an automobile would be stored or kept in or about a barn, and not * * * in or about an hotel.”

We concur with the construction put upon the policies by the court below, and agree with what is said in plaintiff's paper book, viz.:

“The risk assumed was the hotel; that is the only thing described, and, when this word ‘premises’ is used in the policy, it refers to the hotel building, not the land. No gasoline was kept in the hotel building, and it is clear that

the demands of the hotel for gasoline were not such as to require a storage tank underground, and that the gasoline be 'conveyed to the building by means of a return draining pump.' This [provision] referred to, and was intended to refer to, the barn, in case one was insured; the rider is general, and, no barn being insured, * * * that clause is inoperative" in the present instance. *Grandin v. Rochester German Ins. Co.*, 107 Pa. 28, 37.

While, owing to differences in the facts involved, no authority is called to our attention which precisely rules the case at bar, yet the following may be cited as consistent with, and to some degree supporting, the conclusions reached on the points which we have been discussing. *Allemania Fire Ins. Co. v. Pittsburgh Exposition Society*, 8 Sadler, 424, 443, 11 Atl. 572; *Teutonia Fire Ins. Co. v. Mund*, 102 Pa. 89, 93, 94; *Central Market Street Co. v. North British & M. Ins. Co.*, 245 Pa. 272, 276, 91 Atl. 662; *Fireman's Fund Ins. Co. v. Shearman*, 20 Tex. Civ. App. 343, 50 S. W. 598, 599; *Carlin v. Western Assurance Co.*, 57 Md. 515, 529, 40 Am. St. Rep. 440; *N. W. Mutual Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446, 452; *Sperry v. Ins. Co. of N. A. (C. O.)* 22 Fed. 516, 517.

[3, 4] The last question involved in defendant's appeal relates to the condition that:

"This entire policy * * * shall be void * * * if any change, other than by the death of the insured, take place in the interest (except change of occupancy without increase of hazard), title, or possession of the subject of insurance, * * * whether by legal process or judgment or by voluntary act of the insured, or otherwise."

Defendant contends that the levy by the sheriff upon the insured "premises" and "goods," in connection with what was done by the officer at the time, constitutes such a change of possession as avoids the policies. In overruling this contention, the court below says:

"As to change of possession, when the facts are in dispute it is * * * a question for the jury. It is undisputed that Manheimer was a tenant under Max Bone [plaintiff]; his possession was the possession of the owner. The jury specially found that Manheimer remained in possession of the hotel after the sheriff's levy and until the time of the fire, as tenant. We think this finding is sustained by the evidence and settled adversely to defendant company its contention that the sheriff's conduct amounted to a dispossession of plaintiff's tenants; but, if the finding of the jury on this point were lacking the support of sufficient evidence, we are not prepared to assent to defendant's contention that the sheriff's levy * * * would effectuate such a change of possession as to avoid the policy."

We agree with both positions taken by the court below. The fact found by the jury, that at least one of plaintiff's tenants continued in possession of the insured property after the sheriff came upon the premises,

subject, of course, to the latter's levy, prevents the application of the provision of the contract, as to change of possession, sought to be enforced by defendant. Then, again, a *fiat facias* is not such a writ as, ex necessitate, would immediately oust the tenants from their possession or right of possession. See the following relevant, if not ruling, authorities: *Commonwealth Ins. Co. v. Berger*, 42 Pa. 285, 292, 82 Am. Dec. 504; *Collins v. London Assurance Corporation*, 165 Pa. 298, 306, 30 Atl. 924; *Marcello v. Concordia Fire Ins. Co.*, 234 Pa. 31, 84, et seq., 82 Atl. 1090, 39 L. R. A. (N. S.) 366; *Stainer v. Royal Ins. Co.*, 13 Pa. Super. Ct. 25, 41.

[5] Plaintiff is dissatisfied with the amount of the verdict, and for that reason also has appealed, alleging the trial judge erred when he admitted certain evidence as to the market value of the insured real estate. In disposing of this complaint, the court below states:

"Our reply * * * does not depend upon any refined reasoning as to whether, under the terms of the policy, the market value of the property insured has any relation to the amount of the insurance company's liability; it would rather depend on whether the plaintiff had not made [such value relevant] by introducing it into the case. Suppose plaintiff had relied entirely upon proof of market value, and offered no evidence as to cost of reproducing the hotel, it certainly would not be contended that defendant could not accept the issue of value * * * relied upon. * * * Plaintiff having relied upon two measures of value as fixing defendant's liability, defendant could meet the case presented only by offering like evidence; hence, in our opinion, defendant was entitled to prove market value. See *Morris v. Travis*, 7 Serg. & R. 220 [223]. * * * The evidence tendered by plaintiff was as to offers he had had for the insured property, * * * but the effect was to prove market value. We are also of opinion, the bona fides of such offers being a proper inquiry for the jury, that defendant's evidence as to * * * value would assist the jury in determining whether to believe such offers [to buy actually] had been made, and, if so, whether they were in good faith."

See *Hamilton v. Hastings*, 172 Pa. 308, 317, 34 Atl. 43; and opinion by Rice, P. J., in *Winters v. Schmitz*, 36 Pa. Super. Ct. 496, 505.

We may add, there is no specification of error attacking the manner in which the measure of damages was submitted to the jury; the sole complaint being as to the admission of testimony. Under the circumstances attending the trial of this case, we see no reversible error in the rulings called to our attention by plaintiff's assignment; and, since we have stated already a like view regarding defendant's assignments, they are all overruled.

The judgment is affirmed.

(261 Pa. 532)

RANSLEY v. KENSINGTON WORKINGMEN'S BLDG. ASS'N, NO. 2.

(Supreme Court of Pennsylvania. June 8, 1918.)

JUDICIAL SALES C-29—DEFAULT OF BIDDER—ACTION FOR DIFFERENCE BETWEEN BIDS ON FIRST AND SECOND SALE—AFFIDAVIT OF DEFENSE.

In action by sheriff, to use of third mortgagee, to recover from defaulting bidder difference between original bid and bid at resale, affidavit of defense by defendant, second mortgagee and successful bidder at both sales, denying its appropriation of stocks to reduction of its mortgage debt, and alleging that plaintiff was actual owner of mortgaged premises, which, if true, would entitle defendant to set off taxes, etc., *held* sufficient.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Harry C. Ransley, High Sheriff of the County of Philadelphia, to the use of Robert F. Stetler, against the Kensington Workingmen's Building Association, No. 2, to recover from defendant, as a defaulting bidder at a sheriff's sale, the difference between the original bid and the bid at the resale. From an order dismissing plaintiff's rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Appeal dismissed.

The facts appear from the following opinion by Rogers, J., in the common pleas:

This is a rule for judgment for want of a sufficient affidavit of defense. Suit was brought for the recovery of money which the use plaintiff claims to have lost by reason of defendant's failure to settle for several properties in accordance with bids made by it at sheriff's sales had under judgments upon bonds accompanying second mortgages held by defendant. Plaintiff is a subsequent mortgagee, and claims to have lost the sum of \$1,614.94, being the difference between defendant's first and second bids. The first sale took place January 2, 1917, the down money being \$50; the second sale took place February 5, 1917, and the down money was \$250.

On April 10, 1917, defendant canceled the shares of stock pledged to it as security for the payment of the loans and the fulfillment of all conditions set forth in the bonds and mortgages, and appropriated the value thereof to the payment of certain claims specifically pleaded. On June 22, 1917, Sherwood presented to defendant an assignment of the stock in question from John W. Healy, who held the same by assignment dated July 1, 1912, from Hayden, the original owner. Paragraph 7 of the amended statement of claim is as follows:

"7. The 40 shares of stock in the defendant corporation, which were assigned as collateral security for mortgage loans by the defendant on said properties, were duly assigned to the use plaintiff on December 21, 1914. At the time of the sheriff's sale of January 2, 1917, the surrender value of each of said shares was \$39.90, and the value of each set of 10 shares, pledged as collateral security with each of said mortgages, was \$599, which said shares were canceled by the defendant and the value thereof applied on account of its judgments."

To which defendant answered:

"7. Defendant, by way of answer to the seventh paragraph of plaintiff's amended statement, avers that the said Lewis S. Hayden

made monthly contributions covering dues, interest, premium, etc., and that he continued to make said payments until on or about the 1st day of July, 1913, when the said Lewis S. Hayden duly assigned the four certificates, comprising 10 shares each, to John W. Healy, subject to the prior rights of the association. That the said John W. Healy, from the time of said transfer until the 10th day of April, 1917, was the legal holder of said 40 shares of stock on the books of the defendant association, and that said 40 shares had never been transferred or assigned to any one on the books of the association, and that no application for a transfer or an assignment had been made by any one until the 22d day of June, 1917, at which time Robert E. Lamberton, Esq., attorney for Norman S. Sherwood, presented to this deponent, secretary of the defendant association, a supposed assignment of stock, purporting to assign 40 shares of stock, from one John W. Healy to Robert F. Stetler, dated the 31st day of December, 1914. Defendant denies that said 40 shares of stock were duly assigned to the use plaintiff on the 31st day of December, 1914. He further avers that the said Robert F. Stetler, use plaintiff herein, was not the holder of the title to said premises hereinbefore described, and was not the holder of the assignment of said mortgage as aforesaid, until the 3d day of November, 1916, about one month after the foreclosure proceedings had been started; therefore the use plaintiff herein had absolutely no interest in said properties or mortgage at the time of said supposed assignment, to wit, the 31st day of December, 1914. Defendant further denies that said 40 shares of stock were canceled and applied on account of the judgments obtained on the four bonds, but, on the contrary, avers that the said 40 shares of stock were not canceled until the 10th day of April, 1917, and the stock was appropriated by the association in cancellation of the indebtedness as hereinafter set forth."

The detailed schedules and the subsequent averments in the amended affidavit of defense show distributions and payments which required the use of the stock and its value in such manner as to leave nothing applicable to plaintiff's claim, even if valid. That raises a question of fact for a jury. The affidavit denied that the stock had been appropriated in reduction of the mortgage debts. Whether the building and loan association appropriated the monthly payment on account of the stock in reduction of the mortgage debts owing by the person who owned the property and whether such appropriations were applied as the payments were made or before the sheriff's sale took place are questions of fact to be determined by a jury. If the stock was not appropriated by defendant, there would be no balance coming to the third mortgagee under the first sale.

Paragraph 2 of the amended affidavit of defense is as follows:

"Defendant further avers that said mortgage created by the said Anne H. Blakely was without consideration; that no money had been advanced by the said Norman S. Sherwood on account of said mortgage; that it was created at the sole instance, request, and direction of said Norman S. Sherwood; that at no time since its creation has one penny of interest been paid as provided in said mortgage; that it was created for the sole and exclusive purpose of protecting the said Norman S. Sherwood from possible creditors, and therefore was a fraud upon them and illegal; that the said Robert F. Stetler, holder of the assignment as aforesaid, was and is not a holder for value of said mortgage or the assignments thereof; that he has no interest therein, and that he advanced no money on account of said mortgage or assignment, and he was a mere naked holder

of the title to said mortgage and the assignment thereof for the absolute use and benefit of his employer, the said Norman S. Sherwood. Defendant further avers that, after the creation of said mortgage, the said Anne H. Blakely, at the special instance and request of the said Norman S. Sherwood, transferred the four properties hereinbefore more particularly described on the 28th day of December, 1915, to R. Le Roy Dengler, as will more fully and at large appear by reference to Deed Book J. M. H., No. 76, page 559; that the said R. Le Roy Dengler is a bell boy or night clerk at the Little Hotel, 225 South Broad street; that he is a straw man for the said Norman S. Sherwood, and was used for that purpose in this particular matter, and therefore was holding title to said premises for the sole use, benefit, and enjoyment of the said Norman S. Sherwood. Wherefore title to said premises and said mortgage is now in Norman S. Sherwood."

If it is true that Sherwood owned the property and the mortgage, and that the mortgage merged, Sherwood could not recover as mortgagee; he could only recover as real owner. If he did not pay the taxes and water rents, as set forth in the schedules of distribution in the amended affidavit of defense, and sued as real owner, defendant would have the right to set off the amount of taxes, water rents, et cetera, as set forth in the affidavit of defense. The averments as to the increase of deposit to be paid at the second sale also raise a question of fact which requires submission of the case to a jury.

For these reasons the rule for judgment is discharged.

The lower court dismissed plaintiff's rule for judgment. Plaintiff appealed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Robert E. Lamberton, of Philadelphia, for appellant. J. R. Wilson, of Philadelphia, for appellee.

PER CURIAM. This appeal is dismissed, on the opinion of the learned judge below discharging the rule for judgment.

(361 Pa. 580)

KENNEDY et al. v. E. W. ROTHROCK CO., Inc.

(Supreme Court of Pennsylvania. June 11, 1918.)

1. CONTRACTS \S 214—PAYMENT OF NOTES—CONSTRUCTION.

Where a corporation has agreed to pay notes out of money realized from sale of its capital stock for cash, it is bound to pay notes after sale of enough stock to pay them in full, either for cash or for notes discounted for cash; the contract distinguishing stock sold for cash from that issued in exchange.

2. CONTRACTS \S 322(3)—PAYMENT OF NOTES—EVIDENCE—DEFAULT.

In action against corporation on its notes and written contract, evidence held to show a breach of contract.

3. FRAUDULENT CONVEYANCES \S 54(2)—LOAN OF CREDIT—DISPOSITION OF ASSETS.

One contracting to lend his credit to another is not prohibited from transferring or disposing of his property, unless he has so agreed, at least where it does not appear that the transfer was made to avoid the obligation.

4. APPEAL AND ERROR \S 1064(1)—CHARGE OF COURT—REVERSIBLE ERROR.

Alleged inconsistency in a charge was no ground for reversal, where it appeared that it did defendant no harm.

5. APPEAL AND ERROR \S 230—INCONSISTENT CHARGE—REVERSIBLE ERROR—FAILURE TO OBJECT.

Alleged inconsistency in charge was no ground for reversal, where defendant's counsel, when court inquired of counsel at end of charge whether there was anything else he desired to have said to jury, did not then point out alleged inconsistency.

6. JUDGMENT \S 263(8)—MOTION IN ARREST OF JUDGMENT—MISJOINDER OF ACTIONS.

Where affidavit of defense was filed, plea in abatement was entered, and general issue was pleaded, together with a special plea, without complaint of any misjoinder of actions, it was too late after verdict to complain of such misjoinder on motion in arrest of judgment, especially where it did not appear that any misjoinder prejudiced appellant.

7. PLEADING \S 433(7)—DECLARATION—AMENDMENT TO AGREE WITH VERDICT.

Where declaration in action on contract asked interest only from December 1, 1915, though on most of the claims in suit it was actually due from December 4, 1914, and special verdict allowed it from latter date, declaration might be treated as amended to agree with judgment on the verdict.

8. APPEAL AND ERROR \S 580—STATEMENT OF QUESTIONS INVOLVED—REVIEW.

Where appellant's statements of "questions involved" made no reference to the matter of interest recovered against him, that matter was not properly before Supreme Court on appeal, and need not be considered.

Appeal from Court of Common Pleas, Blair County.

Assumpsit on notes and written contracts by E. J. Kennedy and J. S. Ginter, cashier of the Farmers' & Merchants' National Bank, of Tyrone, Pa., now for use of E. J. Kennedy, against the E. W. Rothrock Company, Incorporated, a Delaware corporation. Verdict for plaintiffs for \$4,712.90, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Wm. L. Pascoe and Albert G. Pascoe, both of Tyrone, for appellants. J. F. Sullivan, of Altoona, and Richard H. Gilbert, of Tyrone, for appellees.

MOSCHZISKER, J. By written agreement of December 8, 1914, E. W. Rothrock Company, a Pennsylvania corporation, sold all its capital stock and property to "E. W. Rothrock Company, Incorporated," a new (Delaware) corporation, for \$26,800, payable in 268 shares of stock of the latter and the assumption of the debts of the former company in the amount of \$31,204.43, such stock to be transferred as follows: One hundred shares of preferred stock of the Pennsylvania corporation in exchange for the same number of shares of like stock of the Delaware corporation, each of the par value of \$100, and, in addition, 168 shares

of the common stock of the latter to be divided pro rata among the holders of the common stock of the former. The new corporation was capitalized at \$100,000 and the old at \$15,000.

Subsequent to the arrangement just outlined, but on the same day, E. W. Rothrock Company, Incorporated—hereinafter called the Delaware company—entered into a written agreement with plaintiff, E. J. Kennedy, who held 35 shares of the capital stock of the Pennsylvania company, and was about to receive, in exchange, the same number of shares of preferred stock of the new corporation, whereby it was agreed (a) that the Delaware company would purchase these 35 shares for \$3,500, payable in seven notes of \$500 each, dated December 4, 1914, with interest, the first maturing one month thereafter, and one falling due each succeeding month; (b) that the Delaware company would give its notes for \$9,100, payable at such times as could be arranged with the then holders of \$9,100 in notes of the Pennsylvania company, upon which Kennedy was either accommodation maker or indorser, as new obligations to lift these old ones; (c) that he (Kennedy) would "use his best endeavors to have the present owners of the \$9,100 notes exchange the same and accept in payment thereof the notes of [the Delaware company]," and that he would "indorse and renew his indorsements of all notes from time to time, so long as the contract and agreement [was] fairly carried out by the [Delaware company]"; (d) that the Delaware company would pay the aforesaid \$3,500 of notes given for Kennedy's stock, and the obligations for \$9,100, upon which he was to become indorser, "out of the money realized from the sales of its capital stock for cash," excluding the before-mentioned 268 shares, and 50 in addition, specially set aside for certain designated purposes; (e) that such money would be applied as follows: "The first \$6,000 upon account of the outstanding bills of said Pennsylvania corporation, the next \$1,000 half on said \$3,500 and half on said \$9,100 notes to said E. J. Kennedy; the next \$1,000 on account of such bills; the next \$1,000 half and half on said E. J. Kennedy notes as aforesaid, etc.," until all of the notes were fully paid.

In pursuance of this last-mentioned agreement, the Delaware company delivered seven notes of \$500 each to plaintiff for his stock, and the latter procured the holders of the old notes for \$9,100 to take in lieu thereof like obligations of the new corporation; Kennedy thereafter signed, and, from time to time, renewed his signature upon the new notes for \$9,100, until the banks refused further to accept him either as maker or indorser. Finally, suit for \$1,000 having been brought on one of the latter obligations, judgment obtained, and execution issued, Kennedy was compelled to pay that amount, with interest and costs, such note having

been signed by him jointly with defendant corporation, he acting as an accommodation maker. After its payment, this obligation was duly assigned to plaintiff. The first of the seven notes was paid, but those subsequently maturing were not. Kennedy brought this action of assumpsit against the Delaware company to recover the \$3,000 yet due on these obligations, and in addition, claimed the \$1,000 which he had paid as accommodation maker, \$342.50 due him on a check, and \$300 for rent of premises occupied by defendant. All these items were sued for by Kennedy as legal plaintiff, except the one of \$1,000, which he claimed as use plaintiff.

Defendant denied liability on the six \$500 notes upon the ground that plaintiff, in February, 1915, had committed a breach of contract by transferring some of his property, resulting in the refusal of the banks further to accept his indorsements, which defendant alleged, in a general way, resulted in damage to it in the sum of \$10,000. Defendant also averred that the capital stock available for the purpose, which it had sold to time of suit, would not aggregate sufficient, if applied as stated in the contract, to pay its obligations held by plaintiff, since the corporation had accepted notes, instead of cash, for a large part of such stock, some of which notes had not been paid. The various issues of fact involved in the controversy were submitted to the jury, and, as shown by the verdict, were found against defendant, judgment was entered accordingly, and this appeal followed.

[1] With reference to the stock sales, the court below was entirely correct in charging that, on the facts at bar, sales on notes, forthwith discounted, were to be treated as sales "for cash" within the meaning of the contract between plaintiff and defendant, which distinguishes stock sold for cash from that issued in exchange for stock of the old company and to accomplish certain other purposes therein mentioned. The agreement in question provides that the proceeds of such cash sales are to be applied, in the manner hereinbefore stated, to the reduction of defendant's various obligations to plaintiff. In disposing of its stock, upon several occasions defendant accepted notes, which were forthwith discounted for cash. Under the circumstances, it would work grave injustice to permit such a subterfuge to delay the enforcement of this company's contractual obligations; but it is not necessary to rest upon that ground the affirmance of the present judgment, for there is ample evidence upon the record to prove that, at the time of this action, defendant had sold for actual cash enough stock fully to pay the notes in suit.

[2, 3] As to the question of the first breach of contract, there is evidence sufficient to sustain a finding that, in February, 1915, the Delaware company refused to pay the note

of \$500 then accruing, at the same time notifying plaintiff it would not meet any more of such obligations, and he would have to sue thereon. With this evidence believed by the jury, as the verdict indicates it was, a breach was proved against defendant; and plaintiff's testimony shows that, upon the date in question, the latter was not in default as to his promised indorsements on the notes for \$9,100. Defendant contends, however, that plaintiff was in default in the respect last mentioned, in that he transferred property to such an extent as to impair his financial credit; and it complains because the trial judge refused testimony concerning these alleged transfers. We see no error in the rulings of the court below upon the subject in hand. There is nothing in the agreement between the parties to prohibit plaintiff from transferring or disposing of his property, and, in addition, it appears that Kennedy attempted no such assignments or transfers until after the Delaware company's refusal to pay the note due him in February, 1915, that is, until after defendant's breach of contract. We have read the authorities cited by appellant as applicable to this branch of the case, but none of them rules the facts at bar.

In one of its assignments, appellant complains because the court below refused to allow in evidence an alleged written contract between plaintiff and E. W. Rothrock individually, which the latter claims, in effect, modified the contract in suit "with reference to the application of money arising from sales of stock." We see no error in this ruling. If there was any breach of the terms of this collateral agreement, the damages accruing therefrom may, perhaps, be recovered by Rothrock personally; but the court below was right in holding that such breach could not affect the questions involved in the present suit.

[4, 5] Another assignment complains of an alleged inconsistency between a part of the charge, dealing with plaintiff's right to regain the amount paid by him on the before-mentioned note of \$1,000, and a point covering the same item. It appears the trial judge said that, if Kennedy had to pay this note of \$1,000, "then he would be put in the position of the bank," and "would have the right to recover the amount the bank collected from him"; but later on, in answer to the point, the jury was plainly told that plaintiff could not recover "anything" upon the item of \$1,000, unless he "proved to the satisfaction of the jury," by the weight of all the evidence in the case, that he had, in all particulars, lived up to his agreement with defendant. It is quite plain this inconsistency could have done defendant no harm. In the first place, plaintiff paid the note for \$1,000, and might have had the judgment thereon marked to his use. (*Carnegie Nat. Bk. v. Seibel*, 255 Pa.

473, 100 Atl. 279); but he preferred to include the item in his present suit. Next, as already indicated, the verdict comprehends a finding that defendant, and not plaintiff, was the party in default; and the last thing said to the jury, upon the subject of this note, was the affirmation of the point to the effect that there could be no recovery unless plaintiff proved "by the weight of the evidence" that he had not breached his contract. Finally, it was the duty of counsel to call the court's attention to the alleged inconsistency, when the trial judge, after answering all points, asked, "Is there anything else, gentlemen, you desire me to say to the jury?" We see no merit in this assignment.

[6] The assignment most strenuously insisted upon alleges that the court below erred "in overruling defendant's motion in arrest of judgment." In this connection the complaint is of a misjoinder of actions. The suit was instituted in December, 1915. An affidavit of defense was filed, a plea in abatement entered, the general issue pleaded, and then defendant, by leave of court, filed a special plea of set-off. In none of these, however, did it suggest a misjoinder of actions, or complain because plaintiff was endeavoring to recover one of the items in suit as a use plaintiff, while he claimed the others as legal plaintiff. After trial, defendant for the first time raised the objection in question. We cannot perceive in what manner the defendant was prejudiced by the so-called misjoinder, and we agree with the learned court below that, after full notice of the cause of action in plaintiff's statement of claim, defendant having "filed his affidavit of defense, entered a special plea, and had a fair trial, it is now too late [for it] to raise the objection that there was a misjoinder." (*Whitney v. Haskell*, 216 Pa. 622, 628, 68 Atl. 101, and cases there cited.

[7, 8] Another matter calls for notice. Defendant contends that plaintiff recovered too much interest. The declaration asks interest only from December 4, 1915; but, as a matter of fact, on the bulk of the claims in suit, it was actually due from December 4, 1914, and the special verdict shows an allowance thereof from that date. Under the circumstances, the declaration might be treated as amended to agree with the judgment on the verdict (*Passenger C. L. Ins. Co. v. Birnbaum*, 116 Pa. 565, 572, 11 Atl. 378; *Fonder v. Rosenstein*, 53 Pa. Super. Ct. 161, 165; *Wilson v. Pullman Co.* [No. 1] 65 Pa. Super. Ct. 499, 507); but it is not necessary to follow this course, for, since appellant's statement of "questions involved" makes no reference to the matter of interest, that subject is not properly before us, and need not be considered (*Willcock v. Beaver Valley Railroad Co.*, 229 Pa. 526, 530, 79 Atl. 138; *Smith v. Lehigh Valley R. R. Co.*, 232 Pa. 456, 462, 81 Atl. 554; *Pramuk's Appeal*, 250 Pa. 45,

51, 95 Atl. 828; Vulcanite Paving Co. v. Philadelphia [No. 1] 252 Pa. 600, 601, 602, 97 Atl. 928; Spang v. Mattes, 253 Pa. 101, 108, 97 Atl. 1026; Hopkins v. Tate, 255 Pa. 56, 62, 99 Atl. 210).

The assignments are overruled, and the judgment is affirmed.

(251 Pa. 602)

WARRUNA v. DICK.

(Supreme Court of Pennsylvania. June 17, 1918.)

1. TRIAL \S 260(1) — CHARGE OF COURT — FAILURE TO ANSWER POINT.

Failure to answer a point is not error, if its subject-matter is elsewhere passed upon in charge.

2. HIGHWAYS \S 172(1) — USE — RIGHTS OF PEDESTRIAN.

A pedestrian has an equal right with the driver of a vehicle on every part of a public road, but must have regard to the rights of others and to the customs of the road.

3. HIGHWAYS \S 172(1) — INJURIES TO PEDESTRIAN — RIGHTS OF PARTIES.

Where pedestrian, blind in one eye, left side of road and went into middle of road to obtain ride in automobile going in same direction, an instruction that driver of automobile approaching his blind side was bound to anticipate meeting infirm persons in road, and to have his automobile under control, and to run it at proper speed, was going as far as the court properly could.

4. TRIAL \S 244(5) — INSTRUCTIONS — UNDUE PROMINENCE — COMMENT ON TESTIMONY.

For trial court to say that testimony of a disinterested witness "is of the utmost importance in the case" does not give undue prominence to such testimony.

5. EVIDENCE \S 492 — OPINION EVIDENCE — SPEED.

In action for personal injury when struck by automobile, refusal to permit witness to state whether defendant's automobile was traveling "fast or slow," on ground that one may call a thing fast which another would call slow, was proper.

6. HIGHWAYS \S 184(3) — INJURY FROM AUTOMOBILE — WARNING — QUESTION FOR JURY.

In action for personal injury when struck by automobile while standing in middle of road, where witness testified that he heard no warning and was in position to hear one, had it been given, whether warning was given was for jury.

7. APPEAL AND ERROR \S 1068(4) — OMISSION OF CHARGE — IMMATERIALITY.

In action for personal injury, plaintiff's assignment of error in charge relating to measure of damage was unimportant, where verdict was for defendant.

Appeal from Court of Common Pleas, Luzerne County.

Trespass for personal injury by Charles Warruna against William H. Dick. Verdict for defendant, and judgment thereon, and plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MOSCHIZISKER, FRAZER, WALLING, and SIMPSON, JJ.

Frank P. Boyle, of Hazleton, and Edward A. Lynch, of Wilkes-Barre, for appellant. John H. Bigelow, of Hazleton, and Joseph Mulhern, of Wilkes-Barre, for appellee.

SIMPSON, J. While walking on the side of a public highway, plaintiff, who was blind in one eye, espied an approaching automobile going in the same direction as himself, and walked or ran into the middle of the road in order to obtain a ride upon it. It did not stop for him, and as he stood there he was struck by defendant's automobile, which was going in the opposite direction. As his basis for recovery he only avers excessive speed on the part of defendant, who denies that charge and alleges contributory negligence on plaintiff's part. The jury found a verdict for defendant. The only errors assigned relate to the charge.

[1] The first assignment complains because the court did not specifically answer plaintiff's first point, to the effect that he had an equal right with the defendant to be where he was at the time of the accident; but the failure to answer it becomes unimportant, in view of the fact that the court charged, as complained of in the second assignment, that "the plaintiff and defendant did not have equal rights to the road at that point." If that charge was right, the failure to answer the point was not error.

[2, 3] It may be admitted that a pedestrian has an equal right with the driver of a vehicle on every part of a public road, but in exercising his right he must have regard to the rights of others, and to the customs of the road. Traffic would be greatly impeded if pedestrians were held entitled to walk or stand on a public highway when, where, and as they please, and particularly on a road but 20 feet wide, as was this one. Under such circumstances, even if the traffic was moving in but one direction, vehicles could not travel faster than the speed of the slowest pedestrian. By reason of these facts, despite the right under proper circumstances to use any part of the highway, custom has established the rule of "Keep to the right"; and it has no less established the rule of pedestrians using the sides and vehicles the center of the highway, subject to certain modifications not necessary to be here considered, inasmuch as plaintiff left the side and went into the middle of the road solely because he wished to get a ride on the approaching automobile. When he was injured, he was not even walking in the road, but was standing in a place which he knew was usually traversed by vehicles; and he so stood with his blind side towards defendant's approaching automobile, the driver of which had no reason to suspect either plaintiff's continuous standing there or his blindness. Under such circumstances the court below certainly went as far as it properly could when, at his request, it told the jury that defendant "was bound to anticipate that he might meet infirm persons on this public highway, and * * * it was his duty to have his automobile under control and to run it at a proper rate of speed."

[4] The third assignment complains because undue prominence was given to the testimony of the driver of the automobile in which defendant was seeking to obtain a ride. He was a disinterested witness, who was in a position to see all that occurred, and to say that his "testimony is of the utmost importance in the case" is but to state a truism.

[5] The fourth and fifth assignments complained because a witness was not permitted to state the "rate of speed" at which defendant's automobile was traveling, and whether it was traveling "fast or slow." As to the former, the witness had testified that he was too far away to give a correct estimate as to the rate of speed; and as to the latter, the objection was sustained because "one may call a thing fast which another man would call slow," certainly a valid objection, which plaintiff did not try to meet.

[6] The sixth assignment complains because another witness was not allowed to "state whether or not a warning was given." He had already testified that he heard none, and would have been in position to hear one, had it been given. This was all that he actually knew. It was for the jury, and not for the witness, to draw therefrom the conclusion sought by the question.

[7] The seventh and last assignment complains of a part of the charge relating to the measure of damages; but, as the verdict was for defendant, that matter became unimportant.

The assignments of error are overruled, and the judgment is affirmed.

(261 Pa. 468)

THOMAS RABY, Inc., v. WARD-MEEHAN CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. SALES \S 418(2)—BREACH OF CONTRACT — DAMAGES.

Measure of damages to a buyer from a seller's failure to deliver goods according to contract is the difference between the contract price and the market value of goods at the time and place of delivery.

2. ACCOUNT. ACTION ON \S 21—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In action on book account for goods sold, where affidavit of defense contained writings under which it was alleged goods were sold, and on which suit should have been brought, but where such writings were simply confirmations of sale, and where nothing showed that orders were given in writing, judgment for want of sufficient affidavit of defense was properly entered for plaintiff, less damage to defendant as to goods not delivered.

3. DAMAGES \S 23—BREACH OF CONTRACTS—MEASURE.

The general rule is that on breach of contract the measure of damages is such as may be fairly and reasonably considered as naturally arising from the breach according to the usual course of business, and under circumstances contemplated by the parties when the contract was made.

4. DAMAGES \S 23 — BREACH OF CONTRACT — PARTICULAR CIRCUMSTANCES.

Damages resulting from particular circumstances connected with the transaction cannot be recovered, unless known to the defaulting party to the contract, and unless such as may be supposed to have entered into the contemplation of the parties.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for goods sold and delivered by Thomas Raby, Incorporated, against the Ward-Meehan Company. From a judgment for plaintiff for want of a sufficient affidavit of defense, assessing damages at \$3,215.38, defendant appeals. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKEB, and FRAZER, JJ.

M. D. Hayes, William H. Wilson, and Francis M. McAdams, all of Philadelphia, for appellant. Alex. Simpson, Jr., and Clinton O. Mayer, both of Philadelphia, for appellee.

FRAZER, J. Defendant appeals from a judgment entered in favor of plaintiff for the portion of the claim as to which the affidavit of defense was deemed insufficient. The action is on a book account for goods sold and delivered amounting to \$5,280.83, a copy of the account being attached to the statement of claim. The affidavit of defense denies defendant "ordered or received any goods whatsoever from plaintiff upon an open book account, but avers that the items charged to plaintiff in the book account * * * were bought by virtue of written contracts hereinafter more fully recited in the statement of counterclaim," and concluded with a denial that defendant "is indebted to plaintiff in any sum whatsoever for goods purchased through an open account." No denial, however, is made that defendant received the goods or that the prices charged were proper. The counterclaim avers written contracts were entered into between plaintiff and defendant on the dates specified, whereby the former agreed to deliver to the latter certain merchandise, that on several of the contracts plaintiff refused to deliver the entire order, while on others no deliveries were made. In consequence of such default defendant was forced to resort to the open market and procure the goods at a price in excess of the contract price, specifying amounts and prices, resulting in a total loss to defendant of \$2,138.49. Defendant also claims a further loss of profits by reason of being obliged to discontinue the use of 40 looms, during a period of two months, owing to the refusal of plaintiff to comply with the terms of his various contracts; the total claim for damage in this respect being \$2,880.

[1] As to the loss resulting from the increased price defendant was obliged to pay for the goods in the open market, the court below cor-

age to a purchaser for the failure of the vendor to deliver goods according to contracts is the difference between the contract price and the market value of the article at the time and place of delivery. *Morris v. Supplee*, 208 Pa. 253, 57 Atl. 566; *Honesdale Ice Co. v. Lake Lodore Imp. Co.*, 232 Pa. 293, 81 Atl. 306. This rule is embodied in section 67 of the Sales Act of May 19, 1915 (P. L. 543, 562).

[2] The main contention of defendant is that the contracts were entire for the delivery of specific goods, and no recovery can be had by plaintiff without showing complete performance, or that performance was prevented by defendant. Conceding the general rule, the present case does not appear from the affidavit of defense to be within the authorities cited by defendant. In the first place, the alleged special contracts relied upon and attached to the affidavit of defense do not require plaintiff to declare on them specially, instead of the book account for goods sold and delivered. The writings set out are not orders, but merely confirmation of sales, apparently sent by plaintiff in accordance with a usual business custom to acknowledge orders received, whether verbally or in writing, for the purpose of avoiding mistakes as to quantity, price, description, or otherwise. We find nothing in the affidavit to show whether the orders in this case were in writing or merely verbal. Had plaintiff's action been brought on the exhibits as contracts, defendant might well argue the statement is defective on its face, as being an action on mere self-serving declarations made by plaintiff, and without signature or assent on part of defendant. The transaction was evidently one occurring in the ordinary course of business dealings between the parties, and in our examination of the affidavit of defense we fail to find any averment warranting the conclusion that the subject-matter of the sale is not the proper subject of the book account. The action, accordingly, was properly brought. *Vallee Bros. Electrical Co. v. North Penn Iron Co.*, 32 Pa. Super. Ct. 111.

The alleged written contracts being eliminated, the affidavit of defense presents nothing to prevent the entry of judgment for the amount of goods sold, less the excess defendant was obliged to pay to procure in the market undelivered goods; the entry of judgment for plaintiff for the difference was consequently proper, unless defendant should be entitled to set off the further claim for loss by reason of inability to operate its looms, owing to delay in obtaining materials.

[3, 4] The general rule governing the measure of damages for breach of contract is that they are such as may be fairly and reasonably considered as naturally arising from the

by the parties at the time the contract was entered into. Damages, however, resulting from particular circumstances connected with the transaction, cannot be recovered, unless such circumstances were known to the defaulting party to the contract, and were such as may be supposed to have entered into the contemplation of the parties. This is the rule established by the leading English case of *Hadley v. Baxendale*, 9 Exch. 341, where the court held the carrier was not liable for damages incident to the stopping of plaintiff's mill during the period of delay in the delivery of a part of a machine sent for repairs and transported by defendant in absence of evidence of defendant being advised the stoppage of plaintiff's mill was due entirely to the broken shaft and loss of profits would result from delay on its part to make prompt delivery. The principle laid down in that case has been followed by Pennsylvania courts in *Adams Express Co. v. Egbert*, 36 Pa. 360, 78 Am. Dec. 382, *Billmeyer Dill & Co. v. Wagner*, 91 Pa. 92, *Hutchinson v. Snider*, 137 Pa. 1, 20 Atl. 510, *Kluports v. Breon*, 193 Pa. 309, 44 Atl. 436, and many others. We find no averment, in the affidavit of defense or counterclaim, of plaintiff having knowledge that his failure to deliver the materials would result in the stoppage of defendant's mill, nor an averment of defendant's inability to procure in the open market goods to take the place of those plaintiff failed to deliver. As matter of fact, the counterclaim expressly states defendant did purchase in the market other goods at an increased price, and the claim for loss by reason of such increased price has been allowed in full by the court below. There being nothing to indicate special circumstances from which could be inferred the parties contemplated anything beyond the usual measure of damage resulting from breach of contract to deliver goods, this item of damage cannot be considered.

The judgment is affirmed.

(261 Pa. 512)

PUSIO v. SALAK et al.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. DEEDS §211(3)—FRAUD—EVIDENCE.

On a bill for cancellation of a deed, evidence held to establish fraud.

2. DEEDS §210—CONSIDERATION—EVIDENCE.

On a bill for cancellation of a deed, evidence held to sustain the chancellor's finding that the deed was without consideration.

3. ACKNOWLEDGMENT §52—DEEDS—KNOWLEDGE OF CONTENTS.

A certificate of acknowledgment of a deed is prima facie evidence of its due execution, including knowledge of its contents.

4. ACKNOWLEDGMENT §56 — GROUNDS OF IMPEACHING—FRAUD.

The presumption of due execution raised by acknowledgment of a deed is subject to rebuttal,

where fraud is alleged, especially where there are no intervening rights.

5. FRAUD §50—PRESUMPTION — BURDEN OF PROOF.

Fraud must be established by clear and satisfactory evidence, as it is never presumed.

6. FRAUD §58(1)—PROOF—CIRCUMSTANTIAL EVIDENCE.

Fraud may be shown by direct or circumstantial evidence or by a combination of both.

7. DEEDS §203—FRAUD—WANT OF CONSIDERATION—IMPROVIDENCE.

Want of consideration for a conveyance does not prove fraud, but is a circumstance to be considered upon that question in connection with other evidence, as is also glaring improvidence.

8. DEEDS §203—KNOWLEDGE OF CONTENTS —FRAUD.

While a grantor is presumed to know the contents of his deed, even when written in a language which he is unable to read or understand, yet that circumstance may be considered as lending a probability to evidence of actual fraud.

9. EVIDENCE §434(3)—PAROL EVIDENCE — FRAUDULENT ACKNOWLEDGMENT OF DEED.

Parol evidence is competent to show fraud in the acknowledgment of a deed.

10. EVIDENCE §434(3)—PAROL EVIDENCE—EXECUTION OF DEED.

Parol evidence is competent to show fraud in the execution of a deed.

11. DEEDS §70(6)—FRAUD — EQUITY JURISDICTION.

Where ignorant man is induced by fraud and deception to execute a deed of his property, which he is unable to read, under the representation by his wife, etc., that it is a wholly different paper, equity has jurisdiction to decree its cancellation and a restoration of property.

12. DEEDS §211(3)—FRAUD—PROOF.

In action to set aside a deed for fraud, the fraud must be clearly and satisfactorily shown, and the witnesses must be credible, and the facts distinctly remembered and accurately stated.

13. TRIAL §139(1)—QUESTION FOR JURY — EVIDENCE.

Whether the evidence is true is a question of fact, and whether, if true, it is sufficient, is a question of law.

14. APPEAL AND ERROR §1000(2) — FINDINGS OF FACT—REVIEW.

Findings of fact in equity on sufficient evidence will not be disturbed, except for manifest error.

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity for cancellation of deed and for an accounting by Steve Pusic against Anna Salak and others. From a decree for plaintiff, defendants appeal. Affirmed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Joseph R. Conrad, of Pittsburgh, for appellants. W. W. Stoner, of Pittsburgh, for appellee.

WALLING, J. This is a bill in equity to secure the cancellation of an alleged fraudulent deed and for other relief connected therewith. The defendants are plaintiff's daughter and her husband and also plain-

tiff's wife. The case was heard upon bill, answer, replication, and testimony. The chancellor's findings of the facts in favor of plaintiff were approved by the court below, and from final decree entered thereon, granting the relief prayed for, the defendants brought this appeal. The real question is: Are the facts as found justified by the evidence? In our opinion they are.

[1-4] Plaintiff came to this country from Russia over 30 years ago, and shortly thereafter married his present wife, Mary Pusic. They located at McKees Rocks, near Pittsburgh, where he engaged in the grocery and meat business and accumulated some property. He cannot speak English nor read or write in any language. In 1907 he bought and paid for a block of four lots on Gardner street in said borough, intending to have the deed therefor made to himself and wife jointly; but the wife, who could speak English and acted for him in the purchase, fraudulently had the deed made to herself as sole owner, and it was so recorded. Mr. Pusic, in ignorance thereof, erected upon the lots a large three-story brick apartment house containing 42 rooms, the income from which amounts to about \$1,800 per year. They owned another property where they lived on Washington street. About the end of 1913 Mr. Pusic's store was destroyed by fire, and in January, 1914, through the persuasion of an agent, he bought in the name of his wife a saloon in New York City for \$5,000, and embarked in that business. He made various payments on the saloon property, amounting in all to about \$3,000, but it proved unprofitable, and he lost what he had paid thereon, and returned to McKees Rocks in October of the same year. Meantime, in April, 1914, his wife and daughter, Mrs. Salak, went to an attorney in Pittsburgh and had a warranty deed prepared conveying the apartment house property from Mr. and Mrs. Pusic to Mrs. Salak. The property was worth approximately \$10,000, and there was a mortgage upon it amounting to about \$4,000. Mrs. Pusic executed the deed in Pittsburgh, and then took it to New York to secure its execution by her husband. It was well understood between her and Mrs. Salak that Mr. Pusic would not knowingly sign such a deed, and so it was agreed between them that his wife should inform him that the deed was a paper referring to the saloon property and induce him to go before an officer with that understanding and execute it, which was done; Mr. Pusic stated to the officer, or acquiesced in his wife's statement, that he knew the contents of the paper. It was subsequently returned to Pittsburgh and recorded. Plaintiff had no knowledge of what he had done until after his return from New York as above stated. While the deed recites a consideration of \$2,600, in fact no consideration whatever was paid. There is con-

diff's behalf, which was credited by the chancellor. The controlling averments in the bill were denied in the answer filed by Mr. and Mrs. Salak, but were fully admitted in the answer and evidence of Mrs. Pusic. Plaintiff testifies that he never executed the deed in question or any deed of like import, while he did execute some papers relating to the saloon property in New York. The officer who took the acknowledgment was not called as a witness; his certificate, however, sets forth that—

"On this 4th day of April, A. D. 1914, before me, a commissioner of deeds in and for the city of New York, came the above named Steve Pusic, husband of Mary Pusic, and one of the parties of the first part hereto, and acknowledged the foregoing indenture to be his act and deed, and desired the same to be recorded as such."

This is prima facie evidence of the due execution of the deed, including knowledge of its contents, but is subject to rebuttal where fraud is alleged. The certificate does not aver that the contents of the deed were made known to Mr. Pusic, and the only direct evidence on the subject is that of himself and wife to the effect that they were not. This is strengthened by statements in a letter written shortly thereafter by the grantee, Mrs. Salak, to her sister, Carrie, in New York, stating, *inter alia*:

"So please, Carrie, answer right away. Does Pap know what Mam and he done? Let me know what Pap says."

The conclusion that this refers to the deed in question is justifiable, although it does not so state. The evidence of Mr. and Mrs. Salak as to the payment of the \$2,600 consideration is so incredible as to strengthen plaintiff's case. They were married in 1911, and for about 2½ years thereafter lived with her parents, and Mr. and Mrs. Salak testify that all of his wages during that period, amounting to about \$2,100, were turned over to Mrs. Pusic, and that the other \$500 was money borrowed from his sister-in-law and turned over to Mr. Pusic for use in the New York saloon; while in fact his entire earnings during that time did not amount to \$2,100, to say nothing of the support of himself and wife, the funeral expenses of a child, the cost of litigation in which he was involved, and other expenses. Not one of his pay checks was cashed by Mr. and Mrs. Pusic, and the contention that he so turned over this large sum to his mother-in-law without any agreement or anything to show for it is highly improbable. The testimony of plaintiff and his wife that Mr. Salak paid her nothing except occasionally a small sum for board seems probable. The \$500 was not secured until about two months after the making of the deed, and then was borrowed directly by Mr. Pusic, and not by Mr. Salak. So the chancellor's finding that the deed was

There were two mortgages against the Washington street property, and about the time of securing this deed Mrs. Salak went to the attorney representing these mortgages and requested him to foreclose the same, ostensibly to protect her parents, and she advanced the attorney \$250 to cover costs and fees. Proceedings to that effect were started, but discontinued on discovering that they were not taken in the interest of Mr. and Mrs. Pusic. The evidence justifies the conclusion that this daughter was trying to secure for herself the property which her father had accumulated. Mr. Pusic was then 50 years of age, and it is improbable that he would voluntarily deprive himself and wife of their property. Mrs. Pusic seeks to extenuate her faithless conduct to her husband on the ground that she was temporarily frightened by the baseless assertion of Mrs. Salak and others that all their property would be swept away by reason of the saloon venture. Mrs. Pusic does not appear in a favorable light, and plaintiff would not be granted relief on her unsupported testimony; but she is so strongly corroborated by other evidence and the circumstances as to justify the findings of the chancellor. Plaintiff and his wife have one other child, the daughter, Carrie, who is younger and unmarried.

[5-7] Fraud must be established by clear and satisfactory evidence, as it is never presumed. It may be proven, however, by direct or circumstantial evidence or by a combination of both. See *Jones v. Lewis*, 148 Pa. 234, 23 Atl. 985. Want of consideration for a conveyance does not prove fraud, but it is a circumstance to be considered upon that question in connection with other evidence, as is also glaring improbvidence. See *Bierer's Appeal*, 92 Pa. 265; *Davidson v. Little*, 22 Pa. 245, 60 Am. Dec. 81.

[8-10] A grantor is presumed to know the contents of a deed executed by him, even when written in a language which he is unable to read or understand; yet that circumstance may be considered as lending probability to evidence of actual fraud and deception. It would be less difficult to deceive such a man, especially where as in this case the paper was presented to him by his wife, in whom he reposed confidence. See *Monroe v. Monroe*, 93 Pa. 520; *Fischer's Estate*, 189 Pa. 179, 42 Atl. 8; *Levick v. Brotherline*, 74 Pa. 149. The officer's certificate is prima facie evidence of the due execution of the deed, but may be rebutted, especially where as here there are no intervening rights. See *Hultz v. Ackley*, 63 Pa. 142. Parol evidence is competent to show fraud in the execution or acknowledgment of a deed. *Cover and Wife v. Manaway*, 115 Pa. 338, 345, 8 Atl. 393, 2 Am. St. Rep. 552.

[11] Where an ignorant man by fraud and

deception is induced to execute a deed of his property, which he is unable to read, under the representation, assurance, and belief that it is an entirely different paper, equity has jurisdiction to decree the cancellation of the deed and restoration of the property. See *Wagner v. Fehr*, 211 Pa. 435, 60 Atl. 1043, 3 Ann. Cas. 608.

[12] In an action to set aside a deed for fraud it must be clearly and satisfactorily shown. See *Sulkin v. Gilbert*, 218 Pa. 255, 260, 67 Atl. 415; *Pyroleum Appliance Co. v. Williamsport Hardware, etc., Co.*, 169 Pa. 440, 32 Atl. 458; *Young v. Edwards*, 72 Pa. 257; *Wolfe v. Arrott*, 109 Pa. 473, 1 Atl. 333. The witness must be credible and the facts distinctly remembered and accurately stated. *Burt v. Burt*, 221 Pa. 171, 70 Atl. 710; *Douglas v. Union Traction Co.*, 198 Pa. 430, 48 Atl. 262. Assuming that the burden of proof here was on plaintiff and that it required the high degree of evidence known as "clear, precise, and indubitable," yet it cannot be declared as matter of law that it did not come up to that standard. See *McGrann v. P. & L. E. R. R. Co.*, 111 Pa. 171, 2 Atl. 872.

[13] Whether the evidence is true is a question of fact; if true, whether it is sufficient is a question of law. The evidence favorable to plaintiff, if believed, as it was by the chancellor, justifies the relief granted, and while there is some conflict in the evidence, we are not inclined to criticize his conclusions.

[14] In any event the findings of facts in equity on sufficient evidence will not be disturbed except for manifest error. *Strause v. Berger*, 220 Pa. 367, 69 Atl. 818; *Rosensteel v. Long*, 65 Pa. Super. Ct. 541. Under the findings, the defendants have no right to retain the property at issue, while the decree giving it to plaintiff does substantial justice, and Mrs. Pusic is not complaining.

The assignments of error are overruled, and the decree is affirmed at the costs of appellants.

(261 Pa. 390)

SURAVITZ v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. NEW TRIAL §104(3)—NEWLY DISCOVERED EVIDENCE—DISCRETION.

In assumpsit on policy issued on joint lives of plaintiff and his wife, defended on ground of another's impersonation of wife before medical examiner, denial of new trial on ground of witness' statement that his testimony had been false, in view of cumulative character of evidence, held not an abuse of discretion.

2. INSURANCE §665(8) — LIFE INSURANCE — FRAUD OF AGENT—BURDEN OF PROOF.

Where defendant's evidence as to deceased's false statements to medical examiner, if true, made a prima facie case, plaintiff, meeting the defense on ground that defendant's agent fraudulently and incorrectly filled in application, had

burden of sustaining such ground by clear and satisfactory evidence.

3. TRIAL §237(3)—INSTRUCTIONS—"WEIGHT OF EVIDENCE"—BURDEN OF PROOF.

An instruction that plaintiff must establish a fact by weight of evidence is erroneous as not being equivalent to clear and satisfactory proof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Weight of Evidence.]

4. INSURANCE §646(1) — LIFE INSURANCE — IDENTITY OF INSURED—BURDEN OF PROOF.

Where the fact is contested, the burden is always on the insured to show that the person whose death is proved was the person insured.

5. INSURANCE §665(3) — LIFE INSURANCE — IMPERSONATION OF APPLICANT—BURDEN OF PROOF.

In action on a policy, defendant, claiming that another had impersonated the alleged insured on the medical examination, had the burden of proving such affirmative defense by a preponderance of clear and satisfactory evidence.

6. EVIDENCE §91—BURDEN OF PROOF.

The burden of establishing facts by such character of proofs as the law demands, and the weight of the evidence, always rests upon party asserting such facts, although as to the necessity of producing evidence the burden of proof may shift during the trial.

7. EVIDENCE §98 — AFFIRMATIVE ALLEGATION—BURDEN OF PROOF.

If there is a conflict on material facts, and it is decided that the preponderance of the evidence does not lie with the party alleging the affirmative, the burden of proof has not been sustained by such party, and the jury must find against him.

8. EVIDENCE §96(1)—IMPERSONATION OF APPLICANT—SHIFTING OF BURDEN OF PROOF.

Where defendant's evidence was sufficient in kind and character to carry a reasonable degree of conviction, the burden of adducing counter proof shifted.

9. EVIDENCE §96(1)—SHIFTING OF BURDEN OF PROOF.

In action on policy, where proof of impersonation of insured before medical examiner, as alleged by defendant, was insufficient in character or did not carry conviction, there was no shifting of burden, as there was a failure to sustain burden originally assumed.

10. EVIDENCE §98—BURDEN OF PROOF—DECISION.

Where jury find the evidence in equilibrium upon an affirmative defense on which the defendant has the burden of proof, its decision should be against defendant, because not sustaining the burden of proof.

11. TRIAL §237(3)—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

In action upon policy, defended on ground of impersonation of insured before medical examiner, instructions that jury must decide as to preponderance of evidence, and, if it favored defendant, should find accordingly, without instructing that burden was on defendant to sustain charge by clear and satisfactory evidence, were not error.

12. INSURANCE §668(15) — IMPERSONATION OF APPLICANT — CONDUCT OF INSUREE'S AGENT.

In action upon policy defended on ground of false statements by applicant as to condition of health, and where plaintiff claimed that applicant had little knowledge of English and confided in insurer's agent, the issue was for the jury.

If applicant for insurance, because of poor understanding of English, did not know of illness from which an applicant was suffering, and if agent wrongfully transcribed answers, failure of insured to call insurer's attention to incorrect answers in application would not entitle insurer to verdict in action on policy.

14. INSURANCE — 655(2)—IMPERSONATION OF APPLICANT—EVIDENCE.

In action on policy defended on grounds of impersonation of applicant before medical examiner and of false statements as to health, testimony of physician, who had attended insured before issuance of policy, as to her condition then and whether it would have been discovered was relevant as to applicant's identity.

15. APPEAL AND ERROR — 1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In action on policy defended for impersonation of applicant, exclusion of question to medical witness whether insured had such a weak heart that a doctor using ordinary care would have discovered it, though admissible on question of impersonation, was harmless error, where doctor had testified that weakness could be determined without a stethoscope.

16. TRIAL — 261—INSTRUCTION—ERRONEOUS REQUESTS—OPINION EVIDENCE.

In action on policy involving misrepresentations as to health of alleged insured, failure to charge that statements of lay witnesses, knowing insured, that she was apparently in good health, would not discredit positive statement of attending physician, was not error, where request lacked essential explanatory words.

17. WITNESSES — 394—CREDIBILITY—INCONSISTENCY.

Where witness who had previously attended insured testified that he told plaintiff she had heart disease, and, on plaintiff's questioning, admitted its inconsistency with his testimony on former trial, it was error to refuse to permit defendant to introduce record evidence of testimony on former trial to show that testimony was not inconsistent.

18. INSURANCE — 668(6)—FRAUD OF INSURED — CIRCUMSTANTIAL EVIDENCE — QUESTION FOR JURY.

In action on policy, where evidence showed ample ground for suspecting good faith of case, and where defendant relied largely on circumstantial evidence as to fraud, the case was for the jury.

19. INSURANCE — 665(3)—FRAUD OF INSURED — CIRCUMSTANTIAL EVIDENCE.

Fraud on part of insured set up as defense to action on policy may be established by circumstantial evidence when the evidence of facts relied on for that purpose is clear and satisfactory.

Appeal from Court of Common Pleas, Lackawanna County.

Action by Jacob Suravitz against the Prudential Insurance Company of America. Verdict for plaintiff for \$2,040, and judgment thereon, and defendant appeals. Reversed, with a venire facias de novo.

See, also, 244 Pa. 582, 91 Atl. 495, L. R. A. 1915A, 273.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKE, and WALLING, JJ.

A. A. Vosburg, of Scranton, for appellant. Charles P. O'Malley and P. L. Walsh, both of Scranton, for appellee.

company on the joint lives of Jacob Suravitz and Mary, his wife. The latter died, and the former brought the present suit, wherein he recovered a verdict upon which judgment was entered in his favor. Defendant has appealed.

There is no dispute about the fact of Mary Suravitz's death, or that plaintiff furnished satisfactory proofs thereof. The contest turns upon two controlling defenses: (1) Alleged misrepresentations, in the application for the policy, by plaintiff and his wife, of the latter's physical condition; (2) fraudulent substitution of another woman, in good health, for plaintiff's wife, at the examination made by defendant's medical examiner. In most part, the errors alleged concern rulings on evidence and instructions to the jury relevant to the issues thus raised.

Since there have been three trials of the present cause already, and it now becomes our duty to order a fourth, we shall discuss the several assignments of error more elaborately than might otherwise be necessary, hoping in this way to aid in bringing the case to a final determination.

[1] A man named Glinisky testified that he knew Mary Suravitz and actually saw her undergo examination by the insurance company's doctor. It was alleged in an affidavit filed by defendant, in support of a motion for a new trial, that after verdict this witness had stated his testimony in regard to the examination of deceased was false. A hearing was fixed to take depositions, and Glinisky, while he admitted having stated what was averred in the affidavit, swore all his evidence at the trial was correct and true. We agree with the court below that the man under discussion is "not a very reliable person"; and, considering the trial judge's belief that "Glinisky was an important witness for the plaintiff," that tribunal might well have refused to enter judgment on the verdict. However, in view of the fact that the testimony in question is merely cumulative, we are disinclined to hold the refusal of a new trial an abuse of discretion constituting reversible error. The first assignment is overruled.

Consideration of the second assignment calls for preliminary notice of certain relevant facts and principles of law. The application attached to the policy contains questions addressed to Mary Suravitz and answers thereto, *inter alia*, as follows:

"Q. Are you in good health? A. Yes." "Q. Have you, so far as you know, ever had any serious illness or disease? A. No."

If believed, the evidence produced by defendant, professional and otherwise, shows rather conclusively that, when these answers were made, Mrs. Suravitz was, and for some time had been, suffering from a pronounced form of heart disease, and plaintiff admits that his wife had, a short while previous to

the examination, been ill in the hospital with pneumonia; but plaintiff contends, as he did in his statement of claim and at trial, that at the time the application was filled out Mrs. Suravitz was unable to speak, understand, read, or write the English language, that his own knowledge thereof was very limited, that he acted as interpreter, that the agent of the insurance company wrote down the answers, and, finally, that in so doing the latter "falsely, fraudulently, negligently, mistakenly, and carelessly" inscribed answers other than those dictated to him. For example, plaintiff denies his wife answered "Yes" to the first and "No" to the second of the above-recited questions. To the first he avers "Mary Suravitz made answer that, in so far as she knew, she was in good health, or words to that effect," and to the second "she replied she had not any serious illness that she knew of, [but] that in 1908 she was ill and was in Lackawanna State Hospital [with] what doctors told her was a severe cold, but she understood that she was cured and better." The defendant, in its pleadings and at trial, denied all allegations of fraud or mistake on the part of its agent in connection with the application or otherwise.

The contract in suit provides that the answers in the application are representations, not warranties; therefore, these issues, among others, arose: (1) Did Mrs. Suravitz have heart disease? (2) If so, did she know it when she made the representations to the insurance company concerning her health?

[2] When the company put in its testimony tending to show that Mrs. Suravitz had the disease in question, this evidence, together with the answers upon the application, made out a *prima facie* case for defendant, which, unreplicated to, if believed by the jury, would have entitled it to a verdict. As already shown, plaintiff undertook to answer this defense in part by proof of certain facts tending to show that defendant's agent mistakenly, fraudulently, and incorrectly filled in the blank application. When plaintiff stood upon this reply, owing to its nature (as involving fraud, and, in effect, an attempt to change an integral part of the contract in suit), the burden was upon him to sustain it, not only by preponderating evidence, but by preponderating evidence of a certain kind, character, or quality, which is not overstated by the phrase "clear and satisfactory evidence." See opinion by Mr. Justice Walling in *Pusic v. Salak*, 104 Atl. 751, handed down simultaneously herewith.

[3] The assignment in hand complains of an answer made by the trial judge to one of defendant's points for charge, which deals with the character of evidence received, as follows:

"If the jury find that Mary Suravitz, when the application in this case was made, was suffering from a form of heart disease incurable in its nature, and that she knew she was suffering from this disease, but stated that she was in

good health, then the verdict must be for the defendant; and the burden is upon the plaintiff to satisfy the jury by clear and satisfactory evidence that the answers were incorrectly written by the agent in the application. Answer: This is affirmed. In other words, we say to you, in connection with affirming this point, that, the plaintiff alleging that the answers in these two applications are not correctly written down, the burden is upon the plaintiff to establish that fact by the fair preponderance of the testimony, or weight, as we call it. That is stated in this point, and we affirm it."

Thus it will be seen that, while the above request has to do with the quality of evidence required for the purpose therein stated, the answer departs from that field and deals with the subject of the ultimate weight of the evidence, not its kind or character. Not only is the answer guilty of this material departure, but it informs the jury in unmistakable language that the request was intended to cover the subject of the weight of the evidence, which, as just pointed out, it was not.

As stated by Rice, P. J., in *Taylor v. Paul*, 6 Pa. Super. Ct. 498, 501:

"To instruct the jury that a fact must be established by 'the weight of the evidence' is not equivalent to saying that it must be established 'by clear and satisfactory evidence.'"

Defendant requested and was entitled to the latter instruction, which it did not get. On the contrary, the answer, as phrased, practically nullified the whole purpose of the request as drawn; while in form an affirmation, in substance and effect it was almost tantamount to a denial thereof. To say the least, the answer was not responsive to the request (*Waynesboro M. F. I. Co. v. Creaton*, 98 Pa. 451, 453), and in a case such as the one before us this was harmful error; therefore the second assignment is sustained.

[4, 5] As to the allegations that "plaintiff substituted another woman, not his wife, and introduced her to the [insurance company's] doctor as his wife, and caused her, instead of his wife, to be examined by the doctor," the trial judge instructed that the burden was upon defendant to prove these charges. The latter, in the third assignment, contends this was error, and that, in the first instance, the burden was on plaintiff to prove Mary Suravitz was in fact the person examined.

Of course, where the fact is contested, the burden is always on the plaintiff to show that the person whose death is proved was the person insured. Here, however, it is not contended either that Mary Suravitz was not the person who died or was not the person insured, but that, when the medical examination was made, plaintiff deliberately substituted another woman in her place. This is an affirmative defense of fraud upon the insurance company, involving the allegation of the existence of specific facts, which defendant assumed the burden of proving by a preponderance of clear and satisfactory evidence.

[6, 7] The burden of establishing facts by such character of proofs as the law demands, and the weight of the evidence, always rests

upon the party asserting them, although, as to the necessity for producing evidence, the burden of proof may shift from time to time in the course of trial. When the proofs are all in, and the case is ripe for determination, it becomes a matter of weighing the evidence; and this is for the jury, under proper instructions. If there is a conflict on a material matter of fact, and it be decided that the preponderance of the evidence does not lie with the party who alleged the affirmative, then the burden of proof has not been sustained by such party, and, in the performance of its duty, the jury must find against him.

[8-10] In other words, applying the rules just stated to a case like the present, if the evidence to sustain defendant's charge of impersonation be sufficient in kind and character to carry a reasonable degree of conviction, then the burden of adducing counter proof shifts, and, after plaintiff presents his testimony upon the issue, it is for the jury to say which side the preponderance of evidence favors, determining the point in controversy accordingly. On the other hand, if the proof of impersonation is insufficient in character, or does not carry conviction, then there is no shifting of the burden, in any sense of that term; for a failure to sustain the burden originally assumed results, and the finding on the point involved should be against defendant. Finally, should the jury find the evidence in equilibrium, its decision ought to be against defendant; for, again, the latter has not sustained the burden of proof. *Burford v. Fergus*, 165 Pa. 310, 314, 30 Atl. 844; 10 R. C. L. 806 et seq. Also see quotation from Rice, P. J., in *Quirk v. Ins. Co.*, 12 Pa. Super. Ct. 250, *infra*.

[11] While the trial judge was not requested to, and did not, go into such an elaborate explanation of the rules relevant to burden of proof as we have endeavored to do, he, in effect, charged in accordance with the principles just announced; for, in connection with the instructions complained of in the present assignment, he twice told the jury that, in the end, they must decide as to the preponderance of the evidence, and, if the fair weight thereof upon the subject under consideration favored defendant, they should render their verdict accordingly. Since defendant stood upon an allegation of fraud, as already pointed out in our consideration of the second assignment, the court might properly have gone further and instructed that the burden was upon it to sustain this charge, not only by a preponderance of evidence, but by evidence "clear and satisfactory" in character.

In *Quirk v. Ins. Co.*, 12 Pa. Super. Ct. 250, chiefly relied upon by appellant, the plaintiff expressly assumed the burden of showing that the insured was in good health at the time the policy was issued; and, in order so

to do, she undertook, as part of her case, to prove deceased had successfully passed "a searching physical examination to the satisfaction of defendant's medical examiner." In reply defendant asserted the insured had passed no such examination, but some one else was substituted in his place for that purpose. As the case was tried, the Superior Court held the court below had not erred in telling the jury plaintiff was "bound to show that the man who was examined was the man insured"; but, in connection with this ruling, Rice, P. J., correctly states the general rules on the burden of proof as we have given them above:

"When the evidence is all in, and the case is submitted for determination, there can obviously no longer be any question as to the burden of proof, so far as that term is concerned with the order of production of evidence. 5 Am. & Eng. Ency. of Law (2d Ed.) 21. The question then is as to the preponderance of the evidence. If at this stage there be conflicting evidence as to an essential matter of fact in issue, and in the judgment of the jury the preponderance is not in favor of the party who alleged the affirmative, they ought to decide that question of fact against him, and it is the duty of the court to so instruct them, if requested."

Although *Quirk v. Ins. Co.* and the case at bar have points of similarity, and much of the law there announced is applicable here, yet we do not feel that all the rules laid down as governing the trial of the former were controlling in the trial under review, where the matter of the alleged substitution was not put at issue, by pleadings, affidavit of defense, or otherwise, till defendant first introduced the subject during the presentation of its case. As this cause was developed in the court below, we see no error in the instructions on the burden of proof complained of in the third assignment, which is overruled.

[12, 13] The fourth assignment complains of the trial judge's answer to another of defendant's requests for charge, wherein the latter asked that the jury be instructed it was the duty of the person insured to call the attention of the insurance company to any incorrect answers written in the application by the latter's agent; that, since in this case there was a failure so to do, plaintiff was thereby estopped from taking advantage of the policy in suit, and "the verdict must be for the defendant." In refusing this point, the trial judge stated the applicant "was a foreigner who could not read, write, or speak the English language, and her husband could only write and read the English language imperfectly," adding, "They trusted and confided in the agent of defendant company to correctly write down their respective answers."

If the facts as to the extent of the illiteracy of plaintiff and his wife, and their trust in defendant's agent, were all admitted in the case, then, under our decision in *Suravitz v. Prudential Ins. Co.*, 244 Pa. 582, 91

Atl. 495, L. R. A. 1915A, 273, the strict rules laid down in *Rinker v. Etna Co.*, 214 Pa. 608, 64 Atl. 82, 112 Am. St. Rep. 773, cited by appellant, would not be applicable, and a refusal of the point would be justifiable on that ground alone; but, since such facts were not admitted, the court, instead of treating them as established, should have recognized at all times the province of the jury to pass upon and determine the extent of the knowledge of the English language possessed by Suravitz and his wife (particularly the former, in view of his apparent linguistic proficiency at the trial), and also the degree in which they trusted to and confided in the agent of the company. In the respects indicated, the answer under consideration was erroneous; but, since the point requested binding instructions for defendant, it could not properly have been affirmed.

In the *Rinker Case*, supra, the answers in the application were all warranted to be true, and it was therein agreed that, if they were not so, the insurance should be void; whereas under the express terms of the present application the answers are not warranties, but representations. The material difference in the governing rules of law between the two cases is pointed out by us in *Suravitz v. Prudential Co.*, supra (see, also, *Oplinger v. New York Life Ins. Co.*, 253 Pa. 328, 98 Atl. 568, *Feinberg v. New York Life Ins. Co.*, 256 Pa. 61, 100 Atl. 538, and *Baer v. State Life Ins. Co.*, 256 Pa. 177, 100 Atl. 745), and thereunder, if the jury believed the testimony presented by plaintiff as to the illiteracy of himself and wife, their alleged lack of knowledge of the ailment from which the latter (as alleged by defendant) was suffering, and the alleged misconduct of the agent of the defendant company in wrongly transcribing their answers, then the failure to call the insurance company's attention to any incorrect answers in the application would not entitle the latter to binding instructions in its favor, as requested in the point now under consideration; hence no reversible error is shown by the present assignment, and it is overruled.

[14, 15] The fifth assignment alleges that the trial judge erred in excluding a question put by defendant's counsel to Dr. J. A. McGinty, who had attended and physically examined Mrs. Suravitz in June, July, August, September, November, and December, 1908, prior to the issuance of the policy in suit. This doctor testified that at the time of his examinations he found deceased suffering from serious heart trouble. The witness was then asked, "Was her condition at that time such that a doctor, using ordinary care in making a medical examination, would have discovered this heart murmur that you speak of?" Plaintiff's objection to the question was sustained, and an exception granted defendant. Appellant contends that the evidence sought to be elicited was relevant, as

"bearing upon the question whether or not the real Mary Suravitz was the woman examined," and for that reason it should have been admitted. We can see the relevancy of the offer, from the standpoint indicated; but it is apparent no harm was done appellant by the ruling here in question, for Dr. McGinty plainly testified that the murmur was so pronounced "it could be detected by the use of the ear without the stethoscope," and that he had no difficulty "in detecting this murmur"—which could be understood by the jury to mean only that "a doctor, using ordinary care in making a medical examination, would have discovered this heart murmur." The assignment, showing no reversible error, is overruled.

[16] The sixth assignment complains because the trial judge failed to read and affirm the following request for charge:

"Statements of lay witnesses that they knew the insured and that she was apparently in good health are insufficient to discredit the positive statements of physicians who had treated her for heart disease."

The failure to read and affirm this point might have been error, had it been preceded by some explanatory words, for example, "When the jury consider the question whether or not, at the time of her examination for the insurance, Mrs. Suravitz was suffering from heart disease, I instruct you that," or "When the jury come to consider the actual condition of health of Mrs. Suravitz, etc.," but, since the request lacked such essential explanatory words, the court below cannot be held to have erred in failing to affirm it, as drawn. Under the circumstances, we see no merit in the present assignment; it is overruled.

[17] The seventh assignment complains that the trial judge erred "in excluding the record relating to the testimony of Dr. J. A. McGinty given at a former trial of this case." At the trial now under review this doctor testified that in 1908, prior to the issuance of the insurance, he told plaintiff the latter's wife had heart disease. After this testimony was in, counsel for plaintiff asked the witness, "You recall, now, don't you, that your testimony to-day is different from what it was at the last trial?" The question was not answered. Counsel then asked if at the prior trial the witness had not said, "I simply told him [plaintiff] his wife was very sick and she ought to go to the hospital." The answer was, "Yes;" whereupon counsel for defendant (referring to what occurred at the prior trial, and apparently reading from the record thereof) said: "I desire to call the attention of the witness to the next question following the one to which his attention was called, * * * the question being as follows: 'What else did you tell him? * * * Do you remember telling him [the husband] in that conversation what the nature of the trouble was [referring to the wife's ailment]?' " Counsel for plaintiff immediately objected to these offers of what

[18, 19] The eighth and final complaint of the refusal to grant judgment for the defendant. When the former appeal, we stated that the case for the jury." The trial now under review presents no reason to change our opinion. The evidence is ample grounds for a finding in good faith of plaintiff's liability, it is one for a jury to decide. At the same time it must be noted that the defense rests on allegations of insurance company deception and circumstantial evidence, from which inferences may be drawn to believe it from liability.

[18, 19] The eighth and complain of the refus- tions and of judgment defendant. When the former appeal, we stat case for the jury." / pages of testimony, e trial now under review able argument of coun see no reason to chang pressed. The evidence ample grounds for gi good faith of plaintiff ly, it is one for a jury same time it must be fense rests on allegatio insurance company dep cumstantial evidence, from which inferences lieve it from liability. lished in this manner, the facts relied on for and satisfactory," if logically, and clearly i (10 R. C. L. 1004); but, the burden of such a de full opportunity to pres to the protection of ev technical or otherwise, the issues involved ma relevant and competent er instructions. In o rights to the present been obliged to sustain enth assignments of erro son indicated earlier in two assignments under tion are overruled.

The judgment is *revocata facias de novo*.

1. WILLS 825—CHANCE
ACTS OF DEVISEE.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—
§ 243—SALE UNDER A JUDICIAL ORDER—
ISSUE—DEDUCTION FROM PROCEEDS.
 Where testator devised property to his wife, charged with \$3,000 during her life, and the property required interest thereon to pay the charge, and the property, and farm was sold by sheriff for the benefit of his creditors, subject to the charge, and purchased by widow, she was entitled to deduct the amount of her bid the amount of her bid in her favor.

Assumpsit by D. H. [unclear]
against Sarah E. Lamas

For other cases see same topic and KEY-NUMBER in all Key-Numbered

upon the purchase price of realty. Facts agreed upon in the form of a case stated, and judgment entered for plaintiffs for \$3,274, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WAL-LING, JJ.

O. C. Bowers, of Chambersburg, for appellant. Charles Walter and Arthur W. Gillan, both of Chambersburg, for appellees.

BROWN, J. [1] Jacob R. Lamaster devised a farm to his son Seth, charged with certain rights and privileges in favor of his wife. After reciting these, he directed as follows:

"Three thousand dollars shall be and remain a charge upon the said lands during the natural life of my wife, Sarah E., and interest upon said sum at 5 per cent. shall be paid to her semi-annually by my son, Seth."

The son executed a deed of assignment for the benefit of creditors, and his assignees sold the farm, under an order of court, at public sale. The condition of the sale set forth the foregoing charge, and stated that the purchaser would take title to the farm "subject to the above charge in favor of Sarah E. Lamaster." This was a necessary condition of the sale, for the charge expressly put upon the farm by Jacob R. Lamaster could not be divested by any act of the son, nor by his assignees, even under an order of court authorizing the sale of the property. *Helst v. Baker*, 49 Pa. 9.

[2] Sarah E. Lamaster purchased the property, and signed an agreement to pay the purchase money "according to the conditions of sale and in all respects to keep and comply with the same." After the sale had been duly confirmed by the court, the assignees tendered her a deed for the property and demanded payment of \$16,671.87, the full amount of her bid. This she refused to pay, claiming that there should be deducted from her bid \$3,000, the amount of the said charge. The assignees accepted from her \$13,671.87, under an agreement that the question of her liability for the full amount of her bid should be submitted to the court below on a case stated. From its judgment, so entered in favor of the assignees for \$3,274, the balance of the bid, with interest thereon, Mrs. Lamaster has appealed.

The charge of \$3,000 upon the farm was not for the payment of that sum, or any portion of it, on the death of the testator's widow. It was merely to secure to her the payment of \$150 annually, and upon her death, if her son should still be the owner of the farm, and he had paid her what was annually due her, the charge would be extinguished; and this would be true, if another should acquire title to the farm from the son. If some one else than his mother had purchased from his assignees, the purchaser would un-

doubtedly have been required to pay the full amount of his bid, and, in addition thereto, the annual sum of \$150 to the widow of the testator, secured to her by the said charge. That she happened to be the purchaser is immaterial in determining her liability for the purchase money. Instead of receiving \$150 annually hereafter from another, she will simply pay herself that sum, for, as long as she owns the farm, the hand that pays will be the hand that receives. Neither she nor any one claiming under her will ever be required to pay the principal sum of \$3,000, for it and all the other charges expressly placed upon the farm by her husband for her benefit will be extinguished by her death. If she could retain \$3,000 of the purchase money, she would get the property for that much less than she unequivocally agreed to pay for it to her son's assignees for the benefit of his creditors. All his interest in the property passed from him when he made the deed of assignment, and there passed to the vendee of his assignees title to the property divested of everything except the charges for the support of his mother during life.

The manifestly correct judgment of the court below is affirmed.

(261 Pa. 574)

McMULLIN v. COMMONWEALTH TITLE INS. & TRUST CO.

(Supreme Court of Pennsylvania. June 11, 1918.)

1. INSANE PERSONS §22 — NONRESIDENT LUNATIC — PROPERTY IN STATE JURISDICTION.

A nonresident lunatic does not become a ward in chancery in Pennsylvania because he has property therein, and the powers of its courts go no further than to conserve any property of such lunatic within the state.

2. INSANE PERSONS §43 — NONRESIDENT LUNATIC — APPLICATION FOR TRANSFER OF PROPERTY — STATUTE.

Where guardian of nonresident lunatic, duly declared such by the courts of his state, applies to court of common pleas after full compliance with Act April 13, 1868 (P. L. 94), for order on Pennsylvania committee in charge of lunatic's property to transfer it to guardian, the court has no discretion to refuse application.

3. STATUTES §227 — CONSTRUCTION — "MAY."

Whenever an act is done for the benefit of others, the word "may," or its equivalent, simply confers a power or capacity to do the act, and is permissive, and does not necessarily imply an option to abstain from doing the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

4. STATUTES §227 — CONSTRUCTION — MANDATORY PROVISIONS.

Whenever a statute authorizes a judicial act in a certain case, it is imperative on those so authorized when the case arises and its exercise is duly applied for by interested party having a right to so apply, and the exercise of authority depends, not on the court's discretion, but on proof of particular case out of which power arises.

Appeal from Court of Common Pleas, Philadelphia County.

guardian of Harry A. Kern, a nonresident lunatic, against the Commonwealth Title Insurance & Trust Company, committee of Harry A. Kern, for the transfer of funds to the nonresident guardian, under Act April 13, 1868 (P. L. 94). From a decree dismissing the petition, the petitioner appeals. Reversed, petition reinstated, and procedendo awarded.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Norman W. Harker, of Philadelphia, for appellant. James H. Wolfe, of Philadelphia, for appellee.

STEWART, J. The case was heard on petition and answer; the facts are therefore not in dispute, and are thus set out in the petition. One Harry A. Kern, a resident of New Jersey owning property in that state, was by due process of law adjudged in the courts of that state a lunatic, and is now confined in the hospital for the insane at Trenton. The petitioner, a citizen of Moorestown, in said state, has been duly appointed resident guardian of the person and estate of the said lunatic, in attestation and confirmation of which he submits certificates, agreeably to the acts of Congress in such case provided, of such appointment, and that he has given bond for the faithful performance of such trust, approved by the court. The petition further avers that the ward is entitled to certain property in this state at present committed to the care and custody of the Commonwealth Title Insurance & Trust Company, which company was on the 10th of July, 1915, by the common pleas court of Philadelphia appointed committee of the estate of the said lunatic lying and being situated in the state of Pennsylvania; that a removal of this property into the hands of the resident guardian will not conflict with the terms and limitations attending the right by which the lunatic owns the same, and that petitioner has made demand upon the Commonwealth Title Insurance & Trust Company, the committee aforesaid, for a transfer to him of such property, in order that he may remove it to the place of residence of the lunatic and of himself as guardian, he having first filed bond with security in the state of New Jersey in double the amount of the value of the lunatic's property in the state of Pennsylvania the removal of which is sought; concluding with the averment that under and by virtue of the act of April 13, 1868 (P. L. 94), as guardian of the person and estate of the lunatic, he is entitled to remove said property to the place of domicile. Upon this showing the petition prays that a rule issue, directed to the Commonwealth Title Insurance & Trust Company, to show cause why an order should not be entered directing said company to transfer all property of any kind or nature whatsoever under its care or

rule so issued the Commonwealth Insurance & Trust Company made submitting the facts, with an importation as to the date of the respondentment as auxiliary or ancilla and guardian; no question is raised strict compliance on the part of with all the requirements of the assembly in such case made and pro the respondent submits the question

"Whether a proper preliminary to this effort to have the assets of said Pennsylvania transferred to the guardian of New Jersey would not be the obtaining of assent by the legal representative guardian in New Jersey (now de the petitioner, the present guardian, New Jersey assets of said estate, so to mine whether such transfer of asset essary and for the best interests of the state of said lunatic and of his wife at law."

The issue as thus defined by the was a very narrow one, a pure question of law, and confined to an inquiry legislative intent in the act of April supra. The learned court below, in the view, urged by respondent, that of April 13, 1868, was not mandatorily it with the court having jurisdiction ancillary trusteeship to exercise its in determining whether it would not direct a transfer of the property guardian within this state into the hands of the resident guardian or committee withstanding full compliance on the part of the petitioner with all the requirements of the act in making his demand, in the exercise of its supposed discretionary power and dismissed the plaintiff's petition certiorari followed, which brings the case proceeding before us.

The act of April 13, 1868, supra titled: "An act respecting the estates of nonresident lunatics," etc. Section 1 of the act provides as follows:

"That in all cases where any lunatic, committee, guardian, trustee or the like, both be nonresidents of this state, and lunatic may be entitled to property or description in this state, such committee, trustee or the like, on producing satisfactory proof to the court of common pleas of the county, by certificates according to the acts of Congress in such cases, that he has given bond and security in the state in which he a lunatic reside, in double the amount of the value of the property, as committee, guardian or the like, and it is found that a removal of such property will not conflict with the terms and limitations attending the right by which the lunatic owns the same, then any such committee, guardian, trustee, or the like, may demand and remove any such property to the place of residence of himself and his lunatic."

[14] Dismissing from consideration extraneous grounds upon which a court below rests its adjudication opinion filed, namely, that the estate of New Jersey had not been wisely or properly managed, and that a former guardian of the estate, now dead, had not settled his accounts in matters not only not appearing in the

but wholly irrelevant and over which the courts of this state have no jurisdiction—what is there in the act to suggest that in the disposition of such cases anything is left to the discretion of the court, when the petitioner has complied with every requirement of the act? The learned judge in his opinion leaves us in no doubt as to the considerations which determined the adjudication adverse to the petitioner. We quote from the opinion:

"We think the words, 'such guardian, trustee, or the like, may demand or sue for and remove any such property to the place of residence of himself and his lunatic,' did not divest the court of the inherent power to do that which seems to be for the best interest of the lunatic and the preservation of the estate; we deemed it our duty to exercise our discretion as chancellor, as we have the powers of a court of equity. * * * A lunatic is peculiarly the ward of the court, whose duty it is to see that when deprived of his reason he is cared for and protected and his estate conserved. This has been done in this case."

We simply remark, without further comment, that the learned court was here under misapprehension as to its proper functions in this particular case; the lunatic here was not its ward; it had not adjudged him a lunatic, and could not have done so, had it attempted it, inasmuch as it had no jurisdiction over him, he being resident of another state. He was the ward of a court in another state and that court alone had jurisdiction over his person. It was by virtue of the adjudication of that court that he was legally adjudged a lunatic, and it was upon the certification of that court to the courts of this state that the latter acquired custody and control of the lunatic's property lying within this state. So it is clear that the power of the courts in Pennsylvania went no further than the conservation of such property of the lunatic as was in Pennsylvania. With what was the lunatic's property outside Pennsylvania the courts here were absolutely without jurisdiction; and this must be equally true with respect to the person of the lunatic. Were we to admit the very question in dispute—the discretionary power of the court—that discretion must be confined to a consideration of those facts and circumstances which appertain and belong to the subject over which the court has jurisdiction, and not be allowed to extend to those of a foreign jurisdiction. But we see nothing in the act to justify even such qualified admission; indeed, any admission of this character, how-

ever limited, would not only be without warrant, but against rule and precedent as well. The rule is thus laid down in *Endlich* on the Interpretation of Statutes, § 310, p. 422:

"Whenever the act is to be done for the benefit of others, the word 'may,' or any of its equivalents, simply confers a power or capacity to do the act. It is facultative, not permissive; and neither by its own connotation nor by force of any legal principle does it necessarily imply an option to abstain from doing the act. On the contrary, it is a legal, or rather constitutional principle, that powers given to public functionaries or others for public purposes, or the public benefit, are always to be exercised when the occasion arises. Whether this is to be done by the authorized persons on their own initiative, indeed, or only on the application of those who have a right to the exercise of the power, is a subordinate question which may depend on the language or object of the statute, or on the constitution, whether executive or judicial, of the authorized body of persons, or of their course of practice. But as regards the imperative character of the duty, it was laid down by the King's Bench that words of permission in an act of Parliament, when tending to promote the general benefit, are always held to be compulsory; and as regards courts and judicial functionaries, to act only when applied to. The same rule was in substance restated by the Common Pleas in laying down that whenever a statute confers an authority to do a judicial act (the word 'judicial' being used evidently in its widest sense), in a certain case, it is imperative on those so authorized when the case arises and its exercise is duly applied for by a party interested and having a right to make the application; and that the exercise depends, not on the discretion of the courts or judges, but upon proof of the particular case out of which the power arises. The Supreme Court of the United States similarly laid it down that what public officers are empowered to do for a third person the law requires shall be done whenever the public interests or individual rights call for the exercise of the power; since the latter is not given for their benefit, but for his, and is placed with the depository to meet the demands of right and prevent the failure of justice. In all such cases, the court observed, the intent of the Legislature, which is the test, is not to devolve a mere discretion, but to impose a positive and absolute duty. There is, therefore, abundant authority for the proposition that such powers as are here under consideration are invariably imperative, and that it is the duty of those to whom they are intrusted to exercise them whenever the occasion contemplated by the Legislature arises."

The case calls for no further discussion or remark. It is quite clear that it is not one calling for the exercise of judicial discretion, but of positive and absolute duty.

The decree of the court below is reversed, the petition is reinstated, and procedendo awarded.

1. APPEAL AND ERROR ¶1022(2)—APPROVED AUDITOR'S REPORT—REVIEW.

Where an auditor's findings of fact are based upon sufficient evidence, and are followed by correct legal conclusions, and are approved by the lower court, they will not be disturbed on appeal.

2. WITNESSES ¶76(2)—WITNESS CALLED BY OBJECTING PARTY—COMPETENCY.

Where a witness is called generally by a party thereafter objecting to his competency, he is thereby rendered competent for either side for all purposes.

Appeal from Orphans' Court, Lycoming County.

In the matter of the estate of Harry W. Lentz, deceased. Exceptions by George W. Lentz and others, and by William P. Beeber and another, surviving executors of the will of J. Artley Beeber, deceased, who had been the executor of the will of Harry W. Lentz, deceased, to the report of James B. Krouse, Esq., auditor in the estate of Harry W. Lentz. From a decree dismissing the exceptions, and confirming the report, the exceptions appeal. Decree affirmed, and appeals dismissed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Wm. W. Porter and Henry K. Fox, both of Philadelphia, and Henry Freedley, of Norristown, for appellants Lentz. S. T. McCormick, Jr., of Williamsport, and Dimmer Beeber, of Philadelphia, for appellees Beeber and Colt.

PER CURIAM. [1, 2] The findings of fact by the learned auditor were all based upon sufficient evidence, and were followed by correct legal conclusions. We have not been convinced that there is any error in his well-considered report, which was properly approved by the court below. In dismissing these cross-appeals nothing more need be said, unless it be to add that when W. P. Beeber was called as a witness generally by those now objecting to his competency, they made him a competent witness for either side for all purposes. *Selp v. Storch*, 52 Pa. 210, 91 Am. Dec. 148; *Bennett v. Williams*, 57 Pa. 404.

Decree affirmed, and appeals dismissed, at the costs of the respective appellants.

(261 Pa. 526)

KLEIN-LOGAN CO. v. DUQUESNE LIGHT CO.

(Supreme Court of Pennsylvania. June 8, 1918.)

1. PUBLIC SERVICE COMMISSIONS ¶6—JURISDICTION—CONTRACT.

Matters within jurisdiction of Public Service Commission must first be determined by the

2. ELECTRICITY ¶11—REGULATION OF COURTS—CONTRACT.

Bill in equity to enjoin elect from terminating renewal contract; furnishing of electricity at certain properly dismissed, on ground that for Public Service Commission in stance, in view of Public Service

Appeal from Court of Common Plegheny County.

Bill for injunction by the Company against the Duquesne pany. From a decree dismissing plaintiff appeals. Affirmed.

The facts appear from the fol ion by Wasson, J., in the common

This case was set down for argu and answer. The material averm bill are admitted. On October 12 plaintiff and the South Side Electr facturing Company entered into a tract, by the terms of which the l to furnish the former with certain rent for a term of 5 years at a fixed rate per kilowatt hour of se contract contains a provision that piration of the term the customer the privilege of renewal at the sam further period of 5 years by givin notice in writing of such renewal. after the contract had been enter though the exact date is not given, ant took over the property of the Electric & Manufacturing Company after operated the same and furnis under the terms and conditions of t On August 13, 1917, the plaintiff, ceived notice from the defendant th tract would be terminated at the e the term on October 13th, notified ant in writing that the privilege was thereby exercised and the cont be extended for a further period. The defendant replied that a renewa be accepted, because neither the fo rate of the old contract were in use, over, the Public Service Company July 26, 1918 [P. L. 1374] requi companies to furnish all service up and standard prices and terms. So negotiations ensued, when finally the on September 29th, notified the pl it would not continue to supply serv rent after October 15th under the the old contract. The plaintiff's bill upon filed, asking for a preliminary to be afterwards made final, restrain fendant from terminating or attempt minate the contract by shutting off or doing anything to interfere with t ful operation of the plaintiff's plant of electricity which the defendant l to furnish and had theretofore been. No preliminary injunction issued; having reached an amicable basis of pending final disposition of the case fendant stood ready at all times to f plaintiff with service according to t rates as set forth in its posted and tariffs, which rates it was maintained just, and reasonable.

[1, 2] The contract in controversy public service company, and deals with service and rates. If the plain titled to relief in any aspect of the sented, it is not in this court under t proceedings. The Public Service La gives the Public Service Commission jurisdiction, in the first instance,

into and regulate the service, rates, fares, tolls, and charges of any and all public service companies. The courts of Pennsylvania no longer have jurisdiction, except upon appeal from a determination by the Public Service Commission. In the most recent deliverance of the Supreme Court in the case of Borough of St. Clair, Appellant, v. Tamaqua & Pottsville Electric Ry. Co. et al., 259 Pa. 462, 103 Atl. 287, in which the borough filed a bill in equity praying that the railway company be restrained from running their cars over a certain designated route, or prohibited from charging more than a five-cent fare thereon, the court says: "Since the Public Service Company Law has been upon our books, we have consistently adhered to the rule that matters within the jurisdiction of the commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy (Bethlehem City Water Co. v. Bethlehem Borough, No. 2, 253 Pa. 333, 337, 338 [98 Atl. 646]; New Brighton Borough v. New Brighton Water Co. et al., 247 Pa. 232, 240, 241, 242 [93 Atl. 327]), and it is plain that orderly procedure requires an adherence to this practice; otherwise, different phases of the same case might be pending before the commission and the courts at one time, which would cause endless confusion. Under the established system, the commission, in the first instance, passes upon all changes of rates made by public service corporations, subject to a proper and well-regulated review by the courts, where and when all questions of law may be raised and determined; and this is so, not because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people, speaking through the Legislature, have declared that these duties shall be performed by a special tribunal created for the purpose."

The provisions of the act of 1913, and the ruling of the Supreme Court as above set forth, are sufficient, we believe, to impel us to dismiss the bill, without entering upon any discussion of the merits of the plaintiff's contention that it is entitled to renew the contract of 1912, regardless of the posted and published rates of the defendant company. The plaintiff can present its claim before the Public Service Commission, and, if denied the right of renewal, may then appeal to the courts without prejudice.

The lower court dismissed the bill. Plaintiff appealed.

Argued before BROWN, C. J., and STEWART, MOSCHISKER, FRAZER, and WALLING, JJ.

W. K. Jennings and D. C. Jennings, both of Pittsburgh, for appellant. Edwin W. Smith, A. W. Robertson, and Reed, Smith, Shaw & Beal, all of Pittsburgh, for appellee.

PER CURIAM. This decree is affirmed, at appellant's costs, on the opinion of the learned court below dismissing its bill.

(261 Pa. 605)

SCHLANGER v. BOROUGH OF WEST BERWICK et al.

(Supreme Court of Pennsylvania. June 11, 1913.)

1. MUNICIPAL CORPORATIONS \Leftrightarrow 994 — TAXPAYER'S BILL—"CLASS BILL."

A taxpayer's bill to enjoin a borough from borrowing money for street improvements is essentially a "class bill," and can only be filed by the common consent of all the taxpayers of the borough.

2. MUNICIPAL CORPORATIONS \Leftrightarrow 992 — TAXPAYER'S BILL — MAINTENANCE OF CLASS BILL—REQUISITES.

To maintain a taxpayer's class bill, the relief sought must be in its nature beneficial to all in the class, and must be intended to prevent the wrongful expenditure of money or the wasting of the assets of the entire class.

3. MUNICIPAL CORPORATIONS \Leftrightarrow 535 — IMPROVEMENTS — CLAIM AGAINST PROPERTY — TAXPAYER'S REMEDY.

Where borough authorities file a municipal claim against a taxpayer's property, his right to defend against a scire facias thereon gives him an adequate remedy at law, aside from an injunction.

Appeal from Court of Common Pleas, Columbia County.

Bill for injunction by Henry Schlanger against the Borough of West Berwick and others. From a decree sustaining a demurrer to the bill and dismissing bill, plaintiff appeals. Decree affirmed, and appeal dismissed.

Argued before BROWN, C. J., and MOSCHISKER, FRAZER, WALLING, and SIMPSON, JJ.

Fred Ikeler and W. S. Sharpless, both of Bloomsburg, for appellant. C. W. Dickson, of Berwick, for appellees.

SIMPSON, J. In the court below, appellant filed a taxpayer's bill, on behalf of himself and such other residents and taxpayers of the borough of West Berwick as might be willing to join in its prosecution, against the borough itself, the officers and members of the borough council, and the borough solicitor. He averred in substance that by a vote of the electors of the borough, and by proper municipal action of the borough council, the borough was authorized to and did borrow the sum of \$50,000 for the sole purpose of grading, paving, and curbing certain of the streets of the borough, and had provided for a sufficient annual tax to pay the principal, interest, and tax on said bonds, as they became due; notwithstanding which the defendants proposed to cause assessments to be made upon and to file municipal claims against the abutting properties along said streets, one of which properties was owned by appellant, to pay two-thirds of the total expense of said grading, paving, and curbing; that he was advised that such action was illegal; and he prayed an injunction thereagainst. The defendants demurred, inter alia, because upon the face of the bill it appeared that plaintiff was not entitled to the relief claimed, and because he had an adequate remedy at law. The court below sustained the demurrer and dismissed the bill, whereupon this appeal was taken.

[1, 2] A taxpayer's bill is essentially a class bill and can be filed only in the common interest of all the taxpayers of the municipality, to prevent the wrongful expenditure of the money of the municipality or the wasting of its assets. This bill, however, is not filed

to prevent the expenditure of the money of the municipality, but to compel its expenditure for the benefit of plaintiff and the other property owners on said streets only. They are not the only taxpayers of the borough, and the matter is therefore squarely within the principle of *Gray v. Chaplin*, 2 Sim. & Stew. 267, that—

"In order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent."

That principle is sound, and, so far as we are aware, has never been departed from.

[3] Moreover, if the borough authorities file a municipal claim against appellant's property, his right to defend against a *scire facias* thereon gives him an adequate remedy at law. *Geesey v. City of York*, 254 Pa. 397, 99 Atl. 27.

The decree is affirmed, and the appeal dismissed, at the costs of appellant.

(261 Pa. 587)

IN RE KNIGHT'S ESTATE.

Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. June 8, 1918.)

TAXATION \S 895(7)—INHERITANCE TAX—TAXABLE VALUE—DEDUCTION OF FEDERAL INHERITANCE TAX.

In determining amount of decedent's estate subject to collateral inheritance tax, the estate tax imposed by Act Cong. Sept. 8, 1916, should be deducted, as the clear value taxable under Act May 6, 1887 (P. L. 79), can only be ascertained after payment of such tax.

Appeal from Orphans' Court, Philadelphia County.

From a decree dismissing the Commonwealth's exceptions to the adjudication in the estate of T. Morris Knight, deceased, in the matter of a decedent's estate tax, the Commonwealth appeals. Decree affirmed.

The facts appear in the following opinion of Gest, J., in the orphans' court, sur the commonwealth's exception to the adjudication:

The testator died October 6, 1916, so that his estate is subject to the tax imposed by the act of Congress approved September 8, 1916, and the entire estate is also subject to the collateral inheritance tax of this state. The commonwealth claims that this tax must be calculated upon the whole estate, without deduction of the sum of \$10,733.97 paid to the United States collector of internal revenue. The auditing judge, however, allowed this deduction, and in this we think he was clearly correct. The act of Congress (39 U. S. Stat. at Large, pt. 1, c. 463, title 2, § 201, page 777 [U. S. Comp. St. 1916, § 6336½b]) provides that a tax is thereby imposed upon the transfer of the net estate of every decedent dying after the passage of the act, and the following sections provide for a method of valuation of the gross estate, and the deductions by which the value of the net estate is determined. This tax is in terms a tax imposed upon the transfer of the net estate of a decedent pass-

ing to others under the provisions of his will or the intestate laws of the several states. It is denominated an estate tax, not a tax upon the succession or inheritance, and it is charged upon and payable out of the net estate of the decedent. It is imposed without regard to the provisions of the will or the law of the several states, the paramount taxing power of the federal government takes effect at the moment of the owner's death upon his entire estate, subject only to the specific deductions mentioned in section 203 (section 6336½d), and an exemption of \$50,000, and it requires payment therefrom of a tax according to a graduated scale, regulated by the net amount of the taxable estate.

The collateral inheritance tax imposed by the act of May 6, 1887 (P. L. 79), provides that all estates passing from any person who may die seized or possessed of such estates to any person or persons or body corporate or politic, in trust or otherwise, other than to or for the use of a father, mother, wife, children, etc., shall be and they are thereby made subject to a tax of \$5 on every \$100 of the "clear value" of said estate or estates, and at and after the same rate for any less amount, to be paid to the use of the commonwealth. In the recent cases of *Van Bell's Estate* and *Otto's Estate*, 257 Pa. 155, 101 Atl. 318, the Supreme Court held that the collateral inheritance tax imposed by our state is upon the "clear value" of the property or estate passing to the legatee or devisee, and consequently the transfer tax imposed by the law of New Jersey, and thereby made a charge on the stock of its corporations belonging to a resident or nonresident passing by will or the intestate law, must be deducted, in order to ascertain the clear value of the estate liable for collateral inheritance tax.

The decision in that case makes it unnecessary for us to enter upon any elaborate discussion of the present. The tax which the commonwealth exacts is 5 per cent. of the clear value of all estates passing from the person dying possessed thereof to any other persons other than those specifically exempted, and every legal charge against the estate must therefore be deducted before the clear value can be ascertained. Obviously the clear value taxable under the law of this state can only be thus ascertained after the payment of the tax due to the United States. As Judge Solly, of the orphans' court of Montgomery county, well says in *Bell's Estate*, 34 Montg. 9: "Otherwise a legatee, devisee, or heir, or next of kin is paying the commonwealth a tax upon something which has not passed and never will pass to him. Such a result would be unjust and highly inequitable and shocking to one's sense of reason and justice." Indeed, a case might readily be imagined where concurrent taxation at a high rate might absorb the entire estate, which would then become almost like the *hereditas damnosa* of the early Roman law.

This argument is not answered by reference to the decisions holding that the collateral inheritance tax is technically a tax on the right of succession, for the question recurs: What is the thing to which the right of succession attaches? And that is clearly the estate which passes after it is diminished by the deduction of the federal tax. It is not necessary for us to consider the decisions in other states. The view here adopted is in accordance with the decision of the Supreme Judicial Court of Massachusetts in *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361, under the federal Revenue Act of June 13, 1898 (30 Stat. 448, c. 448), while the contrary opinion is maintained in New York (*Re Bierstadt*, 173 App. Div. 838, 166 N. Y. Supp. 168, following earlier cases in that state). In our state, Judge Solly, of the orphans' court of Montgomery county, in *Bell's Estate*, 34 Montg. 9, and Judge Copeland, of the orphans' court of Westmoreland county, in *Keister's Estate*, 85 Lanc. Law

R. 49, have carefully examined this question, and have arrived at the same conclusion as ourselves.

The court dismissed the exception. The commonwealth appealed.

Argued before BROWN, C. J., and POTTER, FRAZER, MOSCHZISKER, and WALLING, JJ.

Edwin S. Ward, of Philadelphia, and William M. Hargest, Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for the Commonwealth. George C. Krewson, of Philadelphia, for appellee.

PER CURIAM. The decree in this case is affirmed, at the cost of the commonwealth, on the opinion of the learned court below disallowing its claim.

(261 Pa. 458)

TAYLOR v. CITY OF PHILADELPHIA
et al.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. STATUTES §81—LOCAL OR SPECIAL LAWS—REGULATION OF LABOR.

Act July 6, 1917 (P. L. 752), authorizing municipalities to provide by ordinance or contract that any part or all of work on public buildings shall be done within municipal limits, is a special act violating Const. art. 3, § 7, forbidding special legislation regulating labor or trade.

2. STATUTES §92—MUNICIPALITIES—CLASSIFICATION.

Classification as to governmental functions is valid on ground that legislation adapted to one municipality may be wholly unsuited to another, but as to private undertakings in which state has no concern the same reason for classification does not exist, and test as to legislation as to private corporations must apply.

3. MUNICIPAL CORPORATIONS §111(3)—ORDINANCES—"LAWS"—LOCAL OR SPECIAL LEGISLATION.

Ordinances are not "laws" within Const. art. 3, § 7, prohibiting local or special legislation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

4. MUNICIPAL CORPORATIONS §336(4)—PUBLIC WORK—AWARD TO LOWEST BIDDER.

Ordinance of city of Philadelphia, requiring contracts for construction of public buildings to specify obligation of departments to have stone cutting done in city and that proposals shall so specify, violates Act May 23, 1874 (P. L. 230), in so far as compliance would result in award to other than lowest responsible bidder.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for injunction by Walter R. Taylor against the City of Philadelphia and others. Demurrer to bill sustained and bill dismissed, and plaintiff appeals. Reversed, and record remitted, with direction to reinstate the bill with a procedendo.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, MOSCH-
ZISKER, FRAZER, and WALLING, JJ.

W. B. Linn, F. C. Newbourg, Jr., H. B. Gill, and J. De F. Junkin, all of Philadelphia,

for appellant. John P. Connelly, Joseph G. Magee, and Ernest Lowengrund, all of Philadelphia, for appellees.

FRAZER, J. Plaintiff, a resident and taxpayer of Philadelphia, filed his bill for an injunction against the city of Philadelphia, the trustees of the Free Library of Philadelphia, and the firm of John Gill & Sons, contractors, and others, to restrain the execution of a contract for the construction of a public library. The court below sustained a demurrer to the bill, and this appeal followed.

The city, in conjunction with the trustees of the Free Library of Philadelphia, advertised for bids for the construction of a new library building; the specifications containing a clause that "bidders must fully acquaint themselves with all the legal and departmental regulations applying to contract work in the city of Philadelphia," and calling attention to a provision for allowance of credit to the city to be deducted from the amount of the contract price if "legally permissible to have the stone cut at any place, so that the said cutting be not limited to the city of Philadelphia." Attached to the proposal was a copy of an ordinance approved November 26, 1894, providing that "in all contracts * * * for the construction of public buildings, * * * it shall be specified that the work of cutting and preparing such stone for use shall be done in Philadelphia," together with an amendment approved December 28, 1895, extending the provisions of the earlier ordinance "to all stone entering into work done under contract with the city of Philadelphia, making it obligatory on departments to have all stone used in municipal work cut and prepared in Philadelphia, and proposals for work into which said stone enters shall be so worded as to inform intending bidders of the provisions of this ordinance." Each ordinance also contains a clause providing the cost of cutting stone "shall not be in excess of the price paid labor for like work under private contract in the city of Philadelphia." The two lowest bidders for the work were George A. Fuller & Co. and John Gill & Sons; the bid of the former being \$2,570,000, subject to a deduction of \$155,000 if the provision of the ordinance requiring the stone to be cut in the city of Philadelphia were eliminated. The bid of the latter was \$2,535,000, with a deduction of \$110,000 if the provision as to the place of cutting stone should be excluded. The bid of John Gill & Sons for \$2,535,000 was accepted as being the lowest responsible bid for work done within the city of Philadelphia. The bid of Fuller & Co. is lower, however, if the requirement as to the place of cutting stone be eliminated, and plaintiff now claims the contract was not awarded the lowest responsible bidder as required by law, contending the ordinances above mentioned,

phia, are invalid.

[1, 2] The act of 1917 (section 1) provides it shall be lawful for a municipality, or subdivision thereof, "in the construction of any building or the performance of any public work, to provide, by ordinance, municipal regulation, or contract, that any portion or all of the work on the said building, or the work on the said public improvement, shall be done within the territorial limits of the said city, county, township, borough, or other municipal division or subdivision for which the said work is being performed." By section 2 of the act all ordinances, regulations, or contracts theretofore made requiring any portion of public work to be done within the territorial limits of the municipality "are hereby validated." If the act is a proper exercise of legislative power, a consideration of the validity of the ordinances of 1894 and 1895, above referred to, will be unnecessary, since, whether valid or not before the act of 1917, they, as well as any contracts executed pursuant to their authority, were validated by that act; the rule being that the Legislature may confirm that which it might have previously authorized. *Donley v. Pittsburgh*, 147 Pa. 348, 23 Atl. 394, 30 Am. St. Rep. 738.

Plaintiff contends the Act of July 6, 1917 (P. L. 752), is local or special legislation within the meaning of article 3, § 7, of the Constitution, regulating labor, trade, mining, or manufacturing. A careful examination of the act in view of the decision of this court in *Commonwealth v. Casey*, 231 Pa. 170, 80 Atl. 78, 34 L. R. A. (N. S.) 767, leads to the conclusion this contention is well founded and should be sustained. While the act is not local as to place, but applies to all municipalities, no adequate reason has been given for placing municipalities in a class with respect to the place of performing work or preparing materials incident to contracts for the erection of public buildings, so as to prevent the act being special in respect to its subject within the meaning of the above provision of the Constitution. The subject-matter of the statute does not relate to the exercise of a governmental power or function of the municipality in which it acts as representative or agent of the state in carrying out the purpose of local government for which it was created, but deals with functions which concern only local business and matters with respect to which the state is not interested, and in the performance of which the municipality should be regarded merely as a private corporation with the corresponding powers and duties incident to such bodies. Classification with respect to governmental functions has been uniformly held proper on the ground that legislation adapted to one municipality may be totally unsuited to another by reason

municipality, and in which, the same reason not exist, and the stand the test applied to government of private subject was fully discussed in *Casey*, supra, where 1897 (P. L. 418), regulation men employed by the ties, was held a special § 7, of the Constitution trade, mining, and though its provisions palities of the state.

179, 80 Atl. 81, 34 L.

"It is impossible to between municipal corporations that would measure number of hours to be for one class, unsuitable no pretense that there So far as labor is concerned in the construction of vate enterprises of like

The present act requires "any portion or all of ings" shall be done. expressly mention material parent objects of the move the doubt as to nances such as those stone to be cut in the act be construed as a actual work of construction building is impossible the borders of the municipality may require done within its boundaries tend this requirement supplies and provide manufacture within it impossible from the construction would result in trade, and manufacturing, be special meaning of the Constitution

[3, 4] The act of 19 remains to consider the nances themselves. which the act of 1917 cannot apply because laws within the meaning al provisions prohibiting isolation. *Baldwin v. 184*; *Davis v. Homestead Ct. 444*; *McCormick v. Pa. 190*, 24 Atl. 667. question is whether the provisions of the Act L. 230), and of June quiring all work and the city under contract est responsible bidder raised, but not decided *delphia*, 258 Pa. 355, 10

The right of a municipality to require work on materials to be done within the city limits has not been directly passed upon by the appellate courts of this state, and we find the decisions of other states are not in harmony; their general trend, however, is to hold such requirement invalid where its tendency is to conflict with statutory provisions requiring contracts to be let to the lowest responsible bidder. A case in point, identical in principle, though not on its facts, is *Frame v. Felix*, 167 Pa. 47, 31 Atl. 375, 27 L. R. A. 802, where this court held a provision in the specifications of a municipal contract requiring the contractor to employ no one not a citizen of the United States and to pay not less than a stipulated wage per day to be inconsistent with the Act of May 23, 1889 (P. L. 277), providing that municipal work be let to the lowest responsible bidder. In *Commonwealth v. Casey*, supra, the Act of July 26, 1897 (P. L. 418), fixing eight hours as a day's work for men employed by a municipality, was held to be special legislation, and consequently unconstitutional. In *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, and *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776, referred to by counsel in argument, a statute somewhat similar to the ordinance here in question was held void because it invaded rights of liberty and property and also conflicted with the commerce clause of the federal Constitution (article 1, § 8, cl. 3). No question was there raised as to the violation by a municipality of a state law requiring contracts to be let to the lowest responsible bidder. In *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926, 3 Ann. Cas. 306, an ordinance of the city of St. Louis, requiring the work of dressing stone used in municipal contracts to be done within the limits of the state, was held valid. While the city charter in that case contained a provision requiring the work of public improvements to be let to the lowest responsible bidder, the court found, as a matter of fact, the restriction did not increase the cost of the improvement. In its opinion the court said (188 Mo. 701, 87 S. W. 928, 3 Ann. Cas. 306):

"If the ordinance tended to prevent competition and to increase the price, they [the appel-

lants] have suffered injury and have cause of complaint."

In *St. Louis Quarry & Construction Co. v. Von Versen*, 81 Mo. App. 519, where a similar question arose under the same ordinance and it appeared compliance with its requirement had in fact increased the cost, the ordinance was held to conflict with the provisions of the city charter requiring work to be let to the lowest responsible bidder. In *Gemmill's Case*, 20 Idaho, 732, 119 Pac. 298, 41 L. R. A. (N. S.) 711, Ann. Cas. 1913A, 76, a statute requiring public printing and binding and stationery work to be done within the state and county where used was held valid, and the same rule was followed in *Tribune Printing & Binding Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904, where there was in existence a statute requiring contracts to be let to the lowest bidder; but it was said in the latter case (7 N. D. 596, 75 N. W. 906) that such provision "must be construed with reference to the requirement embraced in section 1807, Revised Codes [requiring all county printing to be done in the state and if practicable in the county ordering the same], and therefore that the competitive bidding must be restricted to those who can and will do the work within the state. The last-mentioned section became a law later in point of time, and, by its terms, necessarily modifies the earlier enactment." The last two cases were both regulations by statute and not by ordinance, and the Dakota case was one of a subsequent statute modifying an earlier one. Neither was an instance of a municipal ordinance containing provisions conflicting with express enactments of an earlier statute.

An act of the Legislature can, of course, be modified by the Legislature itself. No case has been found which is direct authority to sustain the validity of municipal ordinances such as are here in question where the effect is to conflict with an express statutory provision requiring contracts to be let to the lowest responsible bidder. That the cost here has been increased because of the ordinances cannot be disputed in view of the difference in the bids of both contestants. From what has been said the judgment of the court below must be reversed.

The judgment is reversed, and the record is remitted, with directions that the bill be reinstated with a procedendo.

1. MUNICIPAL CORPORATIONS ↔705(1)—COL-
LISION—DUTY OF DRIVER OF AUTOMOBILE—
INSTRUCTION.

In action for injury sustained by pedestrian, when struck by defendant's automobile moving in the same direction on an avenue, instruction that it was defendant's duty to use all possible care to avoid collision was erroneous.

2. TRIAL ↔243—CONFUSING INSTRUCTIONS.

In action for injury sustained by plaintiff pedestrian, when struck by defendant's automobile, instruction that driver of automobile must use all possible care to avoid injuring pedestrian and instruction that he must use the care of an ordinarily prudent man are confusing and misleading.

3. NEW TRIAL ↔39—GROUNDS—ERRONEOUS INSTRUCTIONS.

In action for injury sustained by plaintiff pedestrian, when struck by defendant's automobile moving in the same direction on an avenue, instructing that it was defendant's duty to use all possible care to avoid collision was such error as entitles defendant to new trial.

4. TRIAL ↔250—INSTRUCTIONS NOT SUPPORTED BY ALLEGATION AND PROOF.

Where plaintiff's declaration alleged that she was struck by defendant's automobile, and her testimony was to that effect, an instruction authorizing recovery, if her companion was struck in such way as to result in her injury, was erroneous.

5. DAMAGES ↔218(7)—FUTURE PAIN AND SUFFERING—INSTRUCTION.

Instruction as to recovery for future pain and suffering held objectionable, where it did not explain that to warrant such recovery future pain or suffering must be reasonably certain to follow injury.

6. APPEAL AND ERROR ↔1050(1)—HARMLESS ERROR—TESTIMONY ALREADY GIVEN.

Where testimony that plaintiff was nervous had been introduced without objection, permitting her physician to testify that she was generally nervous, and complained of loss of sleep, was without error.

Exceptions from Superior Court, Kent County; Edward W. Blodgett, Judge.

Action by Bertha Greenhalch against Thomas H. Barber. Verdict for plaintiff, motion for new trial denied, and defendant brings exceptions. Case remitted, with directions to grant new trial.

Quinn & Kernan, of Providence, for plaintiff. Wayne H. Whitman, Waterman & Greenlaw, and Charles E. Tilley, all of Providence, for defendant.

PER CURIAM. This is an action of trespass on the case for negligence, which was tried before a jury, and which resulted in a verdict for the plaintiff for \$900. The defendant's motion for a new trial was denied by the trial justice, and the case is now before this court upon the defendant's bill of exceptions by which objection is taken to certain rulings of the trial justice specified therein.

The plaintiff, on the 9th day of March, 1917, between 8 and 9 o'clock p. m., was walk-

ing on West Warwick. Warwick avenue is a state highway which runs approximately east and west. The highway is macadamized in the center, and at either side of the macadam there is the ordinary dirt surface, but there is no sidewalk. The plaintiff testifies that she was walking in a westerly direction on the left-hand side of the avenue, and that her companion, Mr. Carr, was walking on her right-hand side, between her and the macadam part of the road; that while in this part of the highway she was struck by an automobile operated by the defendant, which came from behind her; that she did not see the automobile, or hear any warning signal; that the automobile struck her on her right hip and dragged her on the ground a distance of about 30 feet, inflicting certain injuries for which suit was brought; that she did not see what happened to her companion, Mr. Carr; and that when she first realized anything after being struck she was lying on her face on the ground.

Defendant testified that he saw the plaintiff and her companion on the right-hand side of the road ahead of him, and that he was then 100 or 150 feet distant from them; that he blew his horn and turned to the left to pass them, but, before he reached them, they crossed to the left side of the road, and he then swung his automobile to the right in order to pass them; that he was going 12 or 15 miles an hour when he first saw them; that his automobile simply touched the man, who was on the right-hand side of the plaintiff, and that he stopped within 5 or 6 feet after touching him; that the man was not knocked down, and that the automobile did not run into the plaintiff at all; and that she was not knocked down and dragged in the highway, as she claimed.

The only witnesses at the trial who testified in regard to the accident were the plaintiff and the defendant. Mr. Carr did not appear as a witness, and his absence, as claimed by the plaintiff, was due to the fact that he was out of the state, in the United States naval service, at the time of the trial. The court charged the jury in part as follows:

"Now, I will charge you, gentlemen, that as a matter of law it was the duty of the driver of the automobile, when he observed people walking in the highway in front of his machine, in the first place to give a warning by blowing his horn, or by such signal as is provided for giving warning on his automobile. It is also his duty to use all possible care not to collide with these people who are walking."

In another part of the charge the court also instructed the jury:

"It is for you to determine—and it is the first point that you will have to determine—as to whether he did use such care as an ordinarily prudent man, using a dangerous vehicle, like an automobile, should use in all these circumstances and under the testimony as it has been disclosed to you."

At the conclusion of the charge the defendant took exception to that part of the charge in which the court stated:

"It is also his duty to use all possible care not to collide with these people who are walking."

[1-3] We think that the action of the court in failing to correct the charge was error. From the quotation already made, it is apparent that the court had in mind the correct rule of law; that is, that the defendant was only bound to use such care as an ordinarily prudent man, using a dangerous vehicle, like an automobile, should use in all the circumstances. The defendant was not bound to use all possible care to avoid a collision, and the instruction to this effect was clearly erroneous. The instructions in regard to the duty of care on the part of the defendant were conflicting and confusing. The attention of the court was called to the error complained of, and an opportunity was thus given to the court to correct the error, and the refusal of the court to modify the charge as suggested by the defendant was error of such character that we think that the defendant is entitled to a new trial.

[4] The attorney for the defendant requested the court to charge the jury that, if the plaintiff was not struck by the defendant's automobile, the verdict must be for the defendant. The court refused to make this charge as requested, but did charge as follows:

"Of course, that is an issue in the case. Mr. Barber claims that he did not hit her at all. She claims she was hit. Of course, if he didn't hit her directly, that is one thing; but if she were in such a position, and you should so find from the testimony, in walking with her companion, that it was the blow to her companion that caused her injury, then I would charge you that, in case you find that he was guilty of negligence in striking her companion, he would be liable for any injuries she may have suffered from that blow."

The exception of the defendant to this particular part of the charge must also be sustained. The plaintiff in her declaration alleged that she was struck by the automobile, and dragged along the ground as a result thereof, and her testimony was to that effect. There was no claim made by the plaintiff, nor was there any evidence which would warrant the finding, that it was the blow to her companion which caused the plaintiff's injury. The effect of this part of the charge was to authorize the jury to find a verdict for the plaintiff on a state of facts neither alleged nor proved by her. The issue in the case was clearly an issue of veracity between the plaintiff and the defendant, and we think that the part of the charge last referred to was erroneous in the circumstances.

[5] The defendant also excepts to the following part of the charge in regard to damages:

"I have already charged you that you are entitled to give her such damages as you believe she has proved for such pain and suffering as you think she will undergo in the future."

Defendant, in stating his exception, said:

"We claim that, to recover for future injuries or suffering, it must be reasonably certain under the testimony to follow."

This part of the charge should have been explained to the jury as requested by the defendant, although, if this were the only objection to the charge, we should not deem it of sufficient gravity to warrant a new trial.

[6] Defendant also claims that the trial court erred in the admission of certain testimony of Dr. Chagnon. Plaintiff's counsel asked the doctor in regard to his client's general nervous condition, to which the doctor replied that she was generally nervous, and complained of loss of sleep. To this testimony the defendant objected, on the ground that no claim had been made in the bill of particulars filed in the case in regard to any nervous condition. We do not consider this objection of much weight, as the testimony evidently had reference to a temporary, rather than a permanent, condition of nervousness. There had been other testimony that the plaintiff was nervous, which had been given without objection by the defendant, and we do not find any error in the ruling complained of.

For the reasons stated, the case is remitted to the superior court, with direction to grant a new trial to the defendant.

(39 N. J. Eq. 334)

WATTERS et al. v. MAYOR AND COMMON COUNCIL OF BAYONNE et al.
(No. 45/282.)

(Court of Chancery of New Jersey. Sept. 17, 1918.)

(*Syllabus by the Court.*)

1. EQUITY §263—ANSWER IN LIEU OF PLEA—MOTION TO STRIKE.

The legal sufficiency of a defense, which under the old practice would have been presented by a plea, and which would be tested by setting down the plea for hearing, is now properly tested under rules 67, 68, and 75 (100 Atl. xii, xiii) by motion to strike out the answer filed in lieu of plea, or that portion of the answer raising the defense.

2. INJUNCTION §88—EXPENDITURE OF PUBLIC MONEY—EXCESSIVE AMOUNT.

The rule is established for this court that, where the price to be paid by a municipality is so excessive as to shock the conscience, the court may properly interfere by injunction to save the municipality's money from willful waste or fraudulent diversion. *McKinley v. Freeholders of Union County*, 29 N. J. Eq. 164; *McCormick v. New Brunswick*, 83 N. J. Eq. 1, 89 Atl. 1084.

3. INJUNCTION §87—ISSUE OF BONDS—USE OF PROCEEDS.

The provisions of subdivision 3 of section 2 of chapter 252 of the Laws of 1916 (P. L. p. 525), as amended by chapter 240, § 2, of the Laws of 1917 (P. L. p. 803), commonly known as the Pierson Act, and which act is designed to provide for a uniform method of issuing

bonds by municipalities, and which subdivision provides that after 20 days after the publication of the statement referred to in the act the ordinance or resolution shall be conclusively presumed to have been duly and regularly passed and to comply with the provisions of the act, or any other act, and that the validity of such ordinance or resolution should not be questioned, except in a suit commenced prior to the expiration of such 20 days, do not prevent a court of equity from, after the expiration of the 20 days, enjoining the municipality from using the proceeds of bonds in the manner contemplated by the provisions of its ordinance, nor from enjoining the issuance of the bonds, and answers filed in lieu of plea setting up the expiration of the 20-day period will be stricken out as presenting no defense.

4. MUNICIPAL CORPORATIONS — §17(2)—ISSUANCE OF BONDS—CONSTRUCTION OF STATUTE.

The purpose of the provisions of the subdivision is to prevent an attack which will affect the validity of the bonds issued under the act, and such is not the effect of the proceedings referred to.

Bill by William Watters and another against the Mayor and Common Council of Bayonne and others. On motion to strike out answers filed by defendants in lieu of pleas. Granted, with leave to file answers on the merits within 10 days.

Robert Carey, of Jersey City, for complainants. James Benny, of Bayonne, and Gilbert Collins, of Jersey City, for defendants.

LANE, V. C. [1] This is a motion to strike out answers filed by defendants in lieu of pleas. Under the old practice the defense would be set up by pleas, and the pleas would be set down for hearing to test their legal sufficiency. Under the present practice the objection is made by motions to strike out. Rules 67, 68, and 75 (100 Atl. xii, xlii). The question is whether the answers present a legal defense.

[2-4] The bill is filed upon the authority of *McKinley v. Chosen Freeholders of Union County*, 29 N. J. Eq. 164, and *McCormick v. Mayor and Common Council of the City of New Brunswick*, 83 N. J. Eq. 1, 89 Atl. 1034, to enjoin the city of Bayonne from purchasing a waterworks system at a price alleged to be so excessive as to shock the conscience. In such a case the Chancellor, in *McCormick v. New Brunswick*, said that this court might properly interfere by injunction to save the city's money from willful waste or fraudulent diversion. The answers set up that proceedings were taken by the city under the provisions of chapter 252 of the Laws of 1916 (P. L. 1916, p. 525), as amended by chapter 240 of the Laws of 1917 (P. L. 1917, p. 806), to raise moneys, through a bond issue, for the purchase of the waterworks, and that all proceedings were in strict accordance with the act, and that more than 20 days having elapsed after the publication of the statement signed by the clerk in accordance with the provisions of section 2 before the commencement of this suit, the complainant is

barred under the provisions of section 2, subdivision 3, from questioning the validity of the ordinance or of any bonds issued in accordance therewith.

No bonds have actually been issued, nor do I think it would make any difference if they had been. The purpose of the act, commonly called the Pierson Act, is to provide for a uniform method of issuing bonds by municipalities. The purpose of subdivision 3 of section 2 is to prevent any action after the expiration of the 20-day period which would cast a cloud upon the validity of the bonds. It is true that subdivision 3 forbids an attack upon the ordinance or resolution after the expiration of the period fixed which ordinance or resolution, in the language of the subdivision, shall be conclusively presumed to have been duly and regularly passed, and to comply with the provisions of this or any other act. The ordinance or resolution referred to, however, will be found by reference to the act to be an ordinance or resolution authorizing the issuance of bonds, not an ordinance or resolution authorizing the making of the improvement, or what not, for which the proceeds of the bonds are to be used. While the ordinance in the instant case authorizing the purchase of the waterworks was incorporated in the same document as the ordinance authorizing the issuance of bonds, there is in reality two distinct steps in the procedure.

My conclusion is that the provisions of subdivision 3, section 2, prevents only an attack upon the regularity and validity of so much of the ordinance as provides for the issuance of bonds. Assuming that the ordinance providing for the issuance of bonds has been regularly passed and is valid, and that any bonds issued under it would be valid obligations of the municipality, there is nothing, I think, which will prevent a court of equity from enjoining the city from using the proceeds of the bonds in such manner as will violate any equitable right of the inhabitants of the municipality. Nor do I think that, assuming the regularity and validity of the ordinance directing the issuance of bonds and that the city has the power to issue the bonds, there is anything to prevent a court of equity from enjoining the municipality from exercising the power which it has derived through the passage of the ordinance in an unconscionable manner, and that therefore, if the bonds have not yet been issued, their issue may be restrained, notwithstanding that the period provided for in subdivision 3 of section 2 within which an attack must be made upon the ordinance has expired. By so holding, the rights of holders of bonds issued under the act will be fully protected, and yet the court will not be precluded from preventing a fraudulent diversion of funds. In many cases the fraud may not be

discovered, or be discoverable, until after the expiration of the short period fixed by the statute.

I will advise an order striking out the answers filed in lieu of pleas, and giving defendants 10 days within which to file answers on the merits. Will counsel kindly present orders at once.

(89 N. J. Eq. 248)

LAWRENCE v. PROSSER.

(Court of Chancery of New Jersey. Aug. 12, 1918.)

1. CHARITIES §10—BEQUEST TO ERECT MONUMENT—VALIDITY.

Testatrix might lawfully give her residuary estate in money to a town in the state of Maine for the erection of a monument to the memory of her brother, a prominent citizen of that town.

2. CHARITIES §20(5) — POWER TO ACCEPT BEQUEST—COMMON AND STATUTE LAW.

Under the common law, as well as under the express statute law of the state of Maine, the town of Bucksport, Me., had capacity to receive a residuary gift of money and apply it as directed by testatrix to the erection of a monument to the memory of her brother, a prominent citizen of that town.

3. CHARITIES §23—BEQUEST FOR ERECTION OF MONUMENT—VALIDITY—DISCRETION.

A residuary bequest of money to a town for the erection of a monument to the memory of testatrix's brother, a prominent citizen of the town, otherwise valid, was not invalid because testatrix left the site and details to the discretion of the proper town authorities.

4. PERPETUITIES §7(1)—BEQUEST TO CONSTRUCT MONUMENT.

A residuary bequest of money to a town for construction of a monument to the memory of testatrix's brother was not subject to the rule against perpetuities, unless the construction was postponed to a period exceeding a life or lives in being and 21 years.

Bill by one Lawrence against Judson C. Prosser, executor of the will of Mrs. Emma H. Dean, deceased. Decree for complainant.

See, also, 101 Atl. 1040.

The will of Mrs. Emma H. Dean, after giving certain legacies, including a life interest, and directing the conversion of her property into cash for investment, provided as follows:

"After the death of said Luman Warren Lawrence I order and direct the said Judson C. Prosser to turn over to the town of Bucksport, Maine, the balance of said sum, including all interest, accumulations and additions thereto, less the amount paid during the lifetime of the said Luman Warren Lawrence and less the disbursements of the said Judson C. Prosser and his commissions for carrying out his duties as trustee and executor, as hereinafter mentioned; the said sum to be received by the town of Bucksport, Maine, aforesaid, to be used by it for the express purpose of erecting a monument to the memory of my brother Luman Warren; the site of said monument and the details thereof to be left to the judgment and discretion of the proper town authorities."

Scott German, Frank E. Bradner, and Robert H. McCarter, all of Newark, for complainant. Theodore D. Gottlieb and Hugh B.

Reed, both of Newark, for executor. Edward Q. Keasbey, of Newark, for town of Bucksport.

STEVENS, V. C. This seems to be a very simple case. The only question is whether Mrs. Dean could lawfully give her residuary estate to the town of Bucksport, for the erection of a monument to the memory of her brother, a prominent citizen of that town.

[1] First. Could she lawfully give it for that purpose? That she could is decided in *Detwiller v. Hartman*, 37 N. J. Eq. 347. The decisions are all one way, and the very cases relied upon by complainants' counsel (In re Ogden, 25 R. I. 373, 55 Atl. 938; In re Fancher, 156 Cal. 13, 103 Pac. 206, 23 L. R. A. [N. S.] 944, 19 Ann. Cas. 1157) assume that the right exists.

[2] Second. Has the town of Bucksport capacity to receive the gift and apply it as directed? In the recent case of *Guild v. Newark*, 87 N. J. Eq. 38, 99 Atl. 120, I had occasion to consider the right of the city of Newark to accept a gift of land for a park. I came to the conclusion that a municipal corporation had, by the common law, without the aid of statute, power to take such a devise. "Not only," it was said, "may municipal corporations take and hold the property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle that such corporations, at least in this country, are capable, unless specially restrained, of taking property, real or personal, in trust for purposes germane to the objects of the corporation."

When one considers that civilized communities have in all ages adorned their ways and parks with memorials of the illustrious dead, it is idle to assert that columns and statuary have no proper place in them. Whether, without legislative authority, a municipality may or may not spend, upon objects of this character, money raised by taxation, it is certain that it may take them by gift or bequest. *Libby v. City of Portland*, 105 Me. 374, 74 Atl. 805, 26 L. R. A. (N. S.) 141, 18 Ann. Cas. 547.

The town of Bucksport has not only this common law right; it has legislative sanction besides. The Maine statute (Rev. St. c. 4, § 82) provides that—

"Any city or town may receive money by donation or legacy in trust for benevolent, religious or educational purposes, for the erection of and maintenance of monuments, and for the benefit of public cemeteries and lots therein; provided that the city or town lawfully consents."

By the laws of this state, therefore, the testatrix has the right to make, and by the laws of the state of Maine, Bucksport has the right to receive a gift of this character.

[3] I will notice briefly some of the objections made to its validity. It is said that the choice of the site and the details of the work are left to the discretion of the town, and

Atl. 1069. It is obvious that the discretion here given is not wider than that which, in a gift of this kind is generally and necessarily given. If testator directs a house to be built for his widow or child, or a portrait to be painted, is the direction 'invalidated because he leaves the details of the work to the discretion of the person to whom it is committed?

[4] Again, it is said that the bequest is void, because it violates the rule against perpetuities. The will directs the money to be applied not for maintenance, but for construction and construction only. To the case of such a bequest the law of perpetuities can have no application unless the construction be postponed to a period exceeding a life or lives in being and 21 years. There is a palpable fallacy underlying much of complainants' argument on this head. It is that, because a monument is likely to last beyond the legal period, the case is one of perpetuity. The same might be said of any structure likely to endure. The case of *Morristown Trust Co. v. Morristown*, 82 N. J. Eq. 521, 91 Atl. 736, is appealed to. Testator made a bequest of money for the bronze and granite base of a flag staff in a public park. Howell, V. O., held that it was void. The case was correctly decided, for the base was to be built with the consent of the trustees of the park, and this consent was refused. That was the main ground of decision. The statement, no doubt inadvertently made, that the gift infringed upon the rule against perpetuities, was obviously erroneous, if the structure was to be completed and handed over within the legal time.

A considerable part of the argument was devoted to the question of the meaning of the word "monument." Does it mean a shaft, or a statue, or does it mean a building like a library or town hall, that would come within the definition of a charity? In the view I have taken the question is not now material. Whether testatrix intended a charity or not, her gift was to have its full effect within the legal period, and so in either aspect is valid.

(79 N. H. 78)

RICHMOND v. TOWN OF BETHLEHEM.

(Supreme Court of New Hampshire. Grafton. Oct. 1, 1918.)

1. TRIAL ~~260~~(1)—INSTRUCTIONS—REFUSAL OF REQUESTS.

Exceptions to denial of instructions, substantially included in charge given, cannot be sustained.

2. TRIAL ~~252~~(8)—INSTRUCTIONS NOT SUPPORTED BY EVIDENCE—REFUSAL.

Where it did not appear at what rate of speed deceased's automobile was going when it went over the embankment, where there was no railing, instruction based upon assumption that automobile was going from 15 to 20 miles

per hour was error.

3. HIGHWAYS ~~218~~(1)—DEFECTIVE HIGHWAYS—ACTION FOR INJURIES—"TRAVELER." Under Laws 1915, c. 48, making a town liable to one injured while traveling upon a highway because of defect rendering it unsuitable for travel, deceased, who was driving his automobile upon highway of defendant town, was a "traveler," in a general sense and also in a method approved by chapter 129.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Traveler on Highway.]

Transferred from Superior Court, Grafton County; Kivel, Judge.

Action by Edwin F. Richmond, administrator, against the Town of Bethlehem. Verdict for plaintiff, and defendant brings exceptions. Transferred from superior court. Exceptions overruled.

Case for negligence. Trial by jury, and verdict for the plaintiff. The plaintiff's intestate was driving in his automobile upon the highway of the defendant between Littleton and Whitefield, when in order to avoid an obstacle in the road he ran his automobile into a ditch on the north side of the road, and, coming out of that, the automobile went across the road and fell over an unrailled embankment on the south side of the highway, and he was killed. An exception which appears in the opinion was taken by the defendant to the refusal of the court to give requested instructions.

Edward J. Cummings, of Littleton, and Martin & Howe, of Concord, for plaintiff. Harry Bingham, of Littleton, and Drew, Shurtleff, Morris & Oakes, of Lancaster, for defendant.

PLUMMER, J. The following requests for instructions, except so far as included in the charge, were denied, subject to the defendant's exception:

(2) In considering the question of the liability of the town for not railing the highway at the place of the accident, the question is not whether a railing would have rendered the highway safe and prevented the accident, but whether repair of that character was reasonably required.

(4) Towns are not bound to maintain railings that will resist, without breaking, the force of an automobile weighing 3,000 pounds going at a rate of 15 or 20 miles an hour.

(6) If you find that a railing which would have made the highway reasonably safe for travel thereon would not have prevented the injury, then the plaintiff cannot recover, because the lack of such a railing was not the proximate cause of the injury.

(7) An automobile is not a carriage, within the meaning of the statute making towns liable for injuries to "any person, his team or carriage, traveling upon a bridge, culvert or sluiceway, or dangerous embankments and defective railings upon a highway."

(8) Public roads are intended for ordinary travel; if they meet the requirements which their ordinary use demands, when used by travelers on foot and with teams and carriages, the town has performed its legal duty under the law, and cannot be made answerable in dam-

ages for extraordinary accidents occurring on them.

[1] The second, sixth, and eighth requests were covered in the charge. The court told the jury several times in different phraseology that the defendant was not liable unless the unrailled embankment was one which reasonably ought to have been railed, and that reasonable men would have railed. It was made clear that the plaintiff could not recover unless the absence of the railing was the cause of the accident; and the jury must have understood from the language of the court that the defendant's liability was limited to maintaining at the place of the accident the highway reasonably suitable for the ordinary travel thereon, for that was distinctly pointed out. These requests for instructions being substantially included in the charge, the exception to their denial cannot be sustained. The court was not required to use the specific language employed by the defendant in its requests. *Wheeler v. Railway*, 70 N. H. 607, 615, 50 Atl. 103, 54 L. R. A. 955; *Walker v. Railroad*, 71 N. H. 271, 273, 51 Atl. 918; *Bond v. Bean*, 72 N. H. 444, 57 Atl. 340, 101 Am. St. Rep. 686; *Kasjeta v. Nashua Mfg. Co.*, 73 N. H. 22, 25, 58 Atl. 874; *Marcotte v. Maynard Shoe Co.*, 76 N. H. 507, 513, 85 Atl. 284.

[2] The evidence does not support the statement made in the fourth request. It does not appear that the car was going 15 or 20 miles an hour when it fell down the embankment. The testimony is that when the car left the road it was going not more than 20 miles an hour. This apparently refers to the time when the car went into the ditch on the north side of the road. It ran in the ditch a short distance, and to bring the car out of it the deceased had to put on the power; then it went across the road and over the embankment; but it does not appear at what rate of speed the car was then going, and an instruction based upon the assumption that the automobile was going 15 or 20 miles an hour when it went over the embankment was not warranted by the evidence, and was therefore properly refused. *Challis v. Lake*, 71 N. H. 90, 95, 51 Atl. 260; *Kuba v. Devonshire Mills*, 73 N. H. 245, 247, 99 Atl. 91. "Before the court can be required to give particular instructions, there must be evidence, relevant and pertinent, upon which to found them." *Goodrich v. Eastern Railroad*, 38 N. H. 390, 397; *Woodman v. Northwood*, 67 N. H. 307, 309, 36 Atl. 255; *Hersey v. Hutchins*, 70 N. H. 130, 46 Atl. 33; *Osgood v. Maxwell*, 78 N. H. 35, 38, 95 Atl. 954.

[3] No error was committed in the refusal to grant the seventh request. In this case damages were sought for killing the plaintiff's intestate, and not for injuries to the

automobile, as the request indicates. The statute (Laws 1915, c. 48) makes towns liable for damages happening to any person traveling upon a bridge, culvert, or sluiceway, or dangerous embankments and defective railings, upon any highway, which at such places is defective or in want of repair, rendering it unsuitable for the travel thereon. The plaintiff is entitled to maintain his action, so far as the point under consideration is concerned, if his intestate was a traveler upon the highway. The deceased was certainly a traveler when the accident occurred. The statute does not prescribe in what manner a person shall travel to entitle him to its protection. One riding in an automobile is as much a traveler upon the highway as he who walks or rides in a horse-drawn vehicle. In *Hendry v. North Hampton*, 72 N. H. 351, 355, 56 Atl. 922, 924 (64 L. R. A. 70, 101 Am. St. Rep. 681) which was an action for injury received by the plaintiff while riding a bicycle in the highway, the court said:

"The defect complained of in the present case was an unrailled and dangerous embankment. We must assume, from the instructions of the court and the verdict of the jury, that it rendered the highway unsuitable, not only for traveling by bicycle, but for ordinary travel as well. This being so, we see no reason why the fact that the plaintiff was on a bicycle, instead of on horseback or on foot pushing her bicycle, should preclude her recovery. Common sense rejects the distinction. The statute furnishes no warrant for it, either in letter or spirit. It says, 'Towns are liable for damages happening to any person * * * traveling,' etc., without any expressed limitation as to the mode of conveyance. 'A traveler is one who travels in any way.' To travel is 'to pass or make a journey from place to place, whether on foot, on horseback, or in any conveyance.' Traveling is 'the act of making a journey; change of place; passage.' The word 'traveling,' as used in some penal statutes, may have a narrow meaning; but, in order to maintain an action against a city or town for a defect in a highway, one need be a traveler only in the general sense above indicated."

See, also, *Hardy v. Keene*, 52 N. H. 370, 377.

The defendant relies upon *Doherty v. Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355. The Massachusetts statute under which the action was brought is not like the statute here, and in that case damages were sought only for injuries to the automobile, and furthermore it was not held that one could not recover for damages to an automobile upon a highway, if the highway was unsuitable for the ordinary travel thereon.

The plaintiff was a traveler upon the highway, not only in the general and usual sense of that term, but also in a method approved and sanctioned by the state. *Laws 1915, c. 129.*

Exception overruled. All concurred.

(281 Pa. 546)

GASKILL v. PITTSBURGH LIFE & TRUST CO.

(Supreme Court of Pennsylvania. June 3, 1918.)

1. INSURANCE §360(4)—PREMIUM—PAYMENT—COLLECTION OF CHECK.

Under ordinary rules of law, when an insurer cashed a check given by insured to take up his premium note, the note was paid.

2. INSURANCE §665(8)—LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUM—SUFFICIENCY OF EVIDENCE.

In action by policy holder for premiums paid on a policy, defended on ground of its forfeiture by failure to pay premium note on its maturity, evidence held sufficient to sustain a finding of insurer's waiver of forfeiture.

3. INSURANCE §237—LIFE INSURANCE—WRONGFUL REVOCATION OF POLICY—REMEDIES OF INSURED.

Holder of life insurance policy, wrongfully revoked by insurer, may elect whether to enforce the contract, or treat it as rescinded and recover for the breach.

4. INSURANCE §198(5)—LIFE INSURANCE—BREACH OF CONTRACT—DAMAGES.

Where holder of a life insurance policy wrongfully revoked by insurer elects to treat the contract as rescinded and recover for breach, he may recover full amount of the premiums paid, with interest, without deduction for protection afforded when policy was in effect.

Appeal from Court of Common Pleas, Crawford County.

Assumpsit by William H. Gaskill against the Pittsburgh Life & Trust Company. From a judgment on a verdict for plaintiff for \$6,815.46, defendant appeals. Affirmed.

Argued before BROWN, C. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

Frank Ewing, of Pittsburgh, and J. A. Northam, of Meadville, for appellant. Frank J. Thomas, of Meadville, for appellee.

MOSCHZISKER, J. In 1896, plaintiff insured his life with a company whose business was later formally taken over by the defendant corporation, which assumed liability under the policy here in question. All premiums were paid by plaintiff as they fell due, until December 15, 1914, when he provided for one amounting to \$217.50 by payment of \$100 and delivery to defendant of two notes, the first for \$67.50, at two months, and a second for \$50, payable March 15, 1915. The larger of these obligations was met when due, but the other was overlooked until March 17, 1915, upon which date plaintiff sent his check for \$51 to defendant, in payment of the \$50 note, with interest. The latter received and deposited the check in bank, and, on March 20, 1915, it was duly paid. The next day plaintiff received a letter from defendant, saying:

"We regret to state that the policy has elapsed for nonpayment of this note when due."

The letter further states:

"We have credited your remittance in suspense," and suggest that, "before we can consider reinstatement of [the policy], it will be necessary for you to fill out, sign and return the inclosed self-health certificate."

On March 22, 1915, this certificate was signed and returned to defendant, who, three days later, advised plaintiff it was insufficient, asking that he cause himself to be examined by either of two designated physicians. This latter request was complied with, and plaintiff mailed the required certificate of such examination to defendant, who acknowledged receipt thereof on April 6, 1915, but stated it was not approved. Neither at this time, nor in its affidavit of defense, nor in the evidence at trial, has defendant given any reason for its refusal to accept these health certificates; so far as the record shows, the company simply declined to approve them, and advised plaintiff his insurance stood canceled. No attempt was made to return the check for \$51, or the amount thereof, until May 20, 1915, when defendant sent plaintiff \$50.62, which the latter declined to receive. The \$50 note was never returned, and, in several letters, defendant took the position that the policy was no longer in force. March 3, 1916, plaintiff brought suit for all premiums paid by him with interest; a verdict was rendered for plaintiff upon which judgment was entered against defendant, and the latter has appealed.

One of the conditions of the contract of insurance here involved is "that, if any payment on this policy be not made when due, this policy shall lapse and shall be ipso facto null and void"; another provision states that after the first premium one month's grace shall be allowed upon written request, but "not otherwise." The premium note due March 15, 1915, and which plaintiff did not pay until two days thereafter, contains this provision:

"If the said note is not paid at maturity, all claims to further insurance, and all benefits whatever, which full payment in cash would have secured, shall immediately become void and become forfeited."

Defendant stands upon what it contends to be its strict legal rights, and asserts a forfeiture under the above-quoted terms of the policy and note. On the other hand, plaintiff contends that defendant by its conduct waived such rights of forfeiture, and subsequently, without warrant of law, canceled its policy. The issues as to this waiver were duly submitted to the jury and found against defendant; the verdict was sustained by the court below, and we are not convinced of any sufficient reason for reversing the judgment entered thereon.

[1, 2] Had defendant really desired to stand upon its legal rights under the policy and note, it should have promptly returned

plaintiff's check, with a notification that the policy had lapsed; then it might have negotiated for a reinstatement of the policy in its own time and way. Instead of pursuing this course, however, the insurance company cashed the check, stating to plaintiff that the amount thereof had been credited "in suspense," and suggesting that plaintiff furnish a health certificate. There is nothing in the letter then addressed to plaintiff showing what the phrase "in suspense" means, nor is there any evidence that plaintiff understood its meaning; moreover, the policy provides for no such procedure, nor does it contain any provision in relation to the health certificates demanded by defendant. When defendant received and collected plaintiff's check, retaining the cash therefrom, it knew all the facts with reference to his two days' default on the premium note, and also that this check was sent in payment thereof. Under ordinary rules of law, when the insurance company cashed the check, the note was paid, and, with this latter obligation thus discharged, defendant could not hold plaintiff's money and maintain its position that the policy had lapsed through nonpayment of premium; at least, under all the circumstances at bar, there was a question whether or not defendant had waived its right of forfeiture, and this was properly submitted to the jury. Since we see no reason to disturb the verdict rendered in favor of plaintiff, in our future consideration of this case we must take it as an established fact that the policy was declared at an end by defendant after what was equivalent to a prompt and full payment of premiums due; hence such cancellation was unwarranted in law.

[3, 4] The remaining question concerns the measure of damages; in cases of the character of the one before us, the rule upon this subject is not uniform throughout the United States (14 R. O. L. 1014), but seems well settled in Pennsylvania. *American Life Ins. Co. v. McAden*, 109 Pa. 399, 1 Atl. 256, is a case where, because a premium was not paid on the due date, the company declared a policy of life insurance at an end, and the assured, alleging an unlawful forfeiture, instituted suit to regain the premiums theretofore paid. A full recovery was allowed, on the theory that, the company having unlawfully declared the policy terminated, plaintiffs might—

"take the defendants at their word, treat the contract as rescinded, and recover back the premiums paid, as so much money had and received for their use."

We there say (109 Pa. 404, 405, 1 Atl. 253):

"Rescission or avoidance, properly so called, annihilates the contract, and puts the parties

in the same position as if it had never existed; and notice that a party will not perform his contract has the same effect as a breach."

After this we add:

"It is of no consequence that the payment of the premiums was voluntary, upon a valid obligation of the plaintiff to discharge a debt which [he] owed, and which defendant had a right to receive; the action is not founded in any fraud or failure in the original contract, but on a rescission of it through the subsequent refusal of the defendant to perform it."

Moreover, although there, as here, the contention was made that, for several years, the assured had enjoyed the protection of the policy and should have their right of recovery reduced accordingly, after due consideration, we expressly refused so to rule.

American Life Ins. Co. v. McAden, supra, was later followed and approved in *Titlow v. Reliance Life Ins. Co.*, 246 Pa. 503, 92 Atl. 747, under like circumstances of default in payment of premium. It is true that in the *Titlow* Case the contract of insurance had no express provision for forfeiture; also that *Insurance Co. v. McAden* was treated by us as though the policy there involved contained no such provision. In neither of these cases, however, was the suit upon the policy of insurance; on the contrary, in each instance the cause of action was expressly based upon an alleged unlawful rescission of such contract. Therefore, so far as the measure of damages is concerned, both are on a parallel with the case at bar. In other words, in the cited cases, defendant had no reserved contractual right of forfeiture, while here such right, though existing, was waived; but there, as here, the suit was to recover premiums on a count for money had and received, and the rescission of the contract by the insurance company was determined to be unwarranted. These facts bring all three cases into parallel on the question of the measure of damages. Also see opinion by Rice, P. J., in *Kerns v. Prudential Ins. Co.*, 11 Pa. Super. Ct. 209, where it is held that, upon an unlawful forfeiture of a policy of insurance, "the insured may treat the contract as rescinded and recover back the premiums already paid with interest"; and 19 Am. & Eng. Ency. of Law (2d Ed.) p. 98, where the rule is stated thus:

"One holding a policy in a company, which wrongfully revokes the policy, may elect whether to enforce the contract or treat it as rescinded and recover for the breach; and, if he takes the latter course, it has been held that he may recover back the full amount of the premiums paid thereon, with interest."

On the whole, the case at bar was well tried, and the assignments show no reversible error; accordingly, they all are overruled, and the judgment is affirmed.

1. TRUSTS §272(1)—EXECUTION OF TRUST—TESTAMENTARY TRUST — CAPITAL AND INCOME.

The principal of testamentary trust fund and the equitable income payable to life beneficiaries upon delivery of trust funds from executor to trustee are ascertained by determining what sum, if invested at time of testator's death at $4\frac{1}{2}$ per cent. interest, would at time trustee received money, together with interest, amount to sum received; the amount of investment being principal of trust fund, and the interest being equitable income due life beneficiaries.

2. TRUSTS §272(1)—EXECUTION OF TRUST—TESTAMENTARY TRUST.

The separation of equitable income from principal, where there are no payments from executor to trustee within the year following testator's death, should be as of the date of the closing of executor's final account, and not the date of passing the account.

Bill for instructions by Willard Hall Bradford, administrator d. b. n. c. t. a. of the will of Junia K. Dwight, deceased, against the Fidelity Trust Company, a corporation of the state of Pennsylvania, executor under the last will and testament of Harriet C. Prevost, deceased. Decree ordered.

Thomas F. Bayard, of Wilmington, for complainant. Herbert H. Ward, of Wilmington, for defendant.

THE CHANCELLOR. The bill for instructions filed by Willard Hall Bradford, administrator d. b. n. c. t. a. of Junia K. Dwight, deceased, raises the question as to the application of the rule established recently respecting equitable income for a life beneficiary of a trust estate.

By the bill of the representative of the Dwight estate it appears that by item IX of her will the testatrix after making sundry legacies, gave all the rest of her estate to her executors in trust to keep the estate invested and out of the income or interest pay certain sums, and by the eleventh paragraph of item IX to pay the balance of the yearly income or interest to her two sisters, Harriet C. Prevost and Jane B. Porter, share and share alike, for their joint lives, and upon the death of either to the survivor for life. There was a disposition of the principal of the trust estate after the death of the survivor.

Junia K. Dwight, the testator, died May 4, 1915, and letters testamentary were soon thereafter granted to Harriet C. Prevost, the surviving executrix. No account was passed by the executrix, and on March 16, 1917, she was at her own request removed as executrix and Willard Hall Bradford was on the same day appointed administrator d. b. n. c. t. a. On April 24, 1917, he passed a first and final account as such administrator and received as trustee under item IX \$395,667.14. Harriet C. Prevost died on September 17, 1917, and the Fidelity Trust Company, a corpora-

by the administrator with respect to the income applicable under paragraph 11 of item IX.

In the case of Equitable Trust Co. v. Kent et al., 101 Atl. 875, the rule was established that where a testator gave pecuniary legacies and the residue to a trustee in trust for his widow and son for life, with remainder over, and gave to the executor power to sell real estate, and the executor sold productive and unproductive real and personal estate, collected income consisting of rents, interest and dividends, and paid debts and legacies of the decedent, the life beneficiaries are entitled to have equitable income for the first year after the death of the testator; that said income is to be ascertained by determining what sum, if it had been invested from the death of the testator for one year at the rate of $4\frac{1}{2}$ per centum per annum would with interest amount to the sum of money received by the trustee, the larger sum being principal for the remainderman and the smaller one income for the life tenant. The rule as to calculating the first year's income for life beneficiaries under a will is limited, of course, to gifts of the residuary estate, or of an undivided part thereof. Theoretically the estate of the testator is settled within or at the end of the year from granting letters testamentary, and usually these letters are granted within a short time after the death of the testator. Of course, theoretically the amount of the residue cannot be ascertained until the estate is settled by a final account.

In case the final account is passed at the expiration of the year from the death of the testator, the problem of ascertaining the first year's income is simple, the rule adopted as to the Kent will being applied, and thereafter the beneficiary receives the income actually received on the investments of the principal as so ascertained by use of the rule.

In case the executor during the year from the death of the testator pays money or delivers other assets of the decedent to the trustee as part of the residuary estate (as a dutiful executor should do if it can be done with reasonable degree of safety), the trustee should then separate equitable income from principal as to the property received by the use of the rule. Of course, the figures constituting the divisor will not be 1.045, but a part thereof proportioned to the time elapsed since the death of the testator. For example, if the trustee receives a sum of money at the expiration of six months from the death of the testator, the divisor would be 1.0225.

The same principle is to be applied as to payments on account of residue made after the expiration of the year, because in no other way can the life beneficiary receive income from the death of the testator. Therefore, if, for example, the trustee receives

money on account of the residuary estate at the expiration of two years from the death of the testator, the divisor for the sum so received would be 1.09.

[1] In brief, when and as the residuary estate is received by the trustee, whether as a whole or at different times in different parts, or whether received during or after the expiration of the first year from the death of the testator, the rule is to be applied, the divisor used in separating equitable income from principal being varied according to the time which elapses from the death of the testator, the rate being $4\frac{1}{2}$ per centum per annum.

This was done recently by the trustee under the will of James Harvey Spruance, M. D., in an account approved by me, where there were payments of part of the residue during and after the expiration of the year, the divisor being varied in proportion to the lapse of time from the death of the testator.

The rule and the method of applying it to cases where the residue is not officially ascertained by a final account until after the lapse of the year from the death of the testator is fair to the successive interests. The life beneficiary receives income from the death of the testator as though the money constituting the residue as subsequently ascertained had been paid to the trustee the day after the death of the testator and immediately invested by the trustee as trust funds should be invested, which being conservative and safe are not productive of the higher rate of income realizable on other kinds of investments. If the assets of the decedent which constituted the residuary estate produced income in the hands of the executor at a larger rate than that stated in the rule, then the beneficiary in remainder would be benefited, and a different situation would show a disadvantage to the remainderman. But in the long run there would be little or no injustice to either of the successive interests by adopting the rule. Any gross injustice which would result from an application of the rule would be remediable.

[2] In order to apply the rule accurately the separation of equitable income from principal in case there be no payments to the trustee within the year, should be as of the date of the closing of the final account by the executor, and not the date of passing the account, for there may be between those dates receipts by the executor which should be considered in the calculation. If the date of closing the account be not ascertainable, the date the last item of receipt by the executor should be adopted.

With respect to the will of Mrs. Dwight, the amount of the residuary estate having been determined on April 24, 1917, and the portion thereof affected by paragraph 11 of item IX having been ascertained, the separation of equitable income from principal is made as of April 24, 1917, which was 1 year,

11 months and 21 days from the death of the testatrix on May 4, 1915. The divisor is, therefore, to be based on that interval of time at the rate of $4\frac{1}{2}$ per centum for a whole year.

The income to April 24, 1917, so ascertained is payable to Mrs. Prevost and Mrs. Porter in equal shares. After June 25, 1917, to the death of Mrs. Prevost, September 17, 1917, the income actually received by the trustee was divisible in the same way. After September 17, 1917, the whole of the actual income was payable to Mrs. Porter.

Let a decree be entered accordingly.

(12 Del. Ch. 53)

KENYON v. MILLARD.

(Court of Chancery of Delaware. Oct. 15, 1918.)

1. SPECIFIC PERFORMANCE §58—LAND CONTRACT—EFFECT OF PENALTY.

The fact that a land contract provides for payment of sum of money as penalty is not in itself sufficient ground for denying specific performance.

2. SPECIFIC PERFORMANCE §58—CONTRACTS ENFORCEABLE—SUM PAYABLE ON BREACH.

Where land contract provides that for the true performance of the contract, each party binds himself to the other in a certain "penal" sum, buyer, upon seller's failure to perform, may refuse to accept specified sum in settlement, and secure relief through specific performance or action for damages.

3. CUSTOMS AND USAGES §15(1)—CONSTRUCTION OF CONTRACT—CUSTOMS OF REAL ESTATE MEN.

Where the meaning of a clause in a land contract was clear and unambiguous, and the language used capable of but one interpretation, testimony of real estate men as to the effect of such a clause according to the custom of men in real estate business was inadmissible.

Bill by John William Kenyon against Dorothy W. Millard. Dismissed on motion of complainant.

Bill for specific performance. By a written memorandum of agreement the complainant, Kenyon, agreed to buy, and the defendant, Dorothy W. Millard, agreed to sell, real estate for \$4,500; and \$100, as stated therein, was deposited by the purchaser with the agent of the seller as "forfeit money to bind the bargain" and "to be considered as a part of the purchase price." The memorandum also contained the following:

"And for the true performance of all and every one of the covenants and agreements aforesaid, each of the said parties binds himself, his heirs, executors, administrators and assigns, in the penal sum of \$100, lawful money in the United States, firmly by these presents."

To compel specific performance of the contract a bill was filed, and a rule for a preliminary injunction to prevent a conveyance otherwise than to the purchaser was awarded. At the hearing of the rule the solicitors for the parties submitted arguments as to the effect of the agreement and particularly the above-quoted clause.

On behalf of the defendant testimony was offered to prove a uniform custom and practice of real estate brokers in Wilmington to construe the clause as fixing liquidated damages, so that the seller may be relieved from carrying out the contract by paying the penalty, and therefore the defendant cannot be compelled to specifically perform the agreement if she offer to refund the amount received and pay to the purchaser the sum of one hundred dollars as penalty or liquidated damages.

Charles F. Curley, of Wilmington, for complainant. William F. Kurtz, of Wilmington, for defendant.

THE CHANCELLOR. [1] If the clause in question is a penalty, then it is settled law that that alone is not sufficient to deny a right to specific performance in a court of equity. 1 Pomeroy's Equity Jurisprudence (3d Ed.) p. 748. Where there is in an agreement of sale a provision clearly showing that a party to the contract may either perform it or pay a sum of money, then as there is an alternative duty, he cannot be compelled to perform the duty he declines to perform, when he chooses to perform the other alternative.

A provision in an agreement of sale of land, whatever it is called in the agreement, whether a penalty or liquidated damages, and which is clearly neither, but is annexed for the purpose of securing performance of the contract, entitles either party to a decree of specific performance. Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; Barrett v. Gelsinger, 179 Ill. 240, 53 N. E. 576; Powell v. Dwyer, 149 Mich. 141, 112 N. W. 499, 11 L. R. A. (N. S.) 978.

[2] The clause in question is not stated to be either a penalty or liquidated damages. There is in it no direct statement that the seller may refuse to convey on paying the buyer \$100, nor does it say that either party may default and be relieved of any obligation to perform by paying the other party \$100. It is clearly a provision intended to secure performance of the contract. Indeed, it expressly says so. It says, for the true performance of the contract each party binds himself to the other in a certain sum of money. In a court of law this may entitle the buyer to sue the defaulting seller for that sum if the buyer wants to end the agreement. In such case it makes no difference that it is called a "penal" sum. The right to the money is one which the buyer has if he elects to take it, or collect it in settlement of his rights against the seller. But if he does not choose to so settle the matter, he has an indubitable right to either an action for damages or specific performance. It would be strange if a provision of a contract purporting to be inserted in order to secure performance should be effective to defeat

an effort of one party to enforce specific performance of the contract.

[3] Inasmuch as the meaning of the clause is clear and unambiguous, and the words used reasonably capable of but one interpretation, it is immaterial what view persons engaged in the sale of real estate in this city take of the meaning of the words, or their practice, or custom, or intention with respect thereto. It is not the case of proving a custom of the trade with respect to a matter not disclosed in the contract, as in the case of Fraser v. Ross, 1 Pennewill, 348, 41 Atl. 204, or as showing the course of conduct of an individual in honoring as his obligation to pay money a certain kind of card with his name and an amount of money named thereon, being the check, ticket or token given by him in payment for work done, as for instance by pickers of berries. Bryan v. Brown, 8 Pennewill, 504, 53 Atl. 55. The testimony which the defendant offered to produce as to the custom of dealers in Wilmington to regard the clause in question as giving to the seller a right to be free of his obligation to convey by paying the sum mentioned in like clauses, was clearly inadmissible and inapplicable to a clause, the meaning and intention of which was so clear.

NOTE.—All of the questions of law and fact involved in this cause were raised at the hearing of the rule for a preliminary injunction, and after stating the foregoing conclusions to the solicitors for the respective parties a conveyance was made by the defendant to the complainant of the premises and the bill of complaint dismissed on motion of the solicitor for the complainant.

(12 Del. Ch. 41)

DAVIS v. FRANTZ et al.

(Court of Chancery of Delaware. July 31, 1918.)

EXECUTION \S 158(1) — **STAY** — **PENDING APPEAL TO OTHER COURT.**

Chancery Court having no jurisdiction to decide the disputed question whether appeal will lie from court of common pleas to Superior Court from judgment for landlord for possession against holding over tenant, it will not, in the absence of any showing of special damages from ousting of tenant, stay execution of judgment till appeal taken with bond can be heard by Superior Court.

Suit by Blanche H. Davis against Abram E. Frantz and another. Restraining order denied.

Injunction bill. As required by rule 101 of the Court of Chancery, after filing the bill of complaint in this cause, the complainant served notice upon the defendants of her intention to apply to the Chancellor for an order restraining the defendants from further proceeding under a judgment in the court of common pleas for New Castle county to obtain possession of premises by Abram E. Frantz, one of the defendants, occupied

by the complainant as tenant under a lease. Solicitors representing the respective parties appeared before the Chancellor at the time designated in the notice, and opposition to the issuance of a restraining order was made by the solicitors for the defendants. The facts are sufficiently stated in the opinion.

Robert Adair, of Wilmington, for complainant. Reuben Satterthwaite, Jr., of Wilmington, for defendant Frantz. Edmund S. Hellings, of Wilmington, for defendant sheriff.

THE CHANCELLOR. The complainant, a tenant, was the defendant in an action by the landlord in the court of common pleas as holding-over tenant, and judgment was there rendered on July 17, 1918, against her for a sum as damages and an order staying execution of a writ of possession until July 25, 1918, was entered upon condition that the money damages be paid to the landlord on or before July 17, 1918. On July 17 the money and costs were deposited under protest with the clerk of the court and thereafter by order of the court of common pleas paid to the landlord's attorney. An appeal was prayed for on July 17 to the Superior Court and signed on the record a statement thereof, and the statement was also signed by the surety in the appeal. This form of entering an appeal and giving surety therein is that used in appeals from a justice of the peace to the Superior Court in cases where such appeals are expressly allowed.

On July 22 the tenant filed a bill in the Court of Chancery alleging the above facts, and that the landlord had threatened to issue after July 25 a writ of the court of common pleas to put him in possession of the premises notwithstanding the appeal and the giving of the security, though both he and the sheriff had notice of the appeal and giving of security. It was alleged that if the writ were issued and served the complainant would be deprived of possession, and that the Superior Court would not be in session until September 16. There was also a claim made that the payment of the damages under protest constituted the complainant as tenant. But there is clearly no merit in such contention.

The prayers of the bill, among others, were that the landlord be perpetually restrained from taking possession and for a preliminary injunction and restraining order against the taking of possession until the appeal could be heard by the Superior Court.

Upon presenting the bill to the Chancellor on July 31, solicitors for the landlord and the other defendant, the sheriff, being present on notice, the motion for a restraining order was heard.

There was no objection made in the bill, or otherwise, to the judgment in the court of common pleas, or to its regularity and validity. The complainant claims that she had a right to take an appeal, and had done so and given security which should operate as a supersedeas, and that as she would be de-

prived of possession of real estate by an execution of the writ of possession, the Chancellor should enjoin the execution thereof until the Superior Court could decide whether there was an appeal and the effect thereof if properly taken.

The act creating the court of common pleas gave to it concurrent jurisdiction in actions against holding-over tenants, presumably concurrent with justices of the peace. It also provided, as follows:

"3763 H. Sec. 8. From any order, ruling, decision or judgment of said court, the aggrieved party shall have the rights of appeal or certiorari, to the Superior Court of New Castle county, in the same manner as is now provided by law as to causes tried before justices of the peace." Chapter, 250, vol. 29, Laws of Delaware.

It is argued that this gave the appeal in this case, and that the manner of taking the appeal was that provided in actions before justices of the peace in cases of debt. On the other hand it is argued that the statute gave an appeal only in those classes of cases where appeals were by statute given from judgments of justices of the peace, and that as there was no appeal from judgments of justices of the peace in cases of landlord against holding-over tenant, there was no appeal to such a judgment in the court of common pleas.

This question is one that the Chancellor should not decide, and its decision should be left to the Superior Court, or court of common pleas. It is not entirely clear that the complainant was not entitled to an appeal, so that the Chancellor must look further into his powers and duties in the matter.

If the conveniences to result to the parties as the result of action by the Chancellor be weighed and balanced, it would seem clear that the landlord should not be restrained from taking possession of his property. No special matter is alleged by the bill to show special damage to the complainant if ousted from the premises, and the absence of such allegations indicates that there was no such special damages. Whereas the landlord may be so damaged for several reasons which could be imagined as reasonably likely to exist. The tenant would probably have an action against both the landlord and the sheriff for damages if turned out of the premises in case her right to a stay pending the appeal was interfered with.

Again, this court has no right to do more than grant suspensory relief until some other tribunal decides the question as to the right of appeal. Ordinarily a court of equity does not take jurisdiction merely to grant suspensory relief, or at all unless having taken jurisdiction for any purpose or reason it can hold jurisdiction for all purposes, which it could not do here.

Again, there is no attack on the judgment

thing respecting that judgment, or the issues raised and decided there. On the other hand, a bond with surety given by the complainant would afford the landlord protection so far as security for payment of his rent is concerned, and he may prefer that to risking to proceed to enforce his right of possession. But this court cannot decide for the landlord as to his preference in this matter.

The case of *Staats v. Herbert*, 4 Del. Ch. 598, 516, does not apply, for in that case where the Chancellor acted to restrain an execution on a judgment when the Superior Court was not in session, the Court of Chancery and the Superior Court had concurrent jurisdiction, i. e., either one could have had jurisdiction to decide the main question, and so whichever first took jurisdiction could continue to hold it. Whereas here the Court of Chancery clearly has no power to decide whether the appeal would lie, and at most could suspend action on the writ of possession until some other court decides whether the writ had been stayed by a properly taken appeal.

For the reasons here indicated, the duty of the Chancellor to grant even the suspensory relief is so doubtful, that it should now refuse to grant the restraining order, but leave the defendants free to pursue their legal remedies and take the responsibility thereof, if there be any.

The restraining order is therefore denied.

(12 Del. Ch. 45)

JEFFERSON v. STUCKERT et al.

(Court of Chancery of Delaware. Oct. 14, 1918.)

1. CHATTEL MORTGAGES ¶185—NECESSITY OF CHANGE OF POSSESSION.

A mortgage of personality with possession retained by the mortgagor was not valid as against other creditors of the mortgagor until authorized by statute.

2. CHATTEL MORTGAGES ¶21 — DEBTS SECURED.

A chattel mortgage may be given to secure a debt, or to indemnify, or for both purposes.

3. CHATTEL MORTGAGES ¶63—VALIDITY—AFFIDAVIT.

In view of the statute providing that a chattel mortgage shall not be valid without an affidavit that it "was made for the bona fide purpose of securing a debt or making indemnity, as the case may be," a mortgage stated to be for securing a debt would not be valid to make indemnity, and vice versa.

4. CHATTEL MORTGAGES ¶63—STATEMENT OF OBLIGATION—VALIDITY—EXECUTION CREDITOR.

In view of the statute providing that a chattel mortgage shall not be valid without an affidavit that it "was made for the bona fide purpose of securing a debt or making indemnity, as the case may be," a mortgage purporting to secure a certain sum then "due and owing," but which in fact was given to secure a debt of

Bill by Charles W. Jefferson against John C. Stuckert and another. Decree for complainant.

See, also, 108 Atl. 870.

Bill to have declared invalid a chattel mortgage. By the admissions of the mortgagor and mortgagee, the chattel mortgage was given, not only to secure a debt which was then owing by the mortgagor to the mortgagee, but also to secure advances of money to be made by the mortgagee to the mortgagor. The mortgage was for \$1,000, which by the condition of the mortgage was stated to be "due and owing" at the date thereof, and it was stated in the affidavit made by the parties to it, and made part of it, that the mortgage was made for the bona fide purpose of securing a debt, and was not made to cover the property of the mortgagor, or to protect it from his creditors, or to hinder or delay them in the execution of their debts.

The complainant was an execution creditor of the mortgagor, and had levied on the mortgaged property after the mortgage was recorded. Afterwards the property was sold by the sheriff under the execution, and there being a dispute as to the right to the proceeds of sale, the money, amounting to \$250, was paid into the Superior Court for New Castle County. But that court declined to decide the question raised by the parties, and gave the complainant leave to file his bill in the Court of Chancery to ascertain the rights of the parties to the fund.

In his bill the complainant asks that the chattel mortgage be declared to be invalid. Both of the defendants have answered the bill, and it is admitted that the mortgage was given to secure an existing debt and advances to be made, and which were made. They claim that the defendant Stuckert, the mortgagee, had made a binding agreement to make advances up to a certain amount, and that therefore he was protected as to such advances, not having had actual notice of the levy of the execution of the complainant.

It was also claimed by the complainant that by the admissions of the answer there was only \$62 due the mortgagee at the date of the mortgage, and in any event the mortgagee is not entitled to more than that sum from the money paid into the Superior Court.

The case was heard upon bill, answer, testimony and exhibits. At the conclusion of the complainant's case the defendants moved to dismiss the bill, but subsequently put in their evidence reserving their rights under the motion to dismiss the bill.

S. D. Townsend, Jr., and Hugh M. Morris, both of Wilmington, for complainant. Walter J. Willis, of Wilmington, for defendants.

THE CHANCELLOR. In this case the sole question, which it is necessary to decide for the first time in this state so far as reported cases show, is whether a mortgage of personal property which purports to secure only a debt due and owing, but which was also given to secure advances to be made to the mortgagor by the mortgagee, is valid as against an execution creditor of the mortgagor, the levy on the mortgaged property having been made after the recording of the mortgage, though the judgment debt existed before the chattel mortgage was made.

It was stated in the condition in the mortgage that the money which the mortgagor was thereby bound to pay the mortgagee was "due and owing" by the former to the latter. Annexed to the mortgage was an affidavit by the parties to the mortgage that it was given to secure a debt, but without stating the amount thereof, or referring to advances.

[1-3] A mortgage of personalty with possession retained by the mortgagor was not valid as against other creditors of the mortgagor, until authorized by statute. In Delaware a valid chattel mortgage may be given to secure a debt, or to make (that is, give) indemnity, or it may be given for both purposes. But the true purpose, or purposes, must appear in the instrument or affidavit in order to make the mortgage valid. This conclusion is not so stated directly in the statute, but it is a necessary consequence of the provision of it that the mortgage shall not be valid without an affidavit "that the said mortgage was made for the bona fide purpose of securing a debt or making indemnity, as the case may be." It follows, also, that a mortgage stated to be for securing a debt would not be valid to make indemnity, and vice versa; otherwise there would be no meaning to the words used in the Act, and the evident purpose of it would be defeated.

It necessarily follows, also, that a mortgage stated to have been made to secure a debt when there was no indebtedness of the mortgagor to the mortgagee would be invalid, though given to make indemnity, if at the time the mortgage was made there was no contract of indemnity, or if it was really given to secure a debt. This is the effect of the statute independent of any fraudulent intention or purpose, though the deception might be considered evidence of an improper design.

Whether this invalidity would result as between mortgagor and mortgagee is here unimportant. It is certainly true, however, that a mortgage which does not state truly the purpose of the instrument is invalid so far as it affects the rights of an execution creditor of the mortgagor.

[4] Inasmuch as in this case the mortgage, though it purports to have been given to secure a debt then due and owing for a certain sum, was in fact given to secure a debt of much smaller amount, and was also given to

make indemnity, or as security for future advances, it was under the statute invalid so far as the rights of the execution creditor were affected.

While this is clearly the meaning and effect of the Delaware statute, and so is decisive in this case without looking at the views of courts elsewhere, still it will be found that a similar view has been taken by other courts as to similar statutes of other states respecting chattel mortgages.

In New Jersey the statute declared a chattel mortgage void unless there be an affidavit stating the consideration of mortgage and as nearly as possible the amount due and to grow due thereon. In the case of *Tingley v. International, etc., Co.*, 74 N. J. Eq. 538, 70 Atl. 919, where the affidavit stated that the consideration was paid by the mortgagee, when in fact it was paid by another person not named, the mortgage was declared to be invalid as to creditors of the mortgagor, though the court found it in fact an honest mortgage. This case was affirmed by the Court of Errors and Appeals in 76 N. J. Eq. 837, 75 Atl. 1102, without an opinion. Also in the case of *Bolce v. Conover*, 54 N. J. Eq. 531, 35 Atl. 402, the affidavit stated that the consideration of a mortgage made by a firm was a loan to the firm then due and owing, whereas the true consideration was in part a loan to one of the partners individually and in part endorsement of notes of the firm then unmatured. This mortgage was held invalid against creditors, though the instrument was an honest mistake of the mortgagee. Vice Chancellor Emery, as to the claim of an honest mistake said:

" * * * But the question is one of the construction of a statute which defines what the affidavit must contain, and makes no exception or allowance for mistakes. As was said in *Kenard v. Gray*, 58 N. H. 51, a case arising on an affidavit under a somewhat similar law, the statute condemns such securities, because their natural tendency is to deceive and defraud creditors, however honest the intention of the parties. And as was held by Mr. Justice Dixon in *Fletcher v. Bonnett* (Err. & App. 1893) 51 N. J. Eq. 615, 618, 28 Atl. 601, the validity of the chattel mortgage depends on the correctness of the information in the affidavit, and not on the knowledge of the affiant of its truth. Neither, as it seems to me, can the validity of the mortgage depend on the honesty of an affiant in making an affidavit which is substantially untrue." *Bolce v. Conover*, 54 N. J. Eq. 531, 35 Atl. 402, 405.

In *Bollschweller v. Packer, etc., Co.*, 83 N. J. Eq. 459, 91 Atl. 1027, Vice Chancellor Emery held invalid a chattel mortgage given to secure notes and also any other sums which might become due under a contract, because the liability on the contract was not mentioned in the affidavit as part of the consideration of the mortgage.

By the Maryland statutes there must be an affidavit that the consideration was true and bona fide. The courts there have decided that if in fact the consideration as stated was untrue, the mortgage is invalid, in-

dependent of actual or intentional fraud. See *Resmeyer v. Norwood*, 117 Md. 320, 83 Atl. 347, where the mortgage stated a debt due to the mortgagee from the mortgagor, when in fact the mortgage was given to secure other creditors of the mortgagor. See also *Denton v. Griffith*, 17 Md. 301.

In Vermont the courts have taken the same view of a mortgage which falsely stated the consideration, though the statute simply required a statement in the mortgage of the liability, the court stating that the evident purpose of the act was to afford convenience without an opportunity for fraud. *Tarbell v. Jones*, 56 Vt. 312. In *Nichols v. Bingham*, 70 Vt. 320, 40 Atl. 827, a mortgage purporting to have been made to secure a note from the mortgagor to the mortgagee larger than the actual debt between them, while its real purpose was to secure the true debt and future advances and a liability as endorser, was held invalid as to creditors, and the oath thereto was false in fact.

In *Blandy v. Benedict*, 42 Ohio St. 295, by the mortgage it appeared that it was given to indemnify the mortgagee against liability as security for the mortgagor, but the affidavit stated that the mortgage was given to secure payment of a debt of the mortgagor to the mortgagee. It was held invalid against creditors of the mortgagor.

By the statute in New Hampshire no mortgage is valid against any person other than the mortgagor, unless sworn to in the manner prescribed, and if given to indemnify the mortgagee against any liability assumed, such liability shall be stated truly in the mortgage and the affidavit accompanying it must verify this validity, truth and justice of the liability. In *Belknap v. Wendell*, 81 N. H. 92, the whole sum secured by the mortgage was described as a debt, when in fact part of it was indemnity. This was decided to be invalid as to creditors of the mortgagor. The case of *Kennard v. Gray*, 58 N. H. 51, was to the same effect as to a mortgage purporting to have been given to secure an absolute debt but in fact to secure a collateral note. Such a mortgage was condemned because its natural tendency was to deceive and defraud creditors however honest the intentions of the parties were. Two cases in New Hampshire are apparently inconsistent with those above mentioned.

In the case of *Parker v. Morrison*, 46 N. H. 280, it was decided that under the statute a valid mortgage of personal property could not be given to a stranger to secure the debt of a third person, and that if given to secure a debt it must be a debt due by the mortgagor to the mortgagee, and if to secure a liability it must be a liability incurred by the mortgagee for the mortgagor. The unreported case of *Richardson v. Blodgett* was cited by the court as authority. There a mortgage had been given to secure a note of the mortgagor to the mortgagee and also to secure a liability which the mortgagee had incurred

for the mortgagor by signing a note with him as his surety to a third person, and both were described in the affidavit as debts due from the mortgagor to the mortgagee. This mortgage was held valid to secure the debt due from the mortgagor to the mortgagee, but void as to creditors so far as it was intended to secure the liability incurred. The court in *Parker v. Morrison* evidently used this case solely as authority for the point that a chattel mortgage given for a liability incurred by the mortgagor to a person other than the mortgagee was invalid, and did not necessarily approve the general principle that a mortgage given to secure a debt and a liability would be good as to the debt, although not valid as to the security.

In *Sumner v. Dalton*, 58 N. H. 295, however, a mortgage given to secure notes of the mortgagor held by the mortgagee and also to indemnify the mortgagee from loss as indorser of another note of the mortgagor was held to be invalid as to the indemnity but valid as to the notes, as the affidavit stated that the mortgage was given to secure a debt. To support the decision the court cited only *Richardson v. Blodgett*, and saying briefly that the precise question raised had been there decided. There is, therefore, a lack of harmony in the New Hampshire decisions, for if the purpose of the statute as stated by the other New Hampshire cases was to prevent deception of creditors, then a mortgage which purports to be for a debt, but which is for a debt and indemnity certainly tends strongly and almost surely to deceive, or at least mislead creditors of the mortgagor, whether it be so intended, or not. Inasmuch as the very brief opinion in *Sumner v. Dalton* was based on an unreported decision, and is inconsistent with the better reasons given in *Belknap v. Wendell* and *Kennard v. Gray*, which cases were not referred to, or were ignored, it seems wise to follow these latter cases.

For the complainant it is urged that independent of the statute the mortgage was invalid as to the complainant, because it bore the badge of fraud, being given on its face for money due and owing, with an affidavit that it was given to secure a debt, while in fact it was in part for money due and owing and in part for future advances, which were certainly not then due and owing. To support this the case of *Louden v. Vinton*, 108 Mich. 313, 66 N. W. 222, and *Butts v. Peacock*, 23 Wis. 359, were cited, in neither of which states was there a statute expressly making the validity of a chattel mortgage depend on the making of an affidavit as to the real character of the transaction between the parties to the mortgage. In the case last cited, *Butts v. Peacock*, it was said, as to a mortgage given for a sum greater than was due:

"There are certainly strong reasons for holding such a mortgage fraudulent in law, upon the ground that it necessarily tends to hinder and delay the creditors of the mortgagor. It

tends directly to deceive and mislead them, by inducing them to believe that the property is absolutely incumbered to the amount expressed on the face of the mortgage, when in truth it is not so. And it is clear that this might materially hinder them in the enforcement of their claims."

The mortgage in question certainly bore this badge of fraud in a legal sense, independent of the statute, and this fault was greater in that it is shown not to conform to the statutory requirements. A mortgage to secure a debt and future advances is not described in good faith as one given to secure a debt due and owing.

There are some authorities cited for the defendants, which seem to uphold as valid a mortgage given to secure a debt and advances, although the true transaction does not so appear. *Wood v. Weimar*, 104 U. S. 798, 28 L. Ed. 779; *Monnot v. Ibert*, 33 Barb. (N. Y.) 24; *Nicklin v. Nelson*, 11 Or. 406, 5 Pac. 51, 50 Am. Rep. 477. But in those cases and others to the same effect the courts were not construing statutes, but applying general principles. The question in this case is to be solved by the requirements of the statute, which invalidates a mortgage unless there be an affidavit stating whether the mortgage is given to secure a debt, or for indemnity, as the case may be.

It is also argued for the defendants, that a mortgage to secure advances will protect the mortgagee for advances made after an attachment or levy by a junior encumbrancer, if the mortgagee is under a binding obligation to make advances, unless the mortgagee had actual notice of the attachment or levy of the junior encumbrancer before making the advances. This too is quite immaterial in construing the statute.

The conclusion is clear, then, that the Delaware statute evidently intended, as were the statutes of other states, to afford a new convenience in financial transactions, and to give protection to persons other than the parties thereto against deception and possible fraud, by requiring an affidavit as to the real transaction. Therefore, a mortgage given in fact to secure a debt and future advances, but which states that it was for a debt due and owing, must be held invalid as against an execution creditor of the mortgagor. This conclusion is reached as an interpretation of the statute, independent of the good or bad faith of the parties thereto. Such a false statement tends naturally to hinder or delay creditors of the mortgagor in the collection of their debts, as well as to mislead, if not deceive, those not parties to it.

Inasmuch as the mortgage of June 1, 1918, was invalid as to the complainant, he was entitled to priority of payment from the proceeds of sale of the corn crop paid into the Superior Court, and is entitled to a decree to that effect and for his costs.

Let a decree be entered accordingly.

(12 Del. Ch. 396)

In re CULVER et al.

(Orphans' Court of Delaware. Sussex. July 8, 1918.)

1. GUARDIAN AND WARD \S 77 — SALE OF LAND—BENEFIT OF MINOR.

Under Rev. Code 1915, \S 3934, authorizing order for sale of a minor's lands by his guardian when it appears sale will be for minor's benefit, it is not enough that the widow of deceased, of whom the minor is sole heir, wants her dower appraised and paid to her in money.

2. DOWER \S 95, 101—PAYMENT IN MONEY—SALE.

Under Rev. Code 1915, \S 3289, 3290, 3292, 3318, as to assignment of dower, there is no right to money dower, unless the land subject to dower is sold in some proceeding other than widow's application for money dower, as in partition cause, applicable only where there are several heirs, or in a proceeding to sell to pay deceased's debts.

Petition by Albert E. Culver, guardian of Mildred E. Culver, minor, and Mamie E. Culver, widow of Perry M. Culver, deceased. Petition denied.

Andrew J. Lynch, of Georgetown, for petitioners.

CURTIS, P. J. The petition of a widow and of the guardian of a sole minor heir at law sets forth in substance that the decedent died May 28, 1918, intestate, leaving a widow and one child, and seised of two parcels of improved land; that the land will not divide; and that the widow waives the assignment of her dower and asks for an appraisement of her dower by the court and payment of her share of the land in money.

[1] This is called a partition cause, but it is not and cannot be one in legal effect, for there is a sole heir at law who takes title subject to dower. It is not properly an application of the guardian to sell land of the minor, for there is no proper allegation as required by section 3934, p. 1781, of the Revised Code of 1915, that such sale is for the benefit of the minor, and no reasons are set forth which would support such an allegation, except that the widow wants her dower appraised and paid to her in money, which is not sufficient. In such cases the matter of security of the guardian is important.

[2] By section 3318, p. 1525, of the Revised Code of 1915, a widow may have her dower assigned (which means by metes and bounds) according to article 2, chapter 95 (see page 1516, \S 3289), or by the same section (3318) upon partition, i. e. upon proper partition. If there is no proper partition, there is no law which authorizes a sale of land which is subject to dower in order to pay the widow her dower in money, calculated upon the partition tables of mortality.

This secures to the owner, or owners of land if there be more than one, a right to hold their land without its being sold, so that when the right of the widow to hold the land assigned to her for life is ended the

then any one of an may start partition proceedings. Then if there is an allegation that the land will not divide advantageously, and it be either admitted (as where all join in the petition) or the petition be taken pro confesso (which is an implied admission), then dower in money may be held by the widow. But in the absence of such allegation, or if such an allegation shall not be sustained, then the commissioners must decide the question of division. If they find against a partition in severalty, then there must be a sale and the widow may waive her assignment of dower by metes and bounds, and take dower in money according to the table of mortality (sections 3290, 3292). So also any other person interested, i. e. tenant in common, may under section 3289 have dower so assigned by metes and bounds and hold the remainder as tenants in common, or otherwise. The guardian in this case could do so on behalf of his ward.

But the present petition is none of these things. Section 3292 supplements section 3290. By the latter a widow's proportionate part of the proceeds of sale is invested for her, and by the former she is paid a sum of money according to the tables.

Rule 15, p. 98, provides a procedure for section 3292. It can have no broader scope, because the statute does not give a widow a right to money dower, unless the land subject to dower is sold in some proceeding other than her application to have such money dower paid to her, as in a partition cause, or in a proceeding to sell land to pay debts of her deceased husband. The statutes only provide for an assignment by metes and bounds. Besides, there is no way to enforce payment of money dower when fixed by the procedure of the rule.

The prayers of the petition are, therefore, denied.

(88 N. J. Eq. 345)

BAKER v. BAKER. (No. 125.)

(Court of Errors and Appeals of New Jersey. Nov. 19, 1917.)

Appeal from Court of Chancery.

Suit by John L. Baker against Margaret Baker. From a decree for complainant, defendant appeals. Affirmed.

James Mercer Davis, of Camden, for appellant. Runyon & Autenreith, of Jersey City, for appellee.

PER CURIAM. This appeal is taken from a decree nisi made by the Court of Chancery in favor of the petitioner below, granting a divorce on the ground of desertion. The original petition was filed June 8, 1915, and the hearing was on the pleadings as they stood, which were petition, answer, and cross-petition. The cross-petitioner charged the petitioner with being a resident of the state of New Jersey.

After the court had rendered its opinion to the effect that a decree for the petitioner would be made, and the cross-petition dismissed, the

New Jersey. After this hearing, which was solely on the question of residence, the court again decided that the petitioner was entitled to his decree, as the proofs showed him to be a resident, and consequently the decree nisi was entered. The petition of appeal presents only the question of residence, as to which we concur in the conclusions reached by the learned Vice Chancellor.

The decree of the court below is affirmed.

(79 N. H. 69)

BROWN v. PHILBRICK et al.

(Supreme Court of New Hampshire. Rockingham. Oct. 1, 1918.)

WILLS §523—CONSTRUCTION—EQUAL DIVISION BETWEEN CLASSES.

Under bequest to "H. or his heirs and to the heirs of B., to be divided equally between them," the equal division is between H. or his heirs, as a class, on the one hand, and the heirs of B., on the other hand.

Transferred from Superior Court, Rockingham County.

Petition by David Brown, executor, against Annie M. Philbrick and others. Transferred from superior court. Case discharged.

Petition for the construction of the following clause of the will of Sophia T. Gove:

"The remainder of my money * * * I give to Jeremiah Hilliard or his heirs and to the heirs of Ellen I. Brown to be divided equally among them."

Jeremiah and Ellen were cousins of the testatrix. Ellen died some eight months before the testatrix, leaving five children as her heirs. Jeremiah died after the will was made, leaving two children as his heirs.

H. A. & R. E. Shute, of Exeter, for executor. Eastman & Scammon, of Exeter, for heirs of Jeremiah. Peters, Cole, Margison & Barrett, of Haverhill, Mass., for heirs of Ellen.

WALKER, J. The language used by the testatrix indicates a purpose to give one half of the money in question to her cousin Jeremiah, or upon his decease before the death of the testatrix to his heirs, and the other half to the heirs of her cousin Ellen, whose death occurred before the will was made. The phrase, "to be divided equally among them," though not expressed with verbal precision, refers to an equal division between the two classes, consisting on the one hand of Jeremiah and his heirs, and on the other of the heirs of Ellen. The use of the words "or his heirs" are of little importance. The legacy to Jeremiah was intended to be an absolute gift, as was the legacy to Ellen's heirs. If Jeremiah had survived the testatrix, it is not probable her intention would be carried out by a construction which would give one-sixth of the money to him and five-sixths to Ellen's heirs. If such was not her intention, it fol-

lows it was not her intention that his two children surviving should only receive two-sevenths of the legacy, while Ellen's five surviving children should receive five-sevenths of it. In the absence of explanatory evidence why the testatrix desired to dispose of her property in that peculiar way, it cannot be found that she had such an intention from language in the will that does not make such a construction necessary, or that is at least open to doubt and conjecture as to its precise meaning. The cases relied upon by Ellen's heirs (*Farmer v. Kimball*, 46 N. H. 435, 88 Am. Dec. 219; *Campbell v. Clark*, 64 N. H. 328, 10 Atl. 702; *Cuthbert v. Laing*, 75 N. H. 304, 73 Atl. 641) are distinguishable from the present case, and are not irreconcilable with the above finding of the fact of the testatrix's intention.

The result arrived at renders it unnecessary to consider the admissibility of statements made by the testatrix as to why she made the present will.

Case discharged. All concurred.

(79 N. H. 77)

CORDOPATIS v. BAKALOPOULOS.

(Supreme Court of New Hampshire. Hillsborough. Oct. 1, 1918.)

EVIDENCE ¶455 — CONSTRUCTION OF MARRIAGE CONTRACT.

In an action for specific performance of a Greek marriage contract, evidence was admissible as to what the parties meant by "dowry."

Exceptions from Superior Court, Hillsborough County.

Bill by Christos Cordopatis against Athanasius Bakalopoulos. Judgment dismissing the complaint, and plaintiff excepts. Exceptions overruled.

Cobleigh & Theriault, of Nashua, for plaintiff. Ivory C. Eaton, of Nashua, and J. J. Hennessy, of Lowell, Mass., for defendant.

PLUMMER, J. The defendant agreed to transfer to the plaintiff certain shares of stock, to be given by reason of "dowry" to the plaintiff in consideration of the plaintiff's marriage to the defendant's daughter in accordance with the divine and holy rites of the Orthodox Eastern Church of Christ. The parties were Greeks, the contract was written in the Greek language, and was drawn by the Greek consul in his office in Boston, Mass. It was found by the master that the parties ultimately intended to return to Greece, and that they had in mind the performance of the contract in Greece more than any other place. The marriage was solemnized, and the dowry contract was made conformably to the divine and holy rites of the Orthodox Eastern Church of Christ, and according to the laws of Greece under the rules and regulations of the Greek Church.

It is contended by the defendant that by these laws, rules, and regulations dowry

given by the wife's father to his son-in-law is a gift for the purpose of alleviating the burdens of marriage, to be used during the joint lives of the husband and wife, and to revert to the father in the event of the wife's death without issue. Before the bringing of this bill the plaintiff's wife died without issue. Hence it is claimed the dowry reverted to the defendant. The master found that dowry under these laws, rules, and regulations was in accordance with the defendant's contention. The evidence in the case was sufficient to support such a finding, and the finding warranted the court in dismissing the bill. The plaintiff excepted to evidence offered by the defendant as to the meaning of the term "dowry."

The question for consideration in this case was what the parties understood when they used this word in the marriage contract. What did the term "dowry" mean to them? This was a Greek marriage contract, and evidence as to what was meant by "dowry," as used in such contract, was competent. *Kendall v. Green*, 67 N. H. 557, 42 Atl. 178; *Gill v. Ferrin*, 71 N. H. 421, 424, 52 Atl. 558; *Day v. Towns*, 76 N. H. 200, 81 Atl. 405; *New England Box Co. v. Flint*, 77 N. H. 277, 90 Atl. 789; 4 Wig. Ev. §§ 2461-2465.

Exceptions overruled. All concurred.

(79 N. H. 70)

PAGE et al. v. BROOKS.

(Supreme Court of New Hampshire. Rockingham. Oct. 1, 1918.)

1. ADJOINING LANDOWNERS ¶8—REASONABLE USE—EVIDENCE.

Ordinance prohibiting erection of garage till owner of premises obtains license from city council on petition, if valid, is competent, though not conclusive, on reasonableness of proposed use, in suit by adjoining landowner to enjoin erection without permit.

2. MUNICIPAL CORPORATIONS ¶601—REGULATING BUILDINGS—ORDINANCES.

City council, being authorized by Pub. St. 1901, c. 50, § 10, to regulate building, ordinance prohibiting erection of garage till owner of premises obtains license from city council, on petition giving particulars, is valid.

3. ADJOINING LANDOWNERS ¶8—REASONABLE USE.

Reasonable use of one's land, as regards rights of adjoining landowner, is what an ordinary man would do under the circumstances of the particular case.

4. ADJOINING LANDOWNERS ¶8—REASONABLE USE.

Whether one's use of his land is reasonable, as regards rights of adjoining owners, depends on whether it will deprive them of reasonable enjoyment of their property to a substantial extent, considering all the circumstances, and not on question of his negligence, in view of what he knew or ought to have known.

5. APPEAL AND ERROR ¶842(11) — EXCEPTIONS—QUESTION OF LAW.

Exception to finding that plaintiff would suffer little damage from defendant's proposed use of his adjoining land presents no question of law.

ham County; Allen, Judge.

Suit by Calvin Page and others against Frank E. Brooks. Bill dismissed, and case transferred from superior court. Exceptions overruled in part, and in part sustained.

Bill in equity by owners of premises used for residential purposes in Portsmouth and adjoining the defendant's premises, for an injunction against his building a public garage on his land and from conducting an automobile service and repair business therein. He intends to do the acts complained of without obtaining a license for that purpose from the city council of Portsmouth, in accordance with an ordinance which provides that no person shall erect "any steam mill * * * nor establish any automobile garage, until he has presented to the city council a petition therefor setting out the proposed situation of the building and the materials of which the same is to be built, the dimensions, height, number of stories of the proposed building, * * * the height of the chimney, and the various branches of business to be carried on or proposed to be carried on in said building, and having first obtained a license therefor." The court ruled that this ordinance is invalid and not binding on the defendant, that the question involved is only one of reasonable use, and that the test is what an ordinary man would do, which is to be determined in the light of what he knows, or reasonably ought to know, about the situation, rather than in the light of all the facts, whatever they may be. The plaintiffs excepted to these rulings. The bill was dismissed as to Page because his damage would be comparatively slight, and as to the other plaintiffs because the defendant's proposed use of his premises for a public garage would not be unreasonable.

Samuel W. Emery and Calvin Page, both of Portsmouth, for plaintiffs. Scammon & Gardner, of Exeter, for defendant.

WALKER, J. [1] One question presented by the plaintiffs' exceptions to the special rulings, and to the decree dismissing the bill, is whether the city ordinance, which in substance prohibits the erection of any building in the city of Portsmouth, intended to be used as a garage for automobiles, until the owner of the premises has obtained a license therefor from the city council upon petition for the same, is admissible for any purpose in this proceeding. The court ruled that the ordinance was invalid, and not binding upon the defendant; and declined to receive it in evidence. If it was a valid ordinance, it was legitimate evidence that the threatened act of the defendant in violation of its provisions was unreasonable. It had some probative force upon the principal issue in the case, which was the reasonableness of the defendant's proposed use of his land, in view of the

of his land. In *Lane v. Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643, it was held that, in an action for damages against a municipal corporation for creating a nuisance by dumping refuse material upon a vacant lot adjoining the plaintiff's premises, a city ordinance prohibiting the acts complained of is competent evidence upon the question of reasonable use, but not conclusive. In actions for negligence, statutes or ordinances in the nature of police regulations are regarded as admissible to show the unreasonable character of the defendant's acts. *Bresnehan v. Gove*, 71 N. H. 236, 239, 51 Atl. 916; *Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369; *Clough v. Rockingham County Light & Power Co.*, 75 N. H. 84, 71 Atl. 223; *Lyons v. Child*, 61 N. H. 72. For a similar purpose the ordinance in question, if valid, was admissible.

[2] The only ground suggested by the defendant in support of the claim that the ordinance is void is that the recent decision in *Village Precinct of Hanover v. Atkins*, 78 N. H. 308, 99 Atl. 293, is a conclusive authority in his favor. In that case the by-law and the order issued thereunder was an attempted exercise by fire commissioners of delegated police power with reference to the location and use of a building as a blacksmith's shop, in an arbitrary manner and subject to no general rule or regulation. It was in excess of the legislative authorization and a substantial denial of that equality of the use and enjoyment of property which all citizens constitutionally possess. No such objection is apparent, or has been pointed out, in the ordinance which the defendant refused to comply with. It requires the petitioner to furnish certain information in regard to the general character of the proposed building, in view of which the city council, in the exercise of a reasonable discretion, may issue a license. It is authorized to regulate, not to arbitrarily prohibit, the erection of buildings. Moreover, the city council has not been asked to license the defendant to erect and use his building as a garage. Under the ordinance it might have granted a license under reasonable conditions. As it was not authorized to prohibit the erection of such a building arbitrarily (P. S. c. 50, § 10), and as it has not attempted to do so under an erroneous assumption of legislative power, the validity of the ordinance for the purpose of authorizing reasonable regulation in a particular instance cannot be doubted. There was error in the ruling of the court upon this subject.

[3] As a new trial seems to be necessary, it may be useful to consider the exception to the ruling upon the question of reasonable use of the defendant's land. The doctrine of reasonable use adopted in this state in a broad, liberal, and equitable sense is in many cases the test of the respective rights of ad-

joining landowners. A reasonable use of one's property in land is determined as a fact by a consideration of the nature of the use his neighbor makes of his land and the damages each would suffer from an unrestricted user by both. What an ordinary man would do under the circumstances of a particular case is perhaps a sufficiently accurate statement of the principle for practical purposes. *Hamlin v. Blankenberg*, 73 N. H. 258, 60 Atl. 1010; *Ladd v. Brick Co.*, 68 N. H. 185, 186, 37 Atl. 1041; *Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112; *Horan v. Byrnes*, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670. Whether the defendant's maintenance of the proposed garage upon his premises would be unreasonable in the sense above indicated, in view of the resulting injury to the plaintiffs' property, was the issue between the parties.

[4] Upon that issue the court ruled that what an ordinary man would do is to be determined in the light of what he knows, or reasonably ought to know, about the situation, rather than in the light of all the facts, whatever they might be. From this language it is to be inferred that the court did not consider all the facts tending to show the unreasonableness of maintaining a garage on the defendant's premises, but only such facts as the defendant knew or ought to have known. It would seem that the law of negligence was applied, and that the defendant's liability was determined, as it would be in an action for the negligent use of property. But the plaintiff's right to the enjoyment of his property does not depend upon the determination of the question whether the defendant would use ordinary care in the use of his property to avoid injuring the plaintiff. As stated in *Elliott v. Mason*, 76 N. H. 229, 232, 81 Atl. 701, 702 (37 L. R. A. [N. S.] 357):

"When a person manages his real estate in such a way as to unreasonably interfere with the correlative right of his neighbor to a reasonable enjoyment of his land, it is no justification for the nuisance for the former to prove that he was guilty of no negligence, or that he exercised due care in what he did. The question is: Has he invaded the proprietary right of his neighbor?"

See, also, *O'Brien v. Derry*, 73 N. H. 198, 205, 60 Atl. 843; *Lane v. Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643; *Wood*, Nuis. § 841.

The question, therefore, in this case, is whether the defendant's proposed garage will deprive the plaintiffs of the reasonable enjoyment of their property to a substantial extent, considering all the circumstances of the situation, not whether the resulting injury is due to his negligence or his want of care in view of his knowledge of the situation. There was error in this ruling of the court.

[5] As the case is understood, the court dismissed the bill, so far as the plaintiff Page

is concerned, upon the special ground that he would suffer little damage from the defendant's proposed use of his land, and that for that reason an injunction would be inequitable. The exception to this finding presents no question of law and must be overruled.

Exceptions by Page overruled. Exceptions by the other plaintiffs sustained. All concurred.

(17 Me. 497)

SMITH v. SOMERSET TRACTION CO.

(Supreme Judicial Court of Maine. Oct. 31, 1918.)

1. STREET RAILROADS § 99(13) — COLLISION WITH MOTOR TRUCK—CONTRIBUTORY NEGLIGENCE.

Where collision between street car and plaintiff's motor sprinkling truck, on track in order to refill, was caused by driver's contributory negligence in failing to look out for approaching car until just before he went on track, when his view was obstructed by truck itself, plaintiff could not recover damage to truck.

2. STREET RAILROADS § 103(3) — COLLISION ON TRACK—LAST CLEAR CHANCE.

Where collision between street car and motor sprinkling truck followed on turning of truck onto track, when motorman used every reasonable effort to avoid accident, doctrine of last clear chance was without application to give owner of truck right of action against street railroad, despite truck driver's contributory negligence.

On Motion from Supreme Judicial Court, Somerset County, at Law.

Action by Harold E. Smith against the Somerset Traction Company. Verdict for plaintiff. On motion for new trial in the Supreme Judicial Court. Motion sustained.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Fred F. Lawrence, of Skowhegan, for plaintiff. Butler & Butler, of Skowhegan, for defendant.

CORNISH, C. J. The plaintiff seeks to recover for damages caused to his motor sprinkling truck, driven by one Boothby, in collision with a car of the defendant. The accident occurred on August 19, 1917, on Madison avenue in the town of Skowhegan. The driver of the truck entered Madison avenue from Pleasant street on the west, crossed the track of the defendant, and proceeded in a northerly direction on the easterly side of the track and three or four feet therefrom until he was opposite the standpipe from which he was to refill the sprinkler. He then swung the front end of the truck onto the track, put on his brakes, and stopped, preparatory to reversing his gears and backing up to the standpipe. Before he was off the track, the sprinkler was struck by the electric car which had come up Madison avenue in the same direction as the truck.

[1] The driver's own story of the accident

proves such negligence on his part as precludes recovery.

As he was proceeding up Madison avenue, he was free and clear of any car that might overtake him. The moment he turned toward the track, he was approaching possible peril. It then became his duty to use reasonable efforts to ascertain whether a car was coming from behind. When he left Pleasant street, he glanced down Madison avenue the short distance of two lots, and says he saw no car. He did not look again until just before he turned onto the track, when he looked over his shoulder; but the body of the sprinkler obstructed his view, so that he could see a distance of only 15 or 20 feet along the track, which was about the length of the truck itself. With that restricted view he admits that he turned directly on to the track, and the collision followed. This certainly was not the conduct of a reasonably prudent man concerned for his personal safety. It was a clear case of contributory negligence. Perhaps the presence of a companion riding with him simply for pleasure may throw some light upon the degree of watchfulness he was exercising.

[2] To relieve himself from this predicament, the plaintiff invokes the last clear chance doctrine, and argues a subsequent and independent negligence on the part of the motorman of the electric car, after the truck had reached its perilous position. The evidence wholly fails to warrant the application of that doctrine. The collision followed close on the turning of the truck, and the motorman of the electric car then used every reasonable effort to avoid the accident. The driver's negligence actively continued from its commencement up to the moment of collision, and this case is governed by *Butler v. Railway*, 99 Me. 160, 58 Atl. 775, 105 Am. St. Rep. 267; *Philbrick v. Railway*, 107 Me. 429, 78 Atl. 481; and *McKinnon v. Railway*, 116 Me. 289, 101 Atl. 452.

The verdict is so manifestly contrary to the law and the evidence that it should not stand.

Motion sustained.

(117 Me. 409)

KNOX v. COBURN.

(Supreme Judicial Court of Maine. Oct. 31, 1918.)

1. CORPORATIONS \S 181(8) — RIGHTS OF STOCKHOLDER — INSPECTION OF BOOKS — BURDEN OF PROOF.

Where officer of corporation refuses to permit stockholder to inspect books and copy minutes and names of stockholders upon ground that stockholder's motive in so doing is improper, and stockholder brings action to compel officer to permit such inspection, the burden of proving that stockholder's motive is improper is upon officer.

2. CORPORATIONS \S 181(1) — RIGHTS OF STOCKHOLDER — INSPECTION OF BOOKS.

Member of stock-selling firm, who buys stock in corporation for purpose of securing names

of all the holders of such stock, has the right, under Rev. St. c. 51, \S 22, to inspect the stockbooks and make list of stockholders for use in selling such stock; his motive in obtaining such list not being improper, vexatious, or unlawful.

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Petition for mandamus by Herbert D. Knox against James M. Coburn. Writ ordered, and defendant excepts. Exceptions overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and WILSON, JJ.

Ralph W. Crockett, of Lewiston, for plaintiff. McGillicuddy & Morey, of Lewiston, for defendant.

CORNISH, C. J. This is a petition brought by a stockholder of the Androscoggin Mills, of Lewiston, Me., for a writ of mandamus commanding the respondent, the clerk of the corporation, to allow him to inspect the stockbook, to take copies and minutes therefrom of such parts as concern his interests, and to make a list of the stockholders, their residences, and the amount of stock held by each.

The respondent admits the right of the petitioner to inspect the books, but denies him the right to make copies of the books and of the list of stockholders.

R. S. c. 51, \S 22, provides that the corporate records and stockbook "shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts, as concern their interests," etc.

The sitting justice, after full hearing, granted the petition and ordered the peremptory writ of mandamus to issue. The case is before the law court on defendant's exceptions to this ruling.

The opinion filed by the, sitting justice covers so fully and so discriminatingly the facts and the law involved in this matter that we adopt it as the opinion of the court. That opinion is as follows:

The petitioner bases his application upon section 22 of chapter 51 of the Revised Statutes, and asks that a peremptory writ issue to the respondent, commanding him to allow the petitioner to inspect the stockbook of the Androscoggin Mills and to take copies and minutes therefrom of such parts as concern the petitioner's interests, and to make a list of the stockholders of said corporation, their residences, and the amount of stock held by each.

In previous decisions of this court (*White v. Manter*, 109 Me. 409, 84 Atl. 890, 42 L. R. A. (N. S.) 332; *Withington v. Bradley*, 111 Me. 386, 89 Atl. 201; *Eaton v. Manter*, 114 Me. 260, 95 Atl. 948) it has been held that this statute, so far as the right of inspection is concerned, adds to the common-law rights of a stockholder and removes some of the common-law limitations, and that it gives the stockholder an absolute and unlimited right to inspect the corporate records and the list of stockholders, whatever may be his motive or purpose in seek-

ing to exercise it, and that it is not necessary to state in his application or prove the reasons for his application to inspect such records. The right to take copies and minutes therefrom is, however, limited to such parts as concern the interest of the stockholder making the application, and that limitation is recognized by the prayer of the petition in this case. It has further been held that a list of stockholders concerns a stockholder's interest, and that he has a right to take a copy of the list, irrespective of his motive or purpose.

The court, however, has been careful to say that the character of the remedy sought by application for a writ of mandamus, and the discretion to be exercised by the court in issuing it, seems not to have been taken away or abridged by the statute, and that a state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper, or unlawful that the court might feel compelled to exercise its discretion and decline to issue the writ.

[1] It will not be presumed that the motive of the stockholder is an improper one, and, if the motive or purpose is charged to be otherwise, the burden is upon the officer refusing the request, or on the corporation, to establish it. *Stone v. Kellogg*, 135 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240; *State v. Pacific Brewing Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; *Foster v. White*, 86 Ala. 467, 6 South. 88.

The respondent has filed a return to the alternative writ, stating his reasons for not complying with the request of the petitioner. Treating the allegations of this return as statements of fact, and not of opinion or belief, the allegations of paragraphs 5 and 7, so far as they relate to the purposes of the petitioner, are not sustained by the evidence. In paragraph 6 of the return the respondent states his belief "that it is the intention of said Herbert D. Knox to endeavor to use the information for his sole benefit in the buying and selling of the stock of the Androscoggin Mills, and that such act would be detrimental to the best interests of the corporation and its stockholders."

It appears by the evidence before me that the petitioner first made application to the treasurer of the Androscoggin Mills for a list of the stockholders to which Mr. De Normandie replied, under date of June 22, 1918: "If you will let me know by return mail any specific reason that you may have for desiring this list, I shall be glad to take the matter under consideration." In reply Mr. Knox states: "I beg to advise you that I desire this list for the use only by myself in connection with the firm of Charles A. Day & Co. for the purpose of facilitating the purchase or sale of this stock, as by having a list of stockholders when occasion arises I can communicate with them direct either as to purchase or sale should I so wish." To this letter Mr. De Normandie replied: "I have given your letter careful consideration, and have been advised that I should not disclose the stockholders' names under the circumstances to which your letter refers. We have always refused such requests and think that we ought not to change our custom."

In his testimony upon examination Mr. Knox testified as follows:

"Q. Your purpose in buying a share of stock, as I said before, was for your own private business, to buy and sell the stockholders or anybody else you could get to buy?"

"A. In connection with the firm of Charles A. Day & Co.

"Q. And in selling that stock, of course, you sell to people other than stockholders, or try to sell it, don't you?"

"A. Not at all times; no.

"Q. You do sometimes?"

"A. Once in a while. For instance, we may in the Androscoggin, if there should happen to

be 200 or 300 shares offered for sale, we might circularize it."

It appears from the evidence before me that the petitioner is connected with the firm of Charles A. Day & Co., of Boston, and that that firm makes a specialty of dealing in unlisted and inactive stocks and bonds, and that the share of stock standing in the name of the petitioner was purchased by that firm, that Mr. Knox might have the status of a stockholder in the Androscoggin Mills and such rights as attach thereto. It further appears that this firm makes it a practice to obtain lists of stockholders of corporations in the stock of which it deals; that these lists are for its own exclusive use; that they are not sold or even loaned to brokers or other dealers; that they are used as mailing lists in sending out circulars offering to buy or to sell stock in various corporations. Copies of the circulars issued by this firm were put in evidence, without objection, and seem to be unobjectionable in form. I fall to see where in the purpose which Mr. Knox intends to make of the lists of stockholders is in any way improper, vexatious, or unlawful. In *Withington v. Bradley*, supra, the court found that the evidence failed to disclose any unlawful purpose, and that the power of the court to issue the peremptory writ was properly exercised. The report of that case does not show the evidence upon which this finding was based, but as supporting that view the court cited the case of *State v. Middlesex Banking Co.*, 87 Conn. 483, on page 489, 88 Atl. 861, on page 863, a case which is so parallel in its facts with the present case that I quote from the opinion of the court:

"The primary charge brought against the relator in the return centers about his business as a stockbroker. It is asserted that he ought not to be admitted to an examination of the stockbooks because he became a stockholder for the purpose of trading in its shares, and that his controlling purpose in seeking access to the stockbooks is that he, by means of the information obtained, may more effectually carry on that business and more extensively and successfully buy and sell the company's shares for profit to himself. We fail to discover what harm or loss can threaten either the company or its stockholders from the relator's operations as a buyer and seller of its stock, however active or general they might become, of so grave a character as to call for judicial protection from the exercise of the statutory right. Such operations are not hostile to the corporation, have nothing wrong, unjust, illegitimate, or unlawful about them, and the desire to advance them in honorable ways, although ulterior to the interests of the corporation and stock ownership, has no taint of impropriety about it."

In his testimony Mr. Coburn expresses concern that if the writ were granted annoyance to the stockholders might result. It is difficult to see how such a result would follow. The creation of a wider market for the stock cannot certainly be detrimental to the stockholders' interest, and any information as to stock being offered for sale, or of opportunity to sell stock to persons desiring to purchase, would naturally be to the stockholders' interest. The corporation has within its power to very effectually guard the stockholders against any deception, if such should be attempted, by distributing to its stockholders printed statements of its financial condition in such form as to afford full information. It seems that in the case of this particular corporation it has not been the practice so to do. Referring to a similar claim the court in *State v. Middlesex Banking Co.*, says:

"But whatever evil incidents might be expected to attend the policy of limited publicity enacted into the law, and assuming that the allegations conform to the fact, we must presume that the General Assembly took them into account and weighed them against the anti-

adopted, they are inherent in the system, and do not arise from exceptional cases of misuse or abuse. If we were to say that the right given by statute should not be enforced for the reason that harmful results might follow, we should be usurping the functions of the legislative department in making practical repeal of the statute and transgressing the comparatively narrow limits of proper judicial action already indicated."

I have carefully examined the cases cited by respondents' counsel in his brief. They do not seem to controvert the positions taken in this opinion, but it may be said of them that such cases arose in states where a more limited policy seems to prevail than prevails in states having statutory provisions similar to those found here.

[2] Peremptory writ of mandamus may issue, commanding the said James E. Coburn to allow the said Herbert D. Knox to inspect the stock-book of the Androscoggin Mills and take copies and minutes therefrom of such parts as concern his interests, and to make a list of the stockholders of said corporation, their residences, and the amount of stock held by each.

The entry must therefore be:
Exceptions overruled.

(117 Me. 415)

SWEENEY v. HIGGINS.

(Supreme Judicial Court of Maine. Nov. 4, 1918.)

1. LIBEL AND SLANDER ¶101(4)—BURDEN OF PROOF—CONDITIONALLY PRIVILEGED COMMUNICATIONS.

In an action on the case for libel, where the charges are conditionally privileged communications, the burden of proving malice by affirmative evidence rests on plaintiff.

2. LIBEL AND SLANDER ¶48(2)—PRIVILEGED COMMUNICATIONS — PUBLIC OFFICIALS OR EMPLOYEES.

No action lies to a petition or communication imputing want of integrity or other ground of unfitness to a public official or employé, who is subject to removal by the authority to whom the communication is addressed, if made in good faith and without malice.

3. LIBEL AND SLANDER ¶101(4)—CHARGES AGAINST PUBLIC OFFICIALS—PRESUMPTIONS.

Where charges against a police officer on the ground of official misconduct were made to the mayor and city government, which had power of revocation and removal, it will be presumed that the charges were preferred without malice and from a sense of official responsibility.

4. LIBEL AND SLANDER ¶51(5)—PRIVILEGE—MALICE.

Actual malice in making a charge against a public official cannot be inferred, simply because the charges are false.

Agreed Statement from Supreme Judicial Court, Cumberland County, at Law.

Action by Charles E. Sweeney against Fred W. Higgins, submitted to law court upon an agreed statement of facts. Judgment for defendant.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

William A. Connellan, of Portland, for plaintiff. Jacob H. Berman, of Portland, and

CORNISH, C. J. This is an action on the case for libel, brought by a police officer of South Portland against an alderman of the same city, and is submitted to the law court upon an agreed statement of facts.

The alleged libel is based upon the following written charges which were presented by the defendant against the plaintiff:

"To the Honorable Mayor and City Government of South Portland:

"Respectfully represents Fred W. Higgins, of South Portland, who gives this body to understand that Charles E. Sweeney, of said South Portland, has been acting as an officer of said South Portland; that he has been unmindful of his duty; that he has attempted to extort money from the city of South Portland, by attempting to collect for services after having been paid by the Cumberland County Power & Light Company. Wherefore your petitioner prays that the said Sweeney may be ordered to appear and show cause why he should not be discharged from the force.

"Dated at South Portland this eighth day of August, A. D. 1918.

"[Signed] Fred W. Higgins."

It is admitted that the defendant, while an alderman and at a meeting of that board, presided over by the mayor, presented the foregoing charges; that at the time in question police officers of that city were appointed by the mayor, and his appointments were confirmed by the board of aldermen; and that after these charges were preferred an investigation was had, and the plaintiff was exonerated. It does not affirmatively appear that these officers were subject to removal by the mayor and aldermen; but such is the fair inference, from the fact that the appointment was made by the mayor, subject to confirmation by the aldermen (*Andrews v. King*, 77 Me. 224), and from the further fact that this communication was addressed to them, and cognizance thereof was taken, as an investigation leading to exoneration was subsequently made.

[1] These admitted facts bring the written charges within the class of what is known as conditionally privileged communications, which are not actionable, unless proved to be malicious, and the burden of proving malice by affirmative evidence rests upon the plaintiff. No evidence of malice is submitted by the plaintiff in this case. The burden is not met. The condition is not removed.

[2] It is a settled principle of the law of libel that no action lies for a petition or communication imputing want of integrity, or other ground of unfitness, to a public official or employé, who is subject to removal by the board or officer to whom the petition or communication is addressed, provided such communication is made in good faith, and without malice. 17 R. C. L. § 110; *Jozsa v. Moroney*, 125 La. 813, 51 South. 908, 27 L. R. A. (N. S.) 1041, 19 Ann. Cas. 1193, and note;

Farr v. Valentine, 38 App. D. C. 413, Ann. Cas. 1913C, 821, and note; *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295; *Blakeslee v. Carroll*, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106; *Kent v. Bongartz*, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870. And see *Bradford v. Clark*, 90 Me. 298, 38 Atl. 229.

[3] This rule rests upon sound public policy. It tends to honesty and fidelity in the conduct of public affairs. It renders subordinates more amenable for their derelictions to the superior power which is responsible for their acts. It carefully guards against charges made in bad faith and from malicious motives, on the one hand, while shielding the writer from charges made honestly and from a sense of public duty, on the other. The case at bar comes within this rule. Not only were the charges made to a body having the power of investigation and removal, but they were put forth by one who was himself a member of that body at the time, upon whom rested in part the responsibility for the acts of the subordinate. The presumption is that the charges were preferred without malice and from a sense of official responsibility, and there is no evidence to rebut this presumption.

[4] It appears that upon investigation the plaintiff was exonerated, from which fact, perhaps, it might be reasonably inferred that the charges were not proven to be true. But actual malice cannot be inferred, simply because of the falsity of the charges. "It is well settled that falsity alone is not enough. The author or authors of the communication may make it, and press it upon the attention of others, honestly believing it to be true, and acting from the purest and highest of motives, when in fact it is false, and therefore actual malice is not to be inferred from falsity." *Kent v. Bongartz*, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870, and cases cited.

The application of these familiar principles to the admitted facts in this case requires that the mandate be—

Judgment for defendant.

(117 Me. 418)

ARCHIBALD v. ORDER OF UNITED COMMERCIAL TRAVELERS.

(Supreme Judicial Court of Maine. Nov. 4, 1918.)

1. INSURANCE ~~§~~461(3)—INSURED'S LIABILITY—BURDEN OF PROOF.

In actions on insurance contracts, the burden is on defendant to prove the exemption which it sets up in defense.

2. INSURANCE ~~§~~461(3)—INSURED'S LIABILITY—"VOLUNTARY EXPOSURE TO DANGER."

In an action on an insurance contract exempting from liability if death was incurred from voluntary exposure to danger, facts held to show that insured, struck by locomotive while walking on railroad track, died by "voluntary exposure to danger"; such exposure being an

intentional act which reasonable and ordinary prudence would pronounce dangerous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Exposure.]

3. INSURANCE ~~§~~461(3)—INSURED'S LIABILITY—EXPOSURE TO DANGER—CUSTOM.

In action on insurance policy wherein liability for death from involuntary exposure to danger was exempted, where insured was killed by locomotive while walking on a railroad track, it was immaterial that others were accustomed to use the same track.

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Action by Lucetta W. Archibald against the Order of United Commercial Travelers. Verdict for plaintiff, and defendant excepta. Exceptions sustained.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

McGillcuddy & Morey, of Lewiston, for plaintiff. George C. Wing and George C. Wing, Jr., both of Auburn, and John A. Millener, of Columbus, Ohio, for defendant.

CORNISH, C. J. On January 2, 1914, the defendant issued to the plaintiff's husband, Ernest U. Archibald, a certificate of insurance in the sum of \$6,300, payable to the plaintiff as beneficiary in case of death occasioned by bodily injury effected through external, violent, and accidental means; subject, however, to certain provisions, conditions and requirements contained in the constitution of the order. On January 31, 1914, Mr. Archibald was struck and killed by a locomotive while walking on the tracks of the Maine Central Railroad Company in the city of Lewiston. This suit was brought to recover the amount due under the certificate, and, after a verdict for the plaintiff, is now before this court on defendant's exceptions. A large number of exceptions was reserved; but it is necessary to consider only one, the refusal of the presiding justice to direct a verdict for the defendant. We think this direction should have been given.

The constitution of the defendant order contains many exemptions. Among others, it is provided that the benefits under the certificate shall not cover any death, disability, or loss resulting from "self-destruction (while sane or insane)," "the violation of any law," "or from voluntary exposure to danger." Each of these defenses is set up by the defendant, and in this class of cases the burden is on the defendant to prove the existence of facts which create the exemption.

[1] In ordinary actions for personal injuries, the burden is upon the plaintiff to prove his due care; but, in an action upon the contract of insurance, it devolves upon the defendant to prove the exemption which it sets up in defense. *Keene v. New Eng. Acc. Ass'n*, 161 Mass. 149, 36 N. E. 891; *Garcelon*

v. Commercial Travelers' Ass'n, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961.

The defense of suicide was not made out. No such inference could reasonably be drawn from the facts and circumstances as disclosed by the evidence.

The defense of violation of law is based upon R. S. c. 57, § 67, which provides as follows:

"Whoever without right, stands or walks on a railroad track or bridge, or passes over such bridge except by railroad conveyance, forfeits not less than five, nor more than twenty dollars, to be recovered by complaint."

[2] We will not discuss the application of this statute to the claimed exemption further than we may do so incidentally in connection with the next ground. The third defense, based on "voluntary exposure to danger," is abundantly proved, and is a full and complete bar to the maintenance of this action.

The material facts are not in controversy. Mr. Archibald and his wife were residents of Poland. On the day of the accident they had come to Lewiston from Portland, arriving in Lewiston shortly before noon. They transacted some business at the Lewiston Trust Company, dined together at a restaurant, and then separated; Archibald going to an employment agency for the purpose of securing men for his lumbering operations. These were obtained, and, according to the testimony of the agent, Archibald left the agency stating that he had a little business down street, and would return about quarter past one, in season to take the men up to the 1:45 p. m. train for Rumford. He was next seen by the gate tender at the Chestnut street crossing as he was passing that crossing on the tracks, shortly before the accident, and then by the engineer and fireman of the regular 12:40 train out of the Lewiston Lower Station on its way to Brunswick. The train had reached a point several hundred feet from the station and between the Avon and Androscoggin Mills, when the engineer and fireman saw Archibald walking in the same direction in which the train was moving and beside the track. When the engine was within about 35 feet from him, Archibald, without looking back, started to run across the track, took two or three steps between the rails, threw up his hands, fell, and was caught by the pilot. Evidently he was not aware of the approaching train until that moment, and then in his confusion, or perhaps with the thought of crossing to a safer position, he was struck and killed. Such, in brief, are the circumstances attending the accident.

This brings us to the interpretation of the clause "voluntary exposure to danger." What is its meaning as used in this contract of indemnity? A definition so accurate in detail and yet so comprehensive in scope as to meet all cases it is difficult, if not impossible, to formulate, and yet the essential elements can be stated.

The term is not synonymous with lack of due care or contributory negligence. To give

it that broad construction would make of an accident policy a delusive snare. Many of the accidents of life are attributable to the want of due care on the part of the injured person. They may result from inadvertence, from "thoughtless inattention," and yet they are within the contemplation of the contract. A mere passive negligence is not sufficient to constitute voluntary exposure to danger. It must ordinarily be active in its nature. The word "voluntary" implies an act of the will.

It may therefore be said, speaking generally, that to render one guilty of voluntary exposure to danger he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous, one which an ordinarily prudent man of common intelligence would know to be dangerous. The term implies both an intention to perform the act and a conscious willingness to take the risk which is obviously connected with it. The application of this definition to the case at bar brings it clearly within the inhibition.

[3] Mr. Archibald, in walking along the railroad tracks in the city of Lewiston, was voluntarily and unnecessarily walking in an admittedly dangerous place. The peril was open and plain, his exposure to it was voluntary, and he was injured by the very risk which he had chosen to take. The precise injury happened which there was reason to fear. The liability of passing trains was no hidden danger, but an apparent one. He was in fact a trespasser. *Copp v. Maine Central R. Co.*, 100 Me. 568, 62 Atl. 735. The company itself had posted a sign in that vicinity calling attention to the penalty under R. S. c. 57, § 67, for walking, without right, on the track or bridge. The fact that others were accustomed to take the same course is immaterial in this action against the insurance company. *Piper v. Mercantile Mut. Acc. Ass'n*, 161 Mass. 589, 37 N. E. 759; *Osgood v. United States Acc. Co.*, 76 N. H. 475, 84 Atl. 50, Ann. Cas. 1913C, 425.

In reaching the conclusion that the facts bring this case at bar within the exemption, we are in accord with the authorities which are numerous, and a few of which we cite. These, of course, differ in their facts, but they are analogous in principle, and in some of them the clause in the policy would require even stronger evidence against the plaintiff than that under consideration here. *Cornish v. Acc. Ins. Co.*, L. R. 23, Q. B. Div. 453; *Glass v. Fraternal Acc. Ass'n (C. C.)* 112 Fed. 495; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 7 S. E. 88, 12 Am. St. Rep. 270; *Small v. Travelers' Protect. Ass'n*, 118 Ga. 900, 45 S. E. 706, 63 L. R. A. 510; *Follis v. United States Mut. Acc. Ass'n*, 94 Iowa, 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. Rep. 408; *Smith v. Pref. Mut. Acc. Ass'n*, 104 Mich. 634, 62 N. W. 990; *Alter v. Union Casualty & Surety Co.*, 108 Mo. App. 169, 83 S. W. 276; note to *Hunt v. United States Acc. Ass'n*, 148

Mich. 521, 109 N. W. 1042, 7 L. R. A. (N. S.) 938, 117 Am. St. Rep. 655, 10 Ann. Cas. 451; note to *Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1125; *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316; *Willard v. Masonic Acc. Ass'n*, 169 Mass. 288, 47 N. E. 1006, 61 Am. St. Rep. 285; *Garcelon v. Commercial Trav. Ass'n*, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961.

This case is distinguishable from *Keene v. N. E. Mutual Acc. Ass'n*, 161 Mass. 149, 36 N. E. 891, confidently relied upon by the plaintiff, as in that case, to quote the opinion, "the deceased was not attempting to walk upon the track, or to remain upon it; but he was simply crossing, at a quick pace. He was hit, not by an engine with its noise, but by a detached car, which had been kicked along there, the sight of which was cut off by his umbrella." The other Massachusetts cases above cited are more closely in point.

Our conclusion therefore is that the plaintiff cannot recover, and that the request for an ordered verdict for the defendant should have been given.

Exceptions sustained.

(117 Me. 436)

SCOTT'S CASE.

(Supreme Judicial Court of Maine. Nov. 12, 1918.)

1. MASTER AND SERVANT §388—WORKMEN'S COMPENSATION—FAILURE OF DEPENDENTS.

In a proceeding for compensation under the Workmen's Compensation Act by the deserted wife and also by the mistress of deceased, the fact that the wife was wholly dependent on deceased, and that the illegitimate children of the mistress and deceased were also wholly dependent on him, did not necessitate a disposal of the case under Workmen's Compensation Act, § 13, as though there were no dependents, on the theory that the condition was one not contemplated by the statute.

2. MASTER AND SERVANT §388—WORKMEN'S COMPENSATION—"DESERTION"—"DEPENDENTS."

A deserted wife, who has subsequent to her desertion been guilty of adultery, is not a "dependent" of her husband, within Rev. St. c. 50, § 1, subd. 8(a); "desertion" under the act having its usual meaning in connection with marital relations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Dependent*; *Desertion*.]

3. MASTER AND SERVANT §388—WORKMEN'S COMPENSATION—DEPENDENTS—ILLEGITIMATE CHILDREN.

Illegitimate children of a decedent are not conclusively presumed to be dependent on him, within Rev. St. c. 50, § 1, subd. 8(c), under the rule, "Expressio unius est exclusio alterius."

4. MASTER AND SERVANT §388—WORKMEN'S COMPENSATION—"FAMILY"—"DEPENDENTS."

Illegitimate children of a deceased employé living with decedent and their mother are "dependents" of decedent within Workmen's Compensation Act, as part of his family; a "family" being a collective body of persons who live in one house under a head or manager who has a

legal or moral duty to support the members thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Family*.]

5. MASTER AND SERVANT §348—WORKMEN'S COMPENSATION—STATUTES—CONSTRUCTION.

The Workmen's Compensation Act will be construed liberally with a view to carrying out its general purpose and not strictly as other statutes in derogation of the common law.

6. MASTER AND SERVANT §346—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The general purpose of the Workmen's Compensation Act is to transfer the burdens resulting from industrial accidents from the individual to the industry, to be finally distributed upon society as a whole by compelling the industry through the employer to contribute to the support of those who are lawfully dependent upon deceased for sustenance during his lifetime.

Appeal from Supreme Judicial Court, Penobscot County, at Law.

Proceedings by Mabel Scott and another under the Workmen's Compensation Act for compensation for the death of Harry Scott, opposed by the Eastern Manufacturing Company, employer, and the American Mutual Liability Company, insurer. From a decree of a single justice in accordance with the findings of the chairman of the Industrial Accident Commission, claimant, Mabel Scott, the employer, and the insurer all appeal. Appeals dismissed, and decree affirmed.

Argued before CORNISH, O. J., and SPEAR, HANSON, PHILBROOK, DUNN, MORRILL, DEASY, and WILSON, JJ.

Harold H. Murchie, of Calais, and Burleigh Martin, of Augusta, for Mabel Scott. Emery & Waterhouse, of Biddeford, for Eastern Mfg. Co. and American Mut. Liability Co. Frederick B. Dodd and Lawrence V. Jones, both of Bangor, for defendants.

WILSON, J. This is an appeal from the decree of a single justice in accordance with the findings of the chairman of the Industrial Accident Commission under section 34 of chapter 50, R. S., known as the Workmen's Compensation Act.

On the 24th day of September, 1917, one Harry Scott received an injury while in the employ of the Eastern Manufacturing Company from which death resulted on the following day. Following his death, two claimants filed petitions with the Industrial Accident Commission claiming to be dependents under the act, viz. Mabel St. Clair Scott, claiming to be the lawful wife of the deceased whom he had deserted, and one by Rachel S. Scott, also claiming to be the wife of the deceased and dependent upon him for her support, but whose claim has been abandoned by counsel. The petition of Rachel S. Scott, however, was later amended to include the minor children of said Rachel S. Scott, viz. Irene F., Stanley W., Harry J., and Donald F., aged ten, seven and four years, and one year and nine months, respectively.

After a hearing, the chairman of the In-

dustrial Commission found from the evidence submitted that Harry Scott received the injury which caused his death in the course of his employment, and that at the time of his injury his "average weekly wage" computed according to subdivision 9 of section 1 of the act was \$15 a week, and that his dependents were therefore entitled to \$7.50 per week for a period of 300 weeks. So far there seems to be no dispute between the several parties to these proceedings.

The questions raised under this appeal are upon the chairman's rulings as to who the dependents of Harry Scott were at the time of the injury and so entitled to the benefits. Subdivision 8 of section 1 of the Workmen's Compensation Act (chapter 50, R. S.) defines "dependents" as follows:

"Dependents" shall mean members of the employe's family or next of kin, who are wholly or partly dependent upon the earnings of the employe for support at the time of the injury."

It then provides that—

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employe:

"(a) A wife upon a husband with whom she lives, or from whom she was living apart for a justifiable cause, or because he had deserted her or upon whom she is dependent at the time of the accident."

"(c) A child or children, including adopted and step children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living, or upon whom he is or they are dependent at the time of the death of said parent, there being no surviving * * * parent."

Bearing upon the question of dependency, the chairman of the commission, from an agreed statement signed by counsel for all claimants, found the following facts which appear to be undisputed by either the employer or the insurer:

Henry Scott was lawfully married to the claimant Mabel St. Clair Scott February 17, 1901, but deserted her after three years of married life. Since the desertion he has never contributed anything toward her support. One child, Herbert Scott, aged sixteen years, was born of this lawful union. Five years after the desertion, there was born to Mabel St. C. Scott an illegitimate child, Ruth, aged nine years at the time of the hearing.

After the desertion of his wife, Mabel St. C. Scott, Harry Scott, at least ten years before his death, formed an illicit union with one Rachel Somers, who is named in the petition as Rachel S. Scott. The four children named in the petition of Rachel S. Scott the chairman finds from the agreed statement of counsel to be the illegitimate children of Harry Scott and Rachel Somers, and were members of his family, and it appears to be assumed in the agreed statement of counsel and in all the discussion and findings of the chairman that they were all known under the family name of Scott.

Upon these admitted facts the chairman of the commission ruled that the four chil-

dren of Harry Scott and Rachel Somers Scott were members of his family and his next of kin and were wholly dependent upon him for their support at the time of the injury; that Mabel St. C. Scott was not a member of his family, nor dependent upon him for support; that Rachel S. Scott by reason of the illicit union could not be a dependent under the act; and therefore the four minor illegitimate children of Harry Scott and Rachel S. Scott, being the only dependents, were entitled to all the benefits under the act. From the decree of the justice rendered in accordance with this decision as required under section 34 of chapter 50, R. S., the claimant Mabel St. C. Scott, the employer, and the insurer all appeal. The contentions of the several parties, and we state the facts and contentions of parties at length owing to the questions of first impression raised by this case under the act, are as follows:

1. Mabel St. C. Scott claims that the chairman of the commission erred in ruling that she was not a dependent of Harry Scott at the time of the injury, inasmuch as she was his lawful wife and had been deserted by him, and by the express terms of the statute is conclusively presumed to be wholly dependent upon the deceased husband for her support; that the illegitimate children of Harry Scott were not members of his family or his next of kin, because their father and mother were living together contrary to law, and are not within the purview of subdivision 8 (c) of chapter 50, R. S., which she contends refers only to legitimate, adopted, and step children.

2. Counsel for the illegitimate minor children of Harry Scott and Rachel S. Scott contend that, while they may not be conclusively presumed to be dependent under paragraph (a) of subdivision 8 of section 1 of the act, yet they were members of the family of Harry Scott within the meaning of the act, and were as a matter of fact wholly dependent upon him at the time of his death; and that the former wife by her act of adultery had terminated the running of her husband's desertion and had thereby taken herself out of the class conclusively presumed to be dependent and was not at the time of his death a member of his family, or, at least, was not dependent upon him in fact.

[1] 3. Counsel for the employer and insurer join with counsel for each claimant and agree each is correct in his contention, viz. that Mabel St. C. Scott as the lawful deserted wife was wholly dependent upon the deceased, and that the four children of Harry Scott and Rachel S. Scott were also wholly dependent upon him; but that such a condition was not contemplated by the statute, and therefore the case must be disposed of under section 13 of the act as though there were no dependents.

We must reject the contention of counsel for the employer and insurer as wholly con-

trary to the spirit and "general purpose" of the law. *Coakley's Case*, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 887.

[2] We sustain the ruling of the chairman of the commission that Mabel St. O. Scott was not a dependent of Harry Scott at the time of the injury, though not for the reasons assigned by the chairman in his decree. The chairman appears to find that, inasmuch as Mabel St. O. Scott was no longer living with the deceased and was not in fact dependent upon him for support, the conclusive presumption of the statute arising from her marriage to the deceased and his desertion of her is overcome. If there were no other facts in the case than her marriage and his desertion, we think the presumption of her dependency could not be overcome by evidence, but is conclusive. *Greenleaf, Ev.* (16th Ed.) vol. 1, § 15; *Nelson's Case*, 217 Mass. 467, 470, 105 N. E. 357, Ann. Cas. 1915C, 862. The fact of whether she was or not actually a member of his family or dependent upon him for support would then be immaterial.

Another fact, however, appears in this case, which we think takes Mabel St. O. Scott out of the class conclusively presumed to be dependent and places her in the class that requires proof, and that is her act of adultery after being deserted by her husband. Her counsel do not deny that by that act she would be precluded from obtaining a divorce on the ground of desertion. We think the word "desertion" as used in this connection has its usual meaning when used in connection with marital relations. Desertion as a ground for divorce must continue up to the time of filing the libel, and involves not only the wilful abandonment without just cause, or the consent of the other party, but also the continued refusal to return without justification. If the deserted party at any time furnishes just cause for the one deserting refusing to return, or by his or her acts consents to the separation, desertion as a wilful and unjustifiable abandonment of one party by the other and as a ground of divorce ceases. *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474; *Whippen v. Whippen*, 147 Mass. 294, 17 N. E. 644. Without a conclusive presumption in her favor, Mabel St. O. Scott, though she was one of the deceased's next of kin, or even if within the meaning of the act was still a member of his family, has no standing in this case, as it is admitted that she was not dependent upon him in fact. *Nelson's Case*, 217 Mass. 467, 105 N. E. 357, Ann. Cas. 1915C, 862; *Newman's Case*, 222 Mass. 568, 111 N. E. 359, L. R. A. 1916C, 1145; *Pierro's Case*, 223 Mass. 378, 111 N. E. 957; *Veber's Case*, 224 Mass. 86, 112 N. E. 485.

It is not necessary to decide whether the illegitimate children of Harry Scott were his next of kin, since, in this case, the only ground upon which it could be claimed that they were his next of kin would be because

they had become his heirs under section 3, c. 80, R. S., by being adopted into his family. *Morton v. Morton*, 62 Neb. 420, 87 N. W. 182. If they were members of his family at the time of his death, for that reason alone, being wholly dependent upon him in fact, they would be entitled to the benefits of the act.

[3] We do not think that illegitimate children come within the class defined in paragraph (c) of subdivision 8 of section 1 of chapter 50, R. S., and so are conclusively presumed to be dependents of a deceased parent. Notwithstanding the rule of liberal construction expressly enjoined upon those interpreting the act, the application of the familiar rule of construction, "*Expressio unius est exclusio alterius*," seems to us upon reason and authority to be proper in this instance. *Lyon v. Lyon*, 88 Me. 395, 34 Atl. 180; *Hall v. Cressey*, 92 Me. 514, 516, 43 Atl. 118; *Bell v. Terry & Tench Co.*, 177 App. Div. 123, 163 N. Y. Supp. 733.

[4] The determining factor in this case is: Were these illegitimate children members of the family of Harry Scott at the time of his death? We must accept the finding of the chairman of the commission upon this question as to the fact of their living in that relationship; the only question open for this court is whether they may lawfully be considered members of his family within the meaning of the statute. The word "family" is one of elastic and somewhat varied meaning. Its meaning in any particular statute is a question of intent and must be determined largely by the purpose of the act and the connection in which it is used; while, as used in wills and expressing relationship, it has a broader meaning. *Jacobs v. Prescott*, 102 Me. 63, 65 Atl. 761. A common definition of the word in acts granting benefits to members of a "family" is "a collective body of persons who live in one house under a head or manager who has a legal or moral duty to support the members thereof." *Fox v. Waterloo Nat. Bank*, 126 Iowa, 481, 102 N. W. 424; *Sheehy v. Scott*, 128 Iowa, 551, 553, 104 N. W. 1139, 4 L. R. A. (N. S.) 385; *Holnback v. Wilson*, 159 Ill. 148, 42 N. E. 169; *Wike Bros. v. Garner*, 179 Ill. 257, 259, 53 N. E. 613, 70 Am. St. Rep. 102; *Cowden's Case*, 225 Mass. 66, 67, 113 N. E. 1036; *Robbins v. Railway Co.*, 100 Me. 496, 506, 62 Atl. 136, 1 L. R. A. (N. S.) 963. There appears to be no question from the statement of facts but that Harry Scott, Rachel S. Scott, and their children were living together in one household of which Harry Scott was the head and manager supporting them. But it is urged, and we think the point is well taken, that they must not be violating any law by so doing. *Gordon v. Stewart*, 4 Neb. (Unof.) 852, 96 N. W. 624. The violation of law in this case, however, only applies to Harry Scott and Rachel S. Scott, as was recognized in the case last cited; and it was held in *Bell v. Keach*,

80 Ky. 42, 45, *Rutherford v. Mothershead*, 42 Tex. Civ. App. 360, 92 S. W. 1021, *Lane v. Phillips*, 69 Tex. 240, 6 S. W. 610, 5 Am. St. Rep. 41, and *Roberts v. Whaley*, 192 Mich. 183, 158 N. W. 209, L. R. A. 1918A, 189, that there being a natural and moral duty on the part of the father to support his illegitimate children, even though at the time he was living in adultery with the mother, and had a wife living apart, the father and the illegitimate children constitute a household or family entitled to receive the benefits of a Homestead Act, and the illegitimate children were held to be dependents in case of the father's death under the Workmen's Compensation Act of Michigan (Acts Extra Sess. 1912, No. 10) in the cases above cited.

The common law was very harsh in its attitude toward the offspring of unlawful unions. Nearly, if not all, the states, however, have relaxed the rigor of the common-law rule, especially with reference to the rights of the illegitimate child in the property of his or her parents at their death, and, following the more liberal spirit of the civil and canon law, have enacted statutes permitting illegitimate children when the parents intermarry, or when they are publicly acknowledged by the father, to inherit equally from the father and mother and their collateral kindred. Section 8, c. 80, R. S. The natural and moral duty of the father to support and maintain them is generally recognized. Kent, *Comp.* vol. 2, pp. 212-214; *Schouler's Dom. Rel.* § 279; chapter 102, R. S. Harry Scott was violating no law in fulfilling these natural and moral obligations of caring for and supporting his illegitimate children. The law condemns his acts so far as his relations with Rachel Somers were concerned; but, having brought these children into the world, it was his duty to care for them. They are not to blame for their conditions, nor their manner of coming into existence, and, having been recognized by him as his children, the law regards it as his duty to support them, and, having assumed that obligation and maintained them in his household, we think they became members of his family and dependents within the meaning of the Workmen's Compensation Act of this state. Rev. St. c. 50, §§ 1-48.

The Michigan case above cited was decided upon this ground. The father in that case had a wife in an asylum for the insane, by whom he had one daughter who was living apart from him, and to whom he contributed nothing toward her support. He formed an illicit union with his housekeeper, by whom he had two children. The court held, there being no provision in the Michigan statute of conclusive dependency on the part of the wife as in the Maine statute, that the wife was not a dependent, she being supported by the state, that the daughter of the lawful

wedlock was not a dependent, inasmuch as he was contributing nothing toward her support. The mistress had, of course, no standing in law and apparently made no claim, but it was held that inasmuch as he had cared for and supported the illegitimate children in his household, and it was his legal and moral duty to support them, that they had a right to expect a continuance of that support had he lived, and that they were therefore members of his family and dependents within the meaning of the Michigan statute.

The case of *Bell v. Terry & Tench Co.*, 177 App. Div. 123, 163 N. Y. Supp. 733, cited by counsel for Mabel St. C. Scott, is not in point contra. The New York statute does not provide for the payment of the death benefits to the dependents and then define dependents as many statutes of this nature do, but stipulates that it shall be paid to the wife with additional compensation to children, if any, under 18 years of age. The court there held that the word "children," which the statute expressly provided included posthumous children and children legally adopted, by the familiar rule of construction above referred to, excluded all illegitimate children. We have already applied the same doctrine to the Maine statute, so far as it is applicable to this case.

[5, 6] It is true that the rights of these children of Harry Scott and Rachel S. Scott are purely statutory, and, unless they can be fairly said to come under its provisions, they cannot take. It is a well-recognized rule of construction of acts of this kind, however, and expressly enjoined upon those whose duty it is to administer this statute, that it shall be construed liberally with a view to carrying out its general purpose, and not strictly as other statutes in derogation of common-law rights usually are. Section 87, c. 50, R. S.; *Simmon's Case*, 117 Me. 175, 177, 103 Atl. 68. We so construe it. The general purpose of this act undoubtedly is to transfer the burdens resulting from industrial accidents, regardless of who may be at fault, from the individual to the industry and finally distribute it upon society as a whole, by compelling the industry, in which the accident occurs, through the employer, to contribute to the support of those who were actually and lawfully dependent upon the deceased for their sustenance during his lifetime. To transfer it in this case from the deceased upon whom these children were actually dependent in his lifetime and who had lawfully assumed the burden, to this mother, even though she had violated the social canons and the law of the land in producing these offspring, or upon the town in which they may have a pauper residence, is not in accord with the general purpose of this act.

Appeals dismissed with one bill of costs to appellee.

Decree of sitting justice affirmed.

(622 Pa. 4)

WALSKY v. H. O. FRICK COKE CO.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. MASTER AND SERVANT ¶278(10)—PERSONAL INJURIES—NEGLIGENCE—EQUIPMENT.

In action for injury to minor servant of a coal mining company when a train parted, evidence *held* not to show defendant's alleged negligence in not furnishing plaintiff with reasonably safe cars and appliances.

2. MASTER AND SERVANT ¶278(20)—NEGLIGENCE—INSTRUCTION TO MINOR SERVANT—EVIDENCE.

In action for injury to minor servant of coal mining company when a train of cars parted, evidence *held* not to show defendant's alleged negligence in not giving proper instructions as to getting on and off of moving trains.

3. APPEAL AND ERROR ¶172(2) — MASTER AND SERVANT ¶258(19)—MOTION TO STRIKE NONSUIT — NEW THEORY OF CASE — PLEADING.

Plaintiff could not successfully contend, in support of motion to strike nonsuit, that defendant was negligent in failing to instruct him to keep off of a runaway trip in a coal mine, where such negligence was not alleged in the statement, and such contention had not been previously made.

Appeal from Court of Common Pleas, Fayette County.

Trespass by John Walsky, for himself as father, guardian, and next friend of Arthur Walsky, a minor, against the H. O. Frick Coke Company, to recover damages for personal injuries. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. *Affirmed.*

The facts appear from the following opinion in the common pleas of Van Swearingen, P. J., sur plaintiffs' motion to take off nonsuit:

This action was for the recovery of damages for personal injuries sustained by a 17 year old boy in a coal mine of the defendant company. The trial resulted in the entry of a compulsory nonsuit. There is before the court now a motion to strike off the nonsuit, and also a motion for a new trial. The motion for a new trial at this stage of the case must be considered merely as going to the same point as the motion to strike off the nonsuit.

In the statement of claim it is alleged that at the time of the grievances complained of Arthur Walsky was employed as a trip rider in the mines of the defendant company at Davidson, and that in the course of his employment it became his duty to use certain cars, equipment, and appliances belonging to and in the possession and control of and furnished by the defendant. The material parts of the statement of claim were as follows:

"That it became and was the duty of the said plaintiff, Arthur Walsky, to set and to remove certain sprags in the wheels of said cars in said mine, and that after he had removed said sprags it became and was the duty of the said Arthur Walsky to take his position on one of the cars of said trip, and that after removing said sprags it became necessary and was the duty of him, the said Arthur Walsky, to board said cars or trip while same were in motion, whereby it then and there became and was the duty of the said defendant to use, and to furnish to the said Arthur Walsky to be used, safe, secure, and proper coal cars, appliances, and connections, and to see that the same and all parts thereof were in good,

safe, working condition, and to use due and proper care in and about the premises. That it was also the duty of the said defendant company to give to the said plaintiff sufficient and proper instructions concerning his duties and concerning the nature of his employment. That it further became and was the duty of the said defendant company to see that the coal cars were not loaded beyond their proper capacity, and that said cars were properly loaded. Yet the said defendant company, not regarding its duties, did not use due and proper care in and about the premises, and did not furnish to the said Arthur Walsky to be used safe, secure, and suitable cars, equipment, and appliances, and did not give to the said Arthur Walsky sufficient and proper instructions concerning his duties under said employment, but, on the contrary, wholly neglected so to do, and negligently and carelessly furnished him, the said Arthur Walsky, with such unsafe, unsecure, and improper coal cars, connections, and appliances that the said trip, by reason of said insecure, unsafe, and improper connections, parted unknown to plaintiff, and that by reason thereof, and by reason of the failure of said defendant company to instruct the said Arthur Walsky as to his duties under said employment, and by reason of the failure of said company to see that said cars were loaded in a proper manner, on September 29, 1914, while attempting with due care to board said trip and assume his position on said car, he was thrown under the wheels of one of said cars," receiving the injuries of which complaint is made.

[1, 2] At the trial no evidence was offered in support of the plaintiff's allegation that it was his duty to sprag the wheels of the cars, or showing that he was in any way engaged in spragging the wheels at the time he was injured. Neither was there any evidence of any improper loading of the cars. The only allegations of negligence attempted to be supported at the trial were (1) that the defendant did not furnish the plaintiff with reasonably safe cars, connections and appliances, and (2) did not give to the plaintiff proper instructions relative to getting on and off moving trips; and in both of these respects the plaintiff failed in his proof. There was evidence that a trip of 13 cars parted between the seventh and eighth cars, and that the 7 cars ran away, downgrade; but there was no evidence of any defects in the connections between the cars. On the contrary, the testimony on behalf of the plaintiff was all to the effect that the hitchings, clevises, and pins connecting the cars together were all in good condition, and the cause of the disconnection of the cars remained entirely a matter of conjecture. When the seven cars started running away down the track, Walsky was on the rear of the front car. He set the brake on the rear of that car, and stepped off the trip, and attempted to get on again between the second and third cars, for the purpose of setting the brake on the rear of the second car, but fell, or was knocked down, and injured. At the time of the accident Walsky had been engaged in that particular work only a few days, and he had received no special instructions when he began as to his duties or the manner of avoiding dangers. The evidence showed that he had worked in that mine for a couple of years prior to the accident, and was accustomed to getting on and off of moving cars. There was evidence that it was safer to get on the rear end of a moving car than on the front end, even of cars connected together in a trip. The brakes were on the rear of the cars. And while the evidence relative to Walsky's attempt to get on the trip between the second and third cars was not as specific as it might have been, and all the evidence there was indicated that his attempt was to get on the rear of the second car, he alleged in his statement that he was ex-

the defendant. The defendant was not shown to have been negligent in any respect, and the compulsory nonsuit followed.

[3] At the argument to strike off nonsuit, counsel for the plaintiff contended that the negligence of the defendant was not in failing to give the plaintiff instructions as to how to get on and off of moving cars, but in failing to instruct him to keep off of moving cars, but in failing to instruct him to keep off of a runaway trip. In his brief, counsel for plaintiff says: "When the compulsory nonsuit was entered, great stress was laid by counsel for the defendant on the failure of the plaintiff to prove the manner in which the plaintiff was attempting to board the trip at the time he was injured. There is nothing in that contention. If the plaintiff was injured while trying to board a runaway trip, what difference does it make how he attempted to get on. The negligence of the company lies in the failure to instruct him to keep off." But that is not the negligence alleged in the plaintiff's statement of claim, and which the defendant was required to meet at the trial. It will be noticed that the plaintiff in his statement of claim alleged that "it became necessary and was the duty of him, the said Arthur Walsky, to board said cars or trip while same was in motion" and that the defendant "did not give to the said Arthur Walsky sufficient and proper instructions concerning his duties under said employment, but, on the contrary, wholly neglected so to do." The theory on which the case was tried was that the negligence of the defendant was in not giving the plaintiff proper instructions relative to getting on and off of moving trips, and that was the negligence alleged in plaintiff's statement of claim. At no time until the argument on the motion to strike off the nonsuit was the suggestion made of negligence on the part of the defendant in not instructing the defendant to keep off of runaway trips. To strike off the nonsuit and send the case to another trial on that ground would be to substitute another and different cause of action.

On the trial a compulsory nonsuit was entered, which the court subsequently refused to take off. Plaintiff appealed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

H. S. Dumbauld, of Uniontown, for appellant. W. J. Sturgis and S. J. Morrow, both of Uniontown, for appellee.

PER CURIAM. This judgment is affirmed, on the opinion of the court below, refusing to strike off the nonsuit and denying the motion for a new trial.

(262 Pa. 27)

VANDERSLOOT v. PENNSYLVANIA WATER & POWER CO.

(Supreme Court of Pennsylvania. July 17, 1918.)

EQUITY §36—SUIT FOR REMOVAL OF DAM—LOCATION IN DIFFERENT COUNTIES.

Bill in equity to require removal of part of defendant's dam was properly dismissed, though prayers were so drafted as to ask a decree pertaining to construction of dam only in county of the venue, where such orders would necessarily affect the entire dam, the larger part of which was outside such county.

Bill in equity by John Edward Vandersloot against the Pennsylvania Water & Power Company for an injunction to require the removal of flashboards on part of defendant's dam west of the line dividing York and Lancaster counties, and for other relief. From a decree dismissing the bill, plaintiff appeals. Appeal dismissed.

See, also, 259 Pa. 99, 102 Atl. 422.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

Henry C. Niles, Michael S. Niles, Charles A. May, and George E. Neff, all of York, for appellant. W. F. Bay Stewart, of York, John E. Malone, of Lancaster, and Frederick B. Gerber, of York, for appellee.

PER CURIAM. This appeal is dismissed, at the costs of the appellant, on the following from the opinion of the learned court below making absolute the rule to set aside the order of service and the service of the bill:

"A careful examination of the amended bill, and the prayers based thereon, leads to the conclusion that the present contention is controlled by the ruling of the Supreme Court. *Vandersloot v. Pa. W. & P. Co.*, 259 Pa. 104, 102 Atl. 422. The prayers are so drafted that the court is asked to make such orders and decrees as would only pertain to the physical construction of the dam which exists in York county, yet it is quite obvious that any such order or decree would necessarily affect the entire dam of the defendant, the largest portion of which is outside the jurisdiction of the court."

(261 Pa. 540)

In re SEIDMAN'S ESTATE. Appeal of JOSEPH WILD & SON. Appeal of TROR-LICHT-DUNCKER CARPET CO.

(Supreme Court of Pennsylvania. June 8, 1918.)

1. APPEAL AND ERROR §275 — EXCEPTIONS IN LOWER COURT—RULINGS—FINDINGS.

Findings of an auditing judge can be reviewed only on assignments which show exceptions taken in, and acted upon by, the court below.

2. APPEAL AND ERROR §1017—FINDINGS OF AUDITING JUDGE—REVIEW.

Findings of auditing judge, excepted to in court below, will not be disturbed, unless a review shows palpable error.

3. APPEAL AND ERROR §853 — RULING IN LOWER COURT—CONCLUSIVENESS.

Where the auditing judge, on exceptions to adjudication in an estate, refused to find that between an administrator's sale and the buyer's sale to a third party merchandise of considerable value had been disposed of by the first buyer, and where no exception was taken in court below, the ruling below would be treated as conclusive on appeal.

4. EXECUTORS AND ADMINISTRATORS §91 — TRUSTS §179—LIABILITY—FRAUD.

Ordinarily trustees, administrators, and like fiduciaries are not liable beyond what they actually receive, except in cases of fraud or gross negligence.

**5. EXECUTORS AND ADMINISTRATORS — 391 —
ADMINISTRATOR'S SALE—SURCHARGE.**

Where administrator failed to exercise common care and caution in selling decedent's property, he was not liable to be surcharged for more than full value of property on day of sale, in absence of gross negligence or fraud.

**6. EXECUTORS AND ADMINISTRATORS — 366 —
SALE BY ADMINISTRATOR—PRICE.**

Where an admitted rise in the market might well explain the larger amount subsequently realized from merchandise sold by administrator, the latter price would not demonstrate the question of value at the time of the administrator's sale.

**7. EXECUTORS AND ADMINISTRATORS — 366 —
SALE BY ADMINISTRATOR — APPRAISAL
VALUE.**

The appraisal value is not conclusive in respect to the price obtained on an administrator's sale.

Appeal from Orphans' Court, Lackawanna County.

Exceptions by Joseph Wild & Son to adjudication in the estate of Moses L. Seidman, deceased. From a decree dismissing the exceptions exceptant and the Trorlicht-Dunker Carpet Company, a creditor, appeals. Affirmed.

Argued before BROWN, O. J., and STEWART, MOSCHZISKER, FRAZER, and WALLING, JJ.

R. L. Levy, W. S. Diehl, O. A. Battenberg, A. V. Bower, Ralph Rymer, and Clarence Bahlentine, all of Scranton, for appellants. Morgan S. Kaufman and O'Brien & Kelly, all of Scranton, for appellee.

MOSCHZISKER, J. M. L. Seidman, who conducted a carpet and rug business in Scranton, died intestate January 3, 1916, and letters of administration were granted to his son, Wolf Seidman. Duly appointed appraisers valued the stock in decedent's store at \$9,895. On January 24, 1916, after the due posting of printed bills, the administrator sold these assets in bulk, at public venue, to his brother-in-law, Anthony Shiff, for \$3,600 cash. The latter entered into a partnership with B. J. Smith, a son-in-law of the administrator, and in March, 1916, this firm disposed of the commodities in question to the Scranton Dry Goods Company for \$10,645.27.

The administrator's first and final account was filed March 12, 1917, and, among other creditors, Joseph Wild & Son excepted to the allowance of \$6,295, claimed therein as the difference between the appraised value of decedent's merchandise and the actual amount realized therefrom by accountant. The exceptant contended that these goods were worth at least \$20,000; but, after taking evidence pro and con, the court below found as a fact that, upon the date of the public sale thereof, January 24, 1916, their value was \$8,000. The court further found that "Wolf Seidman, in the administration of the estate of the de-

cedent, did not exercise common skill, * * * prudence, and * * * caution." Upon these findings, accountant was surcharged \$4,400, the difference between the real value found by the auditing judge and the price realized at the administrator's sale, whereupon exceptant appealed to this court.

Appellant contends (1) that accountant should have been found guilty of fraudulent conduct in connection with the disposal of decedent's merchandise, and charged with the full amount received therefrom up to the time of the purchase by the Scranton Dry Goods Company; (2) that, prior to the last-mentioned purchase, Shiff & Smith had sold goods of considerable value from this stock of merchandise; (3) that, even though accountant's conduct were not fraudulent, at the least he should be charged with the price decedent's goods would have realized, had common skill, prudence, and caution been exercised in the disposal thereof—i. e., the figure which they afterwards brought when sold to the Scranton Dry Goods Company by Shiff & Smith, in March, 1916; (4) that, in any event, the auditing judge put too low a value upon the commodities in question; (5) finally, it is suggested that under no circumstances ought such value to have been placed at less than the amount of the appraisalment. We shall dispose of these questions in the order stated.

[1, 2] While the record before us shows circumstances connected with the administration of decedent's estate which lay Wolf Seidman open to grave suspicion, and the evidence relied upon by appellant tends to prove other facts, unnecessary now to mention, which, if we were exercising original jurisdiction, might lead us to affirm certain of the latter's contentions, yet, notwithstanding these sinister appearances, the auditing judge, who saw and heard the witnesses, not only refused to convict the administrator of fraudulent conduct, but found expressly to the contrary, and these findings were not excepted to in the court below. The auditing judge also made a series of subordinate findings dealing with details of the transactions now in controversy, against the contentions of appellant, which also were not excepted to. In other words, despite requests therefor, this record contains no finding that the administrator either conspired with or was improperly interested in the firm of Shiff & Smith, or that he was guilty of any fraud, in connection with the original formation or subsequent conduct of that firm, relating to the sales of the merchandise here in controversy; and, as indicated above, neither the refusal of these requests nor the findings to the contrary appear to have been excepted to below. The present case, like all others, is subject to the well-established rule that findings can be reviewed only on assignments which show exceptions taken in, and acted

upon by, the court below; and even then such findings will not be disturbed, unless the review demonstrates palpable error. So far as appellant's charges of fraud are concerned, the assignments at bar fall when tested by these rules.

[3] 2. Although requested so to do, the auditing judge refused to find that, between the purchase by Shift & Smith and their sale to the Scranton Dry Goods Company, merchandise of considerable value, naming the amount thereof, had been disposed of by the former. No exception having been taken in the court below, we must treat this as conclusive upon that point.

[4, 5] 3. As to the penalty for lack of due care and discretion, it appears there was a rise in the carpet and rug market between the date of the administrator's sale of decedent's merchandise and the subsequent sale of these goods by the purchasers thereof. Albeit there is force in appellant's contention that, in the exercise of common skill, prudence, and caution, the administrator ought to have held the goods, so as to take advantage of this rise, yet we cannot say reversible error was committed when the court below failed to make a surcharge upon that theory. The auditing judge notes, as a reason for the early sale, that it relieved decedent's estate from the obligation to pay rent, it being made "part of the terms of the sale * * * that the purchasers would have to pay the rent"; and we find no request upon the record that accountant be found guilty of negligence or surcharged because he sold the goods at too early a date. Ordinarily, trustees, administrators, and like fiduciaries are not liable beyond what they actually receive, except in cases of fraud or gross carelessness (Calhoun's Estate, 6 Watts, 185; Fahnestock's Appeal, 104 Pa. 46; Semple's Estate, 189 Pa. 385, 390, 42 Atl. 28; Skeer's Estate, 236 Pa. 404, 410, 84 Atl. 787, 42 L. R. A. [N. S.] 170), and here the findings negative such misconduct; but, on the peculiar facts at bar, because accountant failed to exercise common care, prudence, and caution in disposing of decedent's property, the court below surcharges him with what it finds to be the full value thereof on the day of the administrator's sale. In the absence of a finding of gross negligence in selling when accountant did, or of fraudulent participation by him in the subsequent sale of the property in question, appellant cannot properly complain of the amount of the surcharge.

[6] 4. On the subject of valuation, after reading the testimony, we are unable to agree with appellant's contention that there is no evidence to justify the value found by the auditing judge. Furthermore, the admitted rise in the market may well explain the larger amount subsequently realized from the same merchandise, and hence this later

price by no means either demonstrates or sheds controlling light upon the question of value at the time of the administrator's sale.

[7] 5. Finally, the appraisal value is not conclusive (Reese's Appeal, 116 Pa. 272, 274, 9 Atl. 315; Semple's Estate, 189 Pa. 385, 393, 42 Atl. 28); therefore, on the findings and evidence in this case, we cannot say the court below should have adopted it, rather than the figures which the auditing judge determined upon as the amount, or price, which should have been secured by the exercise of proper diligence on the part of the administrator.

An appeal has been filed by the Trorlicht-Duncker Carpet Company, another creditor; but there is a stipulation of record that the judgment here entered shall apply to this other case, and it is accordingly so ordered.

We find no reversible error presented by the assignments. They are all overruled, and the decree of the court below is affirmed, at the cost of appellant.

(362 Pa. 1)

GURSKI v. SUSQUEHANNA COAL CO.

(Supreme Court of Pennsylvania. June 11, 1918.)

1. MASTER AND SERVANT \Rightarrow 375(2)—WORKMEN'S COMPENSATION ACT—ACCIDENT—"COURSE OF EMPLOYMENT."

Where a miner, going to get tools in a part of the mine where he was told not to go, died from noxious gases, he died as the result of an accident occurring "in the course of his employment," within Workmen's Compensation Act, § 801.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. MASTER AND SERVANT \Rightarrow 416—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE.

Where a question arises as to whether an accident from which a workman dies occurred in the course of his employment, the findings of fact by the compensation referee should be so explicit as to state the full circumstances thereof.

3. MASTER AND SERVANT \Rightarrow 417(9)—WORKMEN'S COMPENSATION ACT—FINDINGS OF COMPENSATION BOARD.

Where the Workmen's Compensation Board finds facts additional to those stated by the referee, and their correctness is conceded, the Supreme Court may determine the issues upon the facts so found.

Appeal from Court of Common Pleas, Luzerne County.

Proceeding under Workmen's Compensation Act by Julia Gurski against the Susquehanna Coal Company. Finding of referee for claimant reversed by Workmen's Compensation Board, but affirmed upon appeal to common pleas court, and the employer appeals. Affirmed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

H. A. Gordon, and A. L. Williams, both of Wilkes-Barre, for appellant. Rush Trescott and Roger J. Dever, both of Wilkes-Barre, for appellee.

MOSCHZISKER, J. This is a case under the act of June 2, 1915 (P. L. 736). Plaintiff widow of Frank Gurski, claimed compensation for the death of her husband; the referee found in her favor; the Workmen's Compensation Board reversed; an appeal was taken to the common pleas of Luzerne county, which tribunal reversed the board and affirmed the referee; the defendant employer has appealed to this court.

On October 19, 1916, Frank Gurski, a contract miner in the employ of defendant company died from inhaling noxious gases, which had accumulated in a portion of the latter's mine. The part of the mine infected by these gases was closed off, marked "danger," and all workmen, including plaintiff's husband, were notified not to enter therein. Gurski, who worked in the gaseous section of the mine prior to the time it was closed off, had left "his mining machine, and possibly some other tools, there." About two months subsequent, when engaged in another part of the mine, "at a point 2,600 feet from his former place" of employment, "in the course of his work, he had occasion to use a mining machine, * * * and * * * expressed himself to his fellow workmen that he would go in for his tools to the former working place." On the morning of the accident, Gurski had been notified not to go into the fenced-off portion of the mine; but, "notwithstanding these positive directions and the danger marks on the door and fences, he and his helper went to the place where he had been working [previously], with the declared intention of getting his machine and other tools"; and he died as the result of so doing.

We have taken the above matter from the opinion of Commissioner Scott, of the Compensation Board, as did the court below; and, on the facts stated, it appears that plaintiff's husband met his death by reason of the harmful condition of his employer's premises, while on his way to fetch tools with which to work—in other words, while he was upon the premises of his employer and acting in furtherance of the latter's business.

[1] We agree with the learned court below that Gurski died from an accident which occurred in the course of his employment, within the meaning of the act of 1915, *supra*, and that, "though the orders, not to go into the blocked-off portion of the mine, may have been fully understood and appreciated by him [his departure therefrom] would be but a negligent act on his part"—which does not bar the present claim for compensation. Section 301, Act of 1915, *supra* (page 738);

Lane v. Horn & Hardart Baking Co., 261 Pa. 329, 104 Atl. 615.

[2, 3] In cases of this character, the referee should make his findings of fact so comprehensive and explicit as to disclose the full story of the accident. Here the referee's findings are too meager, and, since no hearing *de novo* was held by the Compensation Board, that body, strictly speaking, should not have found facts in addition to those stated by its subordinate officer, the referee (*McCauley v. Imperial Woolen Co.*, 261 Pa. 312, 104 Atl. 617); but this point was not urged in the court below and is not raised here. Moreover, it appears that all parties concede "the correctness of the statement of facts contained in the opinion of Commissioner Scott," and that "the facts of the case are not in dispute"; therefore we finally determine the issues involved upon such conceded facts.

The assignments of error are overruled, and the judgment is affirmed.

(262 Pa. 39)

WORST v. DE HAVEN et al.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. WILLS ¶461 — CONSTRUCTION — "Or"—"AND."

In the construction of wills, the court may read, "or" as if it were "and," and "and" as if it were "or," whenever it is absolutely necessary to carry out testator's expressed intent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, And; Or.]

2. WILLS ¶865(1) — CONSTRUCTION—INTENT—TACT.

A will giving an estate for life and over to four children, to share the rents and profits "during the lifetime of them or the survivors or survivor of them," and over to testator's grandchildren, their heirs, etc., carried the whole estate, so that there was no intestacy.

3. CONTRACTS ¶147(1)—EXPRESSED INTENT—IMPLIED INTENT.

In construing any writing, the expression of an intent, as to the particular thing under consideration, negatives the idea of an implied intent in regard thereto; the maxim "Expressum facit cessare tacitum" applying.

4. WILLS ¶547 — CONSTRUCTION—TRANSPPOSITION.

A will which, after giving a life estate to testator's wife, gave his realty to his four named children, to have the rents, etc., share and share alike "during the lifetime of them or the survivors or survivor of them," and over to grandchildren, and their heirs, etc., would be construed by transferring the quoted words to a place immediately after the names of such devisees, so as to make the survivorship apply to the rents for life.

5. WILLS ¶460 — CONSTRUCTION—TRANSPPOSITION OF WORDS OR SENTENCES.

In wills obscurely expressed the court may transpose a word or sentence to effectuate the testamentary purpose; the order in which the words are placed being immaterial, if a different arrangement will best answer the testator's apparent intent.

Appeal from Court of Common Pleas, Lancaster County.

Assumpsit by Le Roy Worst against Catharine E. De Haven and others to recover rents collected by defendants. From a judgment for defendants on an affidavit of defense in the nature of a demurrer, plaintiff appeals. Affirmed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

John E. Malone, of Lancaster, for appellant. Frank S. Groff and William H. Keltner, both of Lancaster, for appellees.

SIMPSON, J. By the will of Henry Worst, he gave all his residuary estate to his wife for life, and as to his real estate further provided as follows:

"Fifth. Upon the death of my said wife, I give and devise my real estate to my four children, to wit, Catharine E. De Haven, née Worst, S. Clayton Worst, Annie M. Worst and Harry L. Worst, to have and to hold the same and take and divide, share and share alike, the rents, issues and profits thereof during the lifetime of them or the survivors or survivor of them. And at the death of the survivors or survivor of them, I give and devise the same to my grandchildren, per stirpes, their heirs and assigns."

S. Clayton Worst, one of the sons, died February 20, 1910, leaving the plaintiff as his sole heir at law. Testator's widow died July 15, 1913. After her death the three surviving children collected and kept the rents of the real estate. This suit was brought by plaintiff against them to recover one-fourth of said rents, asserting his right thereto under the foregoing fifth paragraph of his grandfather's will. The defendants denied his right, raised that question as one of law under section 20 of the act of 14th of May, 1915 (P. L. 486), the court below decided in their favor and entered judgment accordingly, and this appeal was then taken.

[1] Plaintiff's claim is that as the gift is to the four children during their lifetime and the lifetime of the survivors and survivor of them, and as he is the sole heir of one of those children, that the gift of the income during such survivorship must inure to him. But the will does not so provide. The words are, "or the survivors or survivor of them," and not, "and the survivors or survivor of them." It is true that we may read "or" as if it were "and," and "and" as if it were "or," whenever it is absolutely necessary to carry out the expressed intent of the testator; but we are not at liberty so to do unless it is necessary. *Griffith v. Woodward*, 1 Yeates, 316; *Gilmor's Estate*, 154 Pa. 523, 28 Atl. 614, 35 Am. St. Rep. 855. In the present instance it is not.

If said paragraph of the will were to be literally construed according to the existing arrangement thereof, it would result in a manifest absurdity; for it would give to the three children first dying a share of the rents after they were dead. We must therefore

seek for a construction which will avoid that absurdity. Three possibilities exist:

[2, 3] 1. To decide that an intestacy arose as to the share of the rents which S. Clayton Worst would have received had he lived. We agree, however, with both parties to this litigation, that an intestacy does not result, for where, as here, the words of the will carry the whole estate, an intestacy will be held not to exist. *Reimer's Estate*, 159 Pa. 212, 28 Atl. 186; *Woodside's Estate*, 188 Pa. 45, 41 Atl. 475.

2. To decide that there was an implied gift to the heir of testator. This is plaintiff's claim. But manifestly testator did not intend to leave anything to implication; and to permit it here would result in an express antagonism to the last clause of the same paragraph of the will, which provides that the grandchildren's interest shall commence after the death of all testator's children. In construing any writing, the expression of an intent, as to the particular thing under consideration, negatives the idea of an implied intent in regard thereto. This is stated in the maxim "expressum facit cessare tacitum," which, as Broom points out (*Broom's Legal Maxims*, *651), "excludes any increase of an estate by implication, where there is an estate expressly limited by will."

[4] 3. This leaves open only the conclusion that the survivorship mentioned in the will applies to the gift of the rents for life. It is true that the words used might be better phrased to express the purpose, but a lack of clarity of expression will no more defeat a testator's intent than it does that of any other person. At most this will requires a rearranging of the language actually used, so as to transfer the words "during the lifetime of them or the survivors or survivor of them," to a place immediately after the words "Harry L. Worst," making the paragraph then read:

"At the death of my said wife, I give and devise my real estate to my four children, to wit, Catharine E. De Haven, née Worst, S. Clayton Worst, Annie M. Worst and Harry L. Worst, during the lifetime of them or the survivors or survivor of them, to have and to hold the same and take and divide, share and share alike, the rents, issues and profits thereof. And at the death of the survivors or survivor of them, I give and devise the same to my grandchildren, per stirpes, their heirs and assigns."

[5] From at least as early as *Roberjot v. Mazurie*, 14 Serg. & R. 42, to at least as late as *Eckert v. Penna. Trust Co.*, 212 Pa. 372, 61 Atl. 935, we have held that in wills obscurely expressed the court may transpose a word or a sentence in order to effectuate the testamentary purpose; the order in which the words are placed being immaterial, if a different arrangement will best answer the apparent intent of the testator. *Ferry's Appeal*, 102 Pa. 207. We think this is a case in which that course may be safely followed.

The assignment of error is overruled, and the judgment affirmed.

(283 Pa. 28)

CITY BANK OF YORK v. RIEKER.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. PLEDGES ⇨17 — COLLATERAL SECURITY—RECORD.

A creditor, accepting as collateral security the assignment of a judgment note or mortgage of a third party, should enter it of record within a reasonable time, if thereby it will become a lien upon realty, and revive it, from time to time, if necessary, even without any agreement thereon.

2. PLEDGES ⇨30(8) — COLLATERAL SECURITY—PROTEST.

If a creditor takes as collateral a note not due, he should protest it so as to hold the solvent indorsers, if any.

3. PLEDGES ⇨30(2)—COLLATERAL SECURITY—COLLECTION.

A creditor accepting an unmatured claim as collateral should attempt its collection within a reasonable time after maturity.

4. PLEDGES ⇨28 — COLLATERAL SECURITY—PROTECTION.

A creditor accepting collateral security, and who is negligent in respect to its protection, whereby a loss is suffered, must bear such loss.

5. PLEDGES ⇨29—MORTGAGE COLLATERAL—CONVERSION INTO OTHER SECURITY—NEGLIGENCE.

A creditor taking an assignment of an overdue mortgage lien as collateral which could not be disturbed, and which needed no reviving, was not negligent in refusing the debtor's request to convert it into some other kind of security, especially if that would entail considerable expense or a personal liability for taxes, etc.

Appeal from Court of Common Pleas, York County.

Assumpsit on a note by the City Bank of York against Amos E. Rieker. Verdict for defendant and judgment thereon, and plaintiff appeals. Reversed and judgment entered for plaintiff.

Argued before BROWN, C. J., and MOSCHIZISKE, FRAZER, WALLING, and SIMPSON, JJ.

Henry C. Niles and Donald H. Yost, both of York, for appellant. James G. Glessner and Samuel B. Meisenhelder, both of York, for appellee.

SIMPSON, J. Plaintiff sued upon two promissory notes for \$5,000 and \$4,500, respectively, given by the defendant to it. As collateral thereto plaintiff held certain stocks, and in addition two mortgages aggregating \$17,000 secured upon a property in the borough and county of Queens, N. Y. The mortgages were about four years overdue when assigned, and the property covered thereby was subject to two other mortgages, upon which \$20,750 was due, exclusive of interest, and to sewer and tax assessments aggregating nearly as much more, all of which were prior liens to the two collateral mortgages. Pending the trial the stocks were sold at a price satisfactory to defendant, leaving an admitted balance of \$6,763.91, with interest from February 6, 1918. The counterclaim

as to this balance was that the defendant had given plaintiff's cashier notice to foreclose said collateral mortgages, and had been told it was all right, but that no foreclosure had taken place; that at that time the real estate was of a value greater than all the claims against it, including the two collateral mortgages, but that, owing to the declaration of war with Germany, it had depreciated in value more than the balance of plaintiff's claim, and defendant therefore asked that the verdict should be in his favor with a certificate against the plaintiff in the sum of \$6,500. There was evidence that the bonds accompanying the mortgages had become valueless by the discharge of the obligor in bankruptcy, but no request was made that plaintiff should sell the mortgages themselves, no tender of money to cover the expenses of foreclosure and the prior liens on the property, and no allegation that the collateral mortgages had been discharged as liens upon the property by proceedings upon the prior incumbrances or otherwise. Plaintiff denied both the fact and legal effect of the above allegations of defendant, and requested binding instructions in its favor, which were refused, and the case was submitted to the jury, a verdict being rendered for the defendant without any certificate in his favor. A motion for judgment non obstante veredicto was made and dismissed, judgment entered on the verdict, and this appeal taken. The single point we have to decide is: On the evidence submitted at the trial, ought binding instructions to have been given for plaintiff?

Some very interesting questions are suggested by this record—questions regarding which this court has not always been wholly in accord with the courts of our sister states, or even with itself; but, as the issue here may be determined without reference to those questions, we prefer not to answer them until it is necessary so to do, after careful arguments thereof due to such necessity.

[1-4] We have held, and in so doing have gone as far as any court of which we have knowledge, that, in the absence of an agreement upon the subject, if a creditor accepts as collateral security an assignment of a judgment note or mortgage of a third party, he should enter it of record within a reasonable time, if thereby it will become a lien upon real estate, and under like circumstances should revive it from time to time, if necessary; that if a promissory note not yet matured is thus accepted he should protest it so as to hold solvent indorsers, if any; that if an unmatured claim is so assigned he should attempt its collection within a reasonable time after maturity; and that if he is supinely negligent in any of those matters, whereby loss is suffered, he and not his debtor must bear that loss. The reason for thus

over the thing assigned, whereby the debtor is prevented from protecting his property by such action as may be needed, the creditor should not be supinely negligent concerning the thing which it is his duty to reassign to the debtor when he pays his debt.

[8] But those requirements must not be stretched beyond their reason and spirit; and hence where, as here, the thing assigned has a lien which cannot be disturbed and needs no reviving, and is overdue when it was assigned, the creditor is not bound, with or without notice, and it is not negligence for him to refuse to convert into some other kind of security that which both parties agreed he should hold as collateral; especially if considerable expense may be required to convert it and to hold the new security, and he may become personally liable for accruing taxes on the property if he obtains title thereto. It is not to be overlooked that there is neither an express nor implied agreement that plaintiff should accept any other kind of security than that for which it bargained. Nor is there any agreement, express or implied, that it should accept the opinion or the fears of defendant regarding the security bargained for, or as an alternative abandon the collateral to the defendant; and this is especially true where, as here, the foreclosure would have been in the face of a falling market, due to a cause which time will cure. It is within the experience of the writer that, in the panic caused by cornering the stock of the Northern Pacific Railroad Company, such a rule as was applied by the court below would have caused great loss to money lenders, and would have bankrupted some of the oldest and most conservative mercantile establishments in the land, without benefiting either party to the contract of lending.

Be it so that plaintiff herein was bound to act in good faith and without supine negligence, it is none the less true that a refusal to act according to defendant's judgment or fears is not negligence of any kind. If bound to act whenever defendant required it, its bargain for a particular security might, without its consent, be broken as soon as made; its judgment would go for naught, and it might lose some or all of its claim, but could never receive more than its debt. Such a contention is too onesided to receive judicial sanction unless unavoidable. To allow one of the parties to the contract to thus change it without the consent of the other, either express or implied, would come perilously near violating the obligation of the contract, if it did not overstep the constitutional line of inhibition.

If, upon the facts appearing in this record, the defendant desired the collateral mortgages to be foreclosed, it was his right to

of the mortgages, or of satisfactory arrangements his desires could be no other right.

The conclusion that necessity for consideration was raised.

The judgment is reversed for the plaintiff's interest from February to be entered also on below and all future interest in said court.

FULTON FARMERS' ASSOCIATION v. BERGER

(Supreme Court of Pennsylvania)
1915

1. APPEAL AND ERROR COURT BELOW—EXCEPT

The lower court's decision of claim was sufficient, signed as error, will not be reversed.

2. PLEADING—§ 155— —SUFFICIENCY—STATUTE

Under Act May 14, 1915 (P. L. 484) § 1, an affidavit of defense, averments of the statement of the defendant.

3. PLEADING—§ 155— —SUFFICIENCY—STATUTE

In assumpsit by an agent for a balance of defendant of defense to be entered on May 14, 1915 (P. L. 484) § 1, defendant collected anything in statement, or averment, and make denial so clear as to entitle plaintiff to judgment, which there was no reason to doubt the issue on a following day.

4. PRINCIPAL AND AGENT REFUSAL TO PAY OVER TO COMMISSIONS.

The agent of an agent to pay over funds collected to commission thereon.

5. PLEADING—§ 350— PLEADINGS—RELIEF

Under Act May 14, 1915 (P. L. 484) § 1, plaintiff, upon a rule for a sufficient affidavit of defense entered for part of the balance.

6. APPEAL AND ERROR JUDGMENT—ASSIGNMENT VIEW.

Supreme Court need not court's action in giving judgment to trial on part of judgment entered for affidavit of defense, unless assigned as error.

Appeal from Court of Common Pleas, Lancaster County.

Assumpsit for commission. Farmers' Association against agent. Judgment for plaintiff. Resenting the amount, which the affidavit of defense, with leave to plaintiff.

trial for the balance of its claim, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MOSCHIZISKER, FRAZER, WALLING, and SIMPSON, JJ.

John E. Malone and Harnish & Harnish, all of Lancaster, for appellant. H. Frank Eshleman and B. F. Davis, both of Lancaster, for appellee.

SIMPSON, J. The statement of claim in this case, was supplemented by a bill of particulars requested by defendant. As thus supplemented, the statement was held to be sufficient by the court below, and no exception was taken to that ruling, and no error is here assigned in regard thereto.

Thereby plaintiff averred that defendant had been appointed treasurer of plaintiff during its organization as a corporation, which appointment was approved by the board of directors after incorporation; that as his compensation he was to receive 2 per centum of the moneys collected by him; that he kept a cashbook, a copy of which was attached, in which he entered some of the funds collected by him; that plaintiff claimed to recover the balance appearing thereby, certain other items specifically stated, but not appearing therein, and certain additional items, which it alleged defendant had expressly admitted to plaintiff's board of directors or officers was owing by him; and it denied in general terms the propriety of certain of the credits appearing in said cashbook. The items in the cashbook were upwards of 1,300 in number and varied in amount from 11 cents to \$1,459.91.

The affidavit of defense specifically denied that the defendant had made any admissions to plaintiff's board of directors or officers, and as to the other averments simply said:

"The statement of facts as set forth in paragraph — of statement is denied."

Plaintiff thereupon took a rule for judgment for want of a sufficient affidavit of defense, specifying the details in which the affidavit was alleged to be insufficient. The court below allowed defendant the credits appearing in the cashbook, refused judgment as to the sums which it was alleged he had admitted to plaintiff's board of directors or officers, but entered judgment as to the other items, with leave to plaintiff to proceed to trial for the residue. From that judgment this appeal is taken, the only specification of error being the entry of said judgment.

[1] Defendant now avers that the statement of claim is insufficient, because not a concise statement, as required by the act of assembly. He fails to draw the distinction between conciseness and brevity. In the nature of the case this statement could not be brief, but we need not consider that question further, as it was not raised by the affidavit of defense in the court below, and

no exception was taken to the ruling that the statement was sufficient.

[2, 3] Nor is defendant any happier in his contention that his bald denial of the averments of the several paragraphs of the statement of claim was sufficient. We agree with the court below that those averments are wholly insufficient, because of section 8 of the act of May 14, 1915 (P. L. 483), which provides that—

"It shall not be sufficient for a defendant in his affidavit of defense to deny generally the allegations of the statement of claim."

To make his denial effective, a defendant must deny that he collected anything from the party named in the statement, or aver how much he did collect from that party, and he must make that denial so clear and specific that plaintiff may forthwith obtain judgment for the amount as to which there is no real defense, and at the ensuing trial the court may know exactly what the issue is. That is the purpose of the above-quoted provision from the act of 1915, and that purpose will be enforced.

[4] Nor do we agree that defendant should have been allowed the 2 per cent. commissions on the moneys regarding which judgment is entered. He forgets that commissions are payable for faithful service only, and that this judgment conclusively determines that he has not been faithful in paying over this fund. Moreover, he does not claim any commissions in his affidavit of defense, or set up any counterclaim in regard thereto.

[5, 6] Lastly, defendant says that, as the rule was for judgment for want of a sufficient affidavit of defense, the court below was without jurisdiction to enter judgment for part of the claim with leave to proceed for the residue, and as to this he cites *Faux v. Fitler*, 223 Pa. 568, 72 Atl. 891, 132 Am. St. Rep. 742. We might dismiss this contention, because of the fact that the only assignment of error does not really raise this question, in that it does not specify error in giving plaintiff leave to proceed to trial for the balance of its claim; but, because the question suggested is an important one, we prefer to settle it now.

In *Faux v. Fitler*, supra, we did hold that a rule for judgment for want of a sufficient affidavit of defense was a rule for judgment for the whole claim, and upon it the court was without authority to enter judgment as upon a rule for judgment for a specified and designated portion of the claim. That decision was rendered in 1909, when the act of May 25, 1887 (P. L. 271), provided for the former rule, and the act of July 15, 1897 (P. L. 276), provided for the latter. Since then both those acts have been superseded by the act of May 14, 1915 (P. L. 486, § 17), which provides that—

"The plaintiff may take a rule for judgment for want of a sufficient affidavit of defense to the whole or any part of his claim, and the

court shall enter judgment or discharge the rule, as justice may require."

This act, which was intended to simplify proceedings, and to reach the real issue as speedily as possible, is to be liberally construed; especially where, as in this case, the particulars in which the affidavit is alleged to be erroneous, were specifically set forth on the record in connection with the rule. It often happens that counsel think that the whole affidavit is insufficient, and the court agrees thereto in part only. No reason appears why, under such circumstances, two rules should be required. The purpose of the act of 1915, as above specified, is opposed to such a construction, and hence, as the conclusion reached by the court below is such as "justice" does require:

The judgment is affirmed.

(363 Pa. 50)

PRICE v. WHELAN et al.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. EMINENT DOMAIN §317(1)—EFFECT OF CONDEMNATION—EXTINGUISHMENT OF EASEMENT.

Where a vendor stipulated to secure the vacation of a street or road located at one end of the property, and took steps to do so, pending which a railroad condemned the road and compensated the purchaser therefor, such condemnation extinguished the easement.

2. VENDOR AND PURCHASER §204—EXTINGUISHMENT OF EASEMENT—ACTION FOR PURCHASE PRICE.

Where vendor contracted to have vacated a street or road upon the property, pending which the price of the land included therein was deposited by purchaser with a stakeholder, upon the extinguishment of the easement for the road from any cause, such as its condemnation by railroad, with compensation to purchaser, vendor might recover the money so deposited.

3. EMINENT DOMAIN §320—CONDEMNATION BY RAILROAD—TITLE—COMPENSATION.

Where a railroad authorized to condemn land filed its bond in a proceeding, the title passed to it, subject to the owner's right of compensation.

4. EMINENT DOMAIN §318—PUBLIC USE—NEW USE.

Where land held for one public use is lawfully taken for another inconsistent public use, the former use is destroyed.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Edward Trotter Price, surviving trustee under the will of Thomas C. Price, deceased, against Patrick J. Whelan and another, for the balance of the purchase price of land. Finding by the court, trying the case without a jury, in favor of the plaintiff for \$3,118, judgment thereon, and defendants appeal. Affirmed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, and WALLING, JJ.

J. Lee Patton, of Philadelphia, for appellants. Wm. Findlay Brown, of Philadelphia, for appellee.

WALLING, J. This is an action of assumpsit for the balance of purchase money of land. In August, 1912, plaintiff sold defendants about 30 acres of land, located in the northeastern part of the city of Philadelphia; the western boundary of one piece thereof being the eastern line of the right of way of the Northern Pennsylvania Railroad Company. Within the bounds of the land, and adjoining the right of way, was a public road of the width of 32 feet, extending from Fisher avenue south for about 865 feet. By the agreement plaintiff was to secure the vacation of this street, pending which, the price of the land embraced therein, to wit, \$3,180, was deposited with a bank as stakeholder, and later paid into court, where this suit to determine its ownership was tried without a jury.

In 1854, a public highway known as the Bristol road, of the width of 33 feet, extended along the western boundary of what is the road here in question. At that time the land lying east of the center of the Bristol road, including that here in controversy, was owned by Joseph Price and his wife Elizabeth G. Price, plaintiff's predecessors in title. Then the railroad company took and occupied the Bristol road as right of way, and secured a conveyance from Mr. and Mrs. Price of their one-half part thereof for railroad purposes. To comply with the statute, it was necessary for the railroad company to reconstruct the public highway, so it was provided in said conveyance:

"That they, the said Joseph Price and wife, their heirs and assigns, shall and will throw out and leave open for public use as a road or common highway, in lieu of that part of said Bristol road or street occupied by the railroad as above stated, a strip of ground of the width of 32 feet, adjoining and along the eastern side or line of the said Bristol road or street, so far as it is laid down of the width aforesaid: * * * Provided that the said strip of ground so thrown out shall not at any time hereafter be used for railroad purposes without the grant or permission of the said Joseph Price and wife or of her heirs or assigns."

Then follows a stipulation for reversion of the land so thrown open and restoration of the Bristol road, should it cease to be used for railroad purposes. So far as appears the 32-foot strip of land so thrown open has since been used by the public. Following the conveyance to defendants, plaintiff took steps to secure its vacation, and, after some negotiations caused a petition on part of defendants for that purpose to be presented to the city authorities, to which an answer was filed. In March, 1914, while that proceeding was pending, the railroad company filed in court its petition and bond for the condemnation of a block of defendants' land embracing the 32-foot strip here in question; the record shows that the land so taken was for any and all uses and purposes of the railroad company. The viewers appointed in the latter proceeding awarded defendants \$9,532, as damages for such tak-

ing, from which both parties appealed and later compromised. The condemnation proceedings show said 82 feet as a public road. On the theory that it was extinguished by the taking for railroad purposes, plaintiff brought this suit. The trial court sustained that theory, made its findings, and entered judgment for plaintiff accordingly, from which defendant appealed. We find no error in the record.

[1-4] The railroad company was within its rights, and when the bond was filed the title passed as to all land embraced in the proceedings, including the bed of the public road, with the right to use the same for all railroad purposes. As between the parties the railroad acquired the street itself, and defendants the right to be compensated for it; especially as by the original agreement it was never to be used for railway purposes without the consent of the owner of the fee. By the taking the right to compensation vested in the defendants. *Underwood v. Penna., Monongahela & Southern R. R. Co.*, 255 Pa. 553, 99 Atl. 64. It is not what the railroad company has done with the property taken, but what it has the right to do with it; it may as against defendants cover the entire roadbed with tracks. That the public may require a reconstruction of the highway elsewhere is true, as it also is that a railroad cannot occupy a street without municipal consent, and perhaps not now, except by the consent of the Public Service Commission; but those questions are not material here, as we are dealing with private rights. A railroad company, having taken property under the right of eminent domain, cannot set up the lack of municipal consent to occupy it. Such company, by proper consent, may lay its track in a street and use the same conjointly with the public; but here the entire street and adjoining land were appropriated, with the right to use it all

for railroad purposes, which whenever exercised will exclude the public therefrom. Where land held for one public use is lawfully taken for and other inconsistent public use, the former is destroyed. Regardless of what is done with the land, defendants will have no right to additional compensation; as to them the land, including the easement, is gone. Their entire interest was divested, and for it they were or should have been compensated. A formal vacation of the street now would as to them be a vain thing. The public street having been destroyed by the condemnation proceedings, at least so far as the parties to this suit are concerned, plaintiff is entitled to the fund in question, for the extinguishment of the easement, no matter by whom or from what cause, inures to his benefit. On the basis of such extinguishment, his contract was fulfilled, and he is entitled to the balance of the purchase money irrespective of what defendants receive from the railroad company. Had that company taken the public road without making compensation to defendants, they could have maintained ejectment for the land embraced therein. *Phillips v. Dunkirk, etc., R. R. Co.*, 78 Pa. 177.

Neither plaintiff nor his predecessors in title received any compensation for the use of the 82-foot strip of land for railroad purposes, and taking it for that purpose was such a violation of the original agreement as to destroy the easement therein, as between the parties. Plaintiff's rights cannot be prejudiced by the recitals in the deed from defendants to the railroad company, made subsequent to the bringing of this suit.

As the case turns practically on the question whether the condemnation removed the easement of the public road, we do not consider it necessary to pass separately on the several assignments of error.

The judgment is affirmed.

(117 Me. 423)

TIBBETTS v. DR. D. P. ORDWAY PLASTER CO.

(Supreme Judicial Court of Maine. Nov. 9, 1918.)

1. PLEADING \S 225(2)—AMENDMENT—POWERS OF SINGLE JUSTICE.

Under Rev. St. c. 87, § 36, the presiding justice, when no exceptions are taken, has the same power as the law court alone formerly had to pass on demurrer and on the question whether plaintiff should be permitted to amend.

2. APPEAL AND ERROR \S 255—AMENDMENT OF PLEADINGS—NECESSITY OF EXCEPTIONS.

In the absence of exceptions taken to the justice's ruling sustaining demurrer and giving plaintiff leave to amend, his decision is final.

3. PLEADING \S 225(3)—AMENDMENT—TIME OF FILING AMENDMENT.

When a single justice sustains demurrer and grants leave to amend the declaration, the amendment must actually be filed in compliance with court rule No. 8 (70 Atl. xiii), requiring it to be filed by the middle of vacation after the term at which the order was made.

4. PLEADING \S 225(3)—AMENDMENT—TIME OF FILING AMENDMENT.

Where a single justice sustained demurrer and gave leave to file an amendment to the declaration, but plaintiff did not file the amendment by the middle of vacation after the term, in compliance with court rule No. 8 (70 Atl. xiii), and asked no extension, plaintiff was not entitled to file the amendment at a later time, notwithstanding defendant's objections, when the amendment was offered, were not based upon correct ground.

Exceptions from Supreme Judicial Court, Knox County, at Law.

Action by Raymond Tibbetts against the Dr. D. P. Ordway Plaster Company. On defendant's exceptions to the allowance of amendment to the declaration. Exceptions sustained.

Argued before CORNISH, C. J., and SPEAR, HANSON, DUNN, and MORRILL, JJ.

O. H. Emery, of Camden, for plaintiff. J. H. Montgomery, of Camden, for defendant.

CORNISH, C. J. On exceptions by defendant to the allowance of an amendment to the plaintiff's declaration. The writ in question was entered at the September term, 1917, of the Supreme Judicial Court for Knox county. At that term the defendant filed a general demurrer to the declaration. Hearing was had on this demurrer at the next or January term, 1918, the demurrer was sustained, and the plaintiff was given leave to amend; the docket entry being: "Demurrer sustained; plaintiff allowed to amend." No exceptions were taken by the plaintiff to this ruling. At the April term, following, the plaintiff filed an amendment which was allowed by the presiding justice. To this ruling the defendant excepts on two grounds: First, because no exceptions were taken to the ruling of the justice sustaining the demurrer at the January term, and no amendment was then offered and filed; and, second, because the amendment allowed at the April

term was wholly new and inconsistent with the declaration, introducing, not an amendment, but a new cause of action.

[1] It is necessary to consider only the first ground. This involves the construction of Rev. St. c. 87, § 36. So much of that section as pertains to the point under consideration reads as follows:

"A general demurrer to the declaration may be filed: * * * but the justice shall rule on it, and his ruling shall be final unless the party aggrieved excepts; and before exceptions are filed and allowed, he has the same power as the full court to allow the plaintiff to amend, or the defendant to plead anew. * * * If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer was filed."

The defendant's contention is that under this statute only the justice who hears and determines the demurrer can allow an amendment, and it is not within the power of a justice at a subsequent term so to do; that the amendment must be filed and allowed at the same term as the decision on the demurrer is rendered or not at all.

We do not think this is the true interpretation of the language of the statute, and the history of the legislation on this point is both interesting and illuminating.

The original act regulating proceedings on demurrer and permitting amendments, in order to mitigate the severity of common-law pleading, was chapter 211 of P. L. of 1856. This act contemplated that the decision on both points should be made by the law court, and if the leave to amend was granted it should be only upon the payment of the defendant's costs from the time of filing the demurrer until the decision of the law court thereon; the action in the meantime being continued on the nisi prius docket to await the determination of the higher court.

This was enlarged the next year by conferring upon the presiding justice the power to pass upon the demurrer, viz.:

"Whenever a demurrer shall be filed and joined, the presiding justice shall rule thereon, and the ruling shall be final, unless the party aggrieved shall except to such ruling." P. L. 1857, c. 55, § 8.

The provisions of these two statutes were incorporated in the revision of 1857 as chapter 82, § 19. But the power of granting leave to amend was still reserved to the law court. In 1859, however, this power was also conferred upon the presiding justice before exceptions were filed and allowed, viz.:

"In all cases of general demurrer to the declaration after the presiding judge shall rule on the demurrer, and before exception filed and allowed, he shall have the same power to allow the plaintiff to amend or the defendant to plead anew, that the full court has by section nineteen of the chapter to which this is additional." Pub. L. 1859, c. 73.

This act was additional to section 19 of chapter 82 of the R. S. of 1857, before noted.

Since this enactment the presiding justice, when no exceptions are taken, has the same

power as formerly the law court alone had, both to pass on the demurrer and on the question whether the plaintiff should be permitted to amend. Subsequent revisions retain this power. R. S. 1871, c. 82, § 19; Rev. St. 1883, c. 82, § 23; Rev. St. 1903, c. 84, § 35; Rev. St. 1918, c. 87, § 36.

[2] In the case at bar the presiding justice at the January term, 1918, sustained the demurrer and gave the plaintiff leave to amend. No exceptions to these rulings were taken. Therefore under the statute his ruling was final.

[3] The next question that arises is when the amendment itself should be filed, because there is a distinction between granting leave to amend and the allowing of the amendment itself. The former is an order permitting an act to be done; the latter is the doing of the act itself. The defendant claims it should have been filed at the January term; the plaintiff, that it could be filed at any subsequent term upon payment of costs subsequent to the filing of the demurrer. Neither contention is strictly accurate.

The time for filing the amendment when the matter is decided by the law court is regulated by statute. Prior to the passage of chapter 118 of P. L. 1915, it was required to be on the second day of the next term after the certificate of decision from the law court. *Rollins v. Cent. Me. Power Co.*, 112 Me. 175, 91 Atl. 837. Since the passage of that act the time for filing the same or for payment of costs may be enlarged by leave of court. If this statute is not complied with, judgment must be entered on the demurrer.

When the decision is made by the presiding justice, and no exceptions are taken, the statute is silent as to the time of filing the amendment; the language of section 36 being:

"If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer was filed."

But this omission is provided for by rule of court No. 8 (70 Atl. xiii), which has the force of statute and is as follows:

"When an action shall be continued with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, etc., if no time is expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office by the middle of the vacation after the term when the order is made; and in such case, the adverse party shall file his plea to the amended declaration * * * by the first day of the term to which the action is continued. If either party neglect to comply with this rule, all his prior pleadings shall be struck out and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown shall allow further time for filing such amendment or other pleadings."

This fixes the time of filing and the rights of the parties, and renders the procedure in case of a decision by the law court or by a single justice harmonious.

[4] In the case at bar the amendment was not filed by the middle of vacation, after the January term. The plaintiff neglected to comply with the rule, and by its terms judgment of nonsuit should have been entered after the expiration of the first day of the April term. No further time for filing was asked of the court. The mere filing of the amendment itself, after the prescribed time therefor had elapsed, cannot be regarded as a motion for extension of time, nor can the allowance of the amendment by the court be regarded as the granting of such a motion. These acts were without force. The rights of the parties had become fixed at the end of the first day of the April term (*Rollins v. Cent. Maine Power Co.*, 112 Me. 175, 91 Atl. 837), and the defendant has waived none of the advantage which he thereby gained. He protested against the allowance of the amendment, and followed his protest with exceptions. The ground of his exception may not be the strictly legal one, but his acquired rights have been neither surrendered nor forfeited. He was entitled under the statute and the rule of court to a judgment of nonsuit, and the allowance of the amendment at the April term under the facts of this case was reversible error.

Exceptions sustained.

(117 Me. 437)

HASWELL v. WALKER.

(Supreme Judicial Court of Maine. Nov. 9, 1918.)

1. WITNESSES \S 81—DISQUALIFICATION OF PARTY—ABROGATION OF RULE.

At common law, a party to an action was not a competent witness at the trial; a rule abrogated by statute in England, Canada, and all the United States, and in Maine by Pub. Laws 1856, c. 266.

2. WITNESSES \S 138—COMPETENCY OF PARTIES—ACTION AGAINST EXECUTOR.

Rule of Pub. Laws 1856, c. 266, that parties are competent witnesses, is subject to exception that common-law rule of incompetency of parties to appear as witnesses obtains in actions by or against executors and administrators.

3. WITNESSES \S 126—COMPETENCY OF PARTIES—ACTIONS AGAINST ADMINISTRATORS—STATUTES.

Pub. Laws 1913, c. 137 (Rev. St. c. 87, § 127), providing that, in all actions on itemized account annexed to writ, affidavit of plaintiff may be used to make prima facie case, did not repeal Pub. Laws 1856, c. 266, excepting from its general abrogation of common-law rule, that parties are not competent as witnesses, parties in actions by or against executors and administrators.

4. STATUTES \S 224—CONSTRUCTION.

In the interpretation of statutes, the whole body of previous and contemporaneous legislation should be considered.

5. EXECUTORS AND ADMINISTRATORS \S 221(6)—ACTION AGAINST ADMINISTRATOR—PAYMENT—SUFFICIENCY OF EVIDENCE.

In an action against an administrator for money paid over by plaintiff at decedent's request, evidence *legit* insufficient to prove that decedent requested plaintiff to pay the money,

and that it was paid in accordance with such request.

Exceptions from Supreme Judicial Court, Waldo County, at Law.

Action by Rhodnah L. Haswell against Charles L. Walker, administrator. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Argued before SPEAR, PHILBROOK, DUNN, and MORRILL, JJ.

H. C. Buzzell, of Belfast, for plaintiff. R. F. Dunton and Arthur Ritchie, both of Belfast, for defendant.

PHILBROOK, J. Two exceptions are presented for examination: First, the exclusion of an affidavit, made and offered by the plaintiff under the provisions of Rev. St. c. 87, § 127; second, an order of nonsuit at the close of plaintiff's evidence.

The section of the statute just referred to provides in part that—

"In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit, with all proper credits given, and that the prices or items charged therein are just and reasonable, shall be prima facie evidence of the truth of the statement made in such affidavit, and shall entitle the plaintiff to the judgment, unless rebutted by competent and sufficient evidence."

The remaining words of the statute relate to the method of executing the affidavit in cases where the plaintiff is a corporation and are not involved in this case.

[1-4] The defendant urges several reasons why this affidavit was properly excluded, but it will be necessary to consider only one of those reasons. It is familiar law, too well established to need the citation of authorities, that at common law a party to an action was not a competent witness at the trial thereof. But this common law rule of incompetency, arising from interest, has been abrogated by statute in England, Canada, and in every one of the United States. This abrogation was adopted in Maine more than three score years ago by chapter 266, P. L. 1856. But the statutory rule that parties are competent witnesses is subject to an exception which is almost as general as the rule itself, namely, that the common-law rule of incompetency of parties appearing as witnesses still obtains in actions by or against executors and administrators. The abrogatory rule in our state, in the terms of its primal enactment, declared that the provisions of the act should not be applied to any case where, at the time of taking testimony, or the time of trial, the party prosecuting or the party defending, or any of them, shall be an executor or an administrator, or made a party as an heir of a deceased party. This rule, through all the intervening years, has retained its original language excepting in certain instances which do not affect the case at bar. Since the affidavit in question was made by the plaintiff,

it is claimed by the defendant that it should be excluded because the plaintiff is not a competent witness, the action being one in which the party defending is an administrator. On the other hand, the plaintiff points out what he regards as most general language, in Rev. St. c. 87, § 127, which declares that "in all actions brought on an itemized account annexed to a writ" the affidavit of the plaintiff may be used. In effect the plaintiff claims that Rev. St. c. 87, § 127, enacted by the Legislature as chapter 137, P. L. 1913, repealed a most wholesome, salutary statute, which has repeatedly proved its beneficence during more than half a century, without the scant courtesy of specifically referring to the statute thus repealed. We cannot adopt this view. In the interpretation of statutes the whole body of previous and contemporaneous legislation should be considered, for the legislative department is supposed to have a consistent design and policy, and to intend nothing inconsistent or incongruous. *Cummings v. Everett*, 82 Me. 260, 19 Atl. 456. We do not hesitate, therefore, in declaring that, when the Legislature enacted the provisions for plaintiff's affidavit, in 1913, the plain intention of the law-making body was to limit the use of such affidavit to cases in which the plaintiff would be a competent witness under statutory provisions so long existing. There was no error in excluding the affidavit in this case.

[5] The order of nonsuit requires our examination of the record. The account annexed contains five items. The first charges for money paid Charlotte Stevens for and at the request of defendant's decedent, but does not disclose what the money was paid for. The other four charge for money paid the Lowell Fertilizer Company for fertilizer, in behalf of and at the request of the defendant's decedent. The only evidence offered by the plaintiff, except the excluded affidavit, is the testimony of an agent of the fertilizer company, who took written orders for the fertilizer signed by the plaintiff, not by the defendant's decedent. That witness gave no evidence regarding the first item in the account, but testified that he approached the plaintiff with a view of selling him some fertilizer. We quote practically his entire testimony:

"I asked Mr. Haswell if he wanted to buy some fertilizer.

"Q. (Mr. Dunton). Was Mr. Evans there?

"A. Mr. Evans was right there in the field; and he said, 'I haven't any use for any fertilizer; you will have to talk with'—I guess he called him Cap'n Flint, I don't remember the name—'about it, because he is running things here.' So I went over and talked with the young man, and he gave me an order for the fertilizer. I put it down on that original contract, taking a carbon copy and leaving it with him, and then went over, and knowing that the boy—or they told me in the conversation that the boy had no real estate, and our company will not take an account unless there is some backing. I asked Mr. Haswell about it, and he said he would sign the contract for the boy and go good for the fertilizer. So we shipped the fertilizer to them, or they got it at Jackson &

Hall's. I don't remember where they got it; I didn't deliver it myself, but he got the fertilizer and paid for it."

Giving this evidence its most liberal effect, it falls short of proving that the defendant's decedent requested the plaintiff to pay the money, and that it was paid in accordance with such request. The nonsuit was properly ordered.

Exceptions overruled.

(117 Me. 431)

MAXWELL v. DIRIGO MUT. FIRE INS. CO.

(Supreme Judicial Court of Maine. Nov. 9, 1918.)

INSURANCE §375(2)—WAIVER OF CONDITION—SALE WITHOUT CONSENT—POWER OF SECRETARY.

Insurer's secretary, who was acting in behalf and as agent of it in investigating and adjusting the loss, could waive breach of condition of the policy that sale without its written consent should render policy void.

2. ESTOPPEL §52—"WAIVER."

"Waiver" implies knowledge of the material facts and of one's rights, and a willingness to refrain from enforcing those rights, and is a voluntary surrender of known rights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

3. INSURANCE §388(3)—BREACH OF CONDITION—ESTOPPEL TO CLAIM FORFEITURE.

Though insurer did not actually intend waiver of breach of condition of policy, if its conduct and declarations justified belief that it was intended, and, acting on the belief, insured incurred trouble and expense, and was subjected to delay, to his injury and prejudice, insurer may, on the principle of equitable estoppel, be prohibited from claiming forfeiture for the breach.

4. INSURANCE §388(3)—BREACH OF CONDITION—WAIVER OF ESTOPPEL.

Course of dealing between insured's trustee in bankruptcy and insurer for six months after fire, involving many interviews, much correspondence, preparation of proof of loss, adjustment of amount, and delay in bringing action and in settling estate, held to constitute waiver of, or estoppel to assert, any breach of condition against sale without consent.

5. APPEAL AND ERROR §1064(1)—HARMLESS ERROR—INSTRUCTIONS.

Plaintiff's right of action being unquestionably established, any error in instruction as to the ground thereof is not prejudicial to defendant.

Exceptions from Supreme Judicial Court, Penobscot County, at Law.

Action by James D. Maxwell, trustee in bankruptcy, against the Dirigo Mutual Fire Insurance Company. Verdict for plaintiff, and defendant brings exceptions and moves for new trial. Motion and exceptions overruled.

Argued before CORNISH, C. J., and SPEAR, PHILBROOK, DUNN, and MORRILL, JJ.

Ryder & Simpson, of Bangor, for plaintiff. Newell & Woodside, of Lewiston, for defendant.

CORNISH, C. J. The defendant company on July 6, 1912, issued its three-year policy of insurance in the sum of \$1,150 to one Martin S. Guppy upon certain buildings and personal property owned by him in the town of Garland. On April 5, 1915, upon his voluntary petition, Guppy was adjudicated a bankrupt in the United States District Court. On May 25, 1915, the plaintiff was duly appointed trustee of the bankrupt estate and qualified as such. On July 3, 1915, the insured property was destroyed by fire.

The writ contains two counts; the first for the total amount of loss, with interest, aggregating \$937.12, and the second for the amount alleged to have been agreed upon in compromise settlement, \$527.50.

The defendant set up a breach of the conditions of the policy, in that without the company's assent the property had been sold; the contention being that the voluntary proceedings in bankruptcy, followed by the adjudication and the appointment of the trustee, constituted a sale of the property, within the meaning of the condition which rendered the policy void if, "without the written or printed assent of the company, the said property shall be sold."

The policy in terms insured "Martin S. Guppy and his legal representatives," and the presiding justice instructed the jury that, without any assignment made by Mr. Guppy and duly assented to by the company, the trustee was the legal representative of the bankrupt, stood in his place, and was entitled to bring and maintain this action under the terms of the policy. This instruction forms the basis of the defendant's exceptions. The jury returned a verdict for the plaintiff in the sum of \$587.87, evidently the amount of the alleged compromise settlement, plus interest.

In deciding this case it is unnecessary to determine whether the transfer of property to a trustee by an adjudication in bankruptcy proceedings constitutes a "sale," within the purview of the policy, so as to render the policy void, nor whether a trustee in bankruptcy comes within the scope of the phrase "legal representatives," who, together with Martin S. Guppy, in this case were the parties insured.

[1-3] We rest our decision upon another principle of firmly established law, enunciated in *Hanscom v. No. British, etc., Ins. Co.*, 90 Me. 833, 88 Atl. 324, and kindred cases, and hold that the conduct of this company, through its secretary, Mr. Millett, during a period of six months after the fire and close up to the time of bringing this suit, was such as to preclude the defendant from setting up the breach of conditions in defense, even if the facts here constitute such a breach—a point that we do not decide.

It cannot be doubted that it was within the power of the secretary, who was acting in

behalf of and as agent of the company in investigating and adjusting the loss, to waive the breach of condition as to sale, if he desired so to do. A waiver implies knowledge of the material facts and of one's rights, and a willingness to refrain from enforcing those rights. "It is a voluntary surrender of known rights." Further than that, however:

"It may happen that a waiver of a breach of condition in the policy was not actually intended; but if the conduct and declaration of the insurer are of such a character as to justify a belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense, and is subjected to delay, to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach, upon the principles of equitable estoppel." *Hanscom v. Ins. Co.*, 90 Me. 333, 339, 38 Atl. 324, 326.

The elements mentioned—trouble, expense, prejudicial delay, and recognition of the continued existence of the policy—are all present here.

The fire occurred on July 3, 1915. Mr. Dearth, the mortgagee of the property, filed a proof of loss directly after the fire, and in that proof the fact that the plaintiff was trustee in bankruptcy was stated, and several letters passed between the mortgagee and the secretary. No objection was made to the proof by the company, although it then knew from its own records and files that the policy still stood in the name of Martin S. Guppy without assignment. A little later, the secretary, with one of the directors, investigated the fire. Then the secretary met the trustee on the street in Bangor, and told him that he had been out in Garland to investigate the fire, and that he desired a conference at some time in order to adjust the loss. The latter part of September or the 1st of October a conference was held. The agent went to the office of the referee in bankruptcy in Bangor, where the bankruptcy proceedings were pending, and the trustee was summoned to meet him. At that conference the agent made an offer of settlement, which, after some discussion, and also after consultation with the mortgagee, was rejected, as being too low. The agent then told the trustee he should require a proof of loss from him, and promised to send the trustee a blank.

Under date of October 4, 1915, the agent wrote the trustee that on arriving home he found he had on hand no blank proofs, but would secure some as soon as possible and send him one, adding that he expected to be in Bangor during the week, and would call, "hoping we can agree on loss." On October 11, 1915, one week later, the agent wrote the trustee, inclosing a blank proof, stating that he was just starting for Alberta to be gone the rest of the month, and adding: "We will adjust this matter on my return." On October 13, 1915, the proof of loss was prepared by the plaintiff, setting forth the facts relating to the bankruptcy proceedings in detail, and was signed, "James D. Maxwell,

Trustee in Bankruptcy of the Estate of Martin S. Guppy, Bankrupt, the Assured." This was sent to the secretary on the same day, with a letter in which the trustee said:

"I trust that we shall be able to adjust this matter as soon as possible, as the estate is held up by reason of the insurance not being adjusted."

On October 14th the receipt of the proof of loss was acknowledged by the assistant secretary of the company, in the absence of the secretary. On November 9th Mr. Millett wrote to the trustee, stating that the proof had not been acted upon by the company, and he wished to see the trustee before presenting it to the company. On November 15th, Mr. Millett went to Bangor and held another conference with the trustee in regard to a settlement. The plaintiff claims that after considerable discussion and calculation Mr. Millett made an offer of \$527.50 in full settlement and adjustment of the loss on both buildings and personal property, but he was unwilling to accept that amount without the sanction of the mortgagee. They could not reach the mortgagee by telephone, and the trustee suggested writing him. Finally the secretary said:

"Well, we ought to close this thing up; it's a small matter; so I guess, perhaps, you do that. You write to him, and find out what he will do, if he is satisfied with it, and then you let me know right off, and if it is satisfactory I will send you a check."

And the trustee replied:

"That is all right; that is fair enough."

We are convinced of the truth of the trustee's statement. He wrote Mr. Dearth under date of November 19th, obtained his acquiescence to the proposed adjustment, and on November 22d wrote to Mr. Millett, accepting his offer.

On November 26th Mr. Millett replied, saying:

"The law requires us to wait 45 days from the time proofs are filed with the company. We will submit your letter to the committee on losses and let you know in a few days."

But the promised advices did not follow, and after waiting until January 3, 1916, the trustee wrote again, saying:

"Will you kindly send me check for the amount of this claim, as per my letter of November 22d last. This matter is holding up the estate, and I should appreciate an early settlement."

On January 5th the secretary replied, regretting the delay, which he termed unavoidable, and for the first time raised any question as to the legality of the plaintiff's claim:

"We have been told that the policy should have been transferred to the trustee in order to make it legal, and I have asked our lawyers to look this matter up carefully. I expect to be in Bangor Monday night, and will give you our decision at that time. * * * Will you kindly look this matter up, relative to the assignment of the policy, and see what you find."

On January 7th the plaintiff wrote the secretary a rather sharp letter, demanding check, and protesting against the conduct of

the secretary, and the unnecessary and prejudicial delay. This was answered by the attorney of the company, denying for the first time liability on the part of the company.

[4] If this course of dealing on the part of the company, carried on over a period of six months, involving many interviews, much correspondence, the preparation of proof of loss, the adjusting of the amount, and the delay both in bringing suit and in settling the bankrupt estate, does not constitute a waiver, or an equitable estoppel, we can conceive of no state of facts which could be so considered. Their mere rehearsal without comment brings them within the legal rule; and the doctrine which is universally accepted is a healthy one. It rests upon sound public policy and the ethics of fair dealing between man and man, as well as upon firmly fixed principles of equity. *Peabody v. Acc. Ass'n*, 89 Me. 96, 35 Atl. 1020; *Hanscom v. Insurance Co.*, 90 Me. 333, 38 Atl. 324, *supra*, and cases cited; 14 R. C. L. 1197, and cases cited.

[5] In this view of the case, it is immaterial whether, as an abstract proposition of law, the instruction excepted to should or should not have been given. Under all the evidence in the case, the plaintiff's right of action is unquestionably established, and the verdict rendered was fully warranted. The plaintiff was legally entitled to what he has won. That is the main object of legal inquiry, before which mere academic technicalities fade away.

Motion and exceptions overruled.

(117 Me. 445)

LADD v. BEAN.

(Supreme Judicial Court of Maine. Nov. 12, 1918.)

1. WORK AND LABOR ⇨4(2)—RECOVERY FOR REASONABLE VALUE OF SERVICES.

Where one renders beneficial services to another, and the latter knowingly and with approbation accepts and avails himself of the services, the law ordinarily supposes a request and a promise to pay what the services are reasonably worth.

2. EVIDENCE ⇨584(3)—NUMBER OF WITNESSES.

Witnesses are to be judged, not so much by numbers, as by the weight of the evidence given by them.

3. EVIDENCE ⇨598(1)—PREPONDERANCE—NUMBER OF WITNESSES.

A simple, natural and reasonable narration by a single witness from his personal knowledge of the essentially complete details of a transaction is more convincing than the aggregate testimony of several witnesses, each apparently as reliable and as honest as the single one, but aware only partially of the facts of the case.

4. WORK AND LABOR ⇨9—EXPRESS CONTRACT—DEFENSE.

Plaintiff, who under express contract fairly made with defendant's testate, agreed to take care of testate's farm during their mutual pleasure from year to year in consideration of the use of the farm, could not recover upon an implied or quasi contract for wages and labor per-

formed during the period covered by the contract.

On Motion from Supreme Judicial Court. York County.

Action by Walter S. Ladd against Eva E. Bean, as executrix of the will of Martha J. Merrill, deceased. On motion. Verdict for plaintiff set aside, and new trial granted.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

John P. Deering, of Biddeford, for plaintiff.

Eva E. Bean, of Saco, and Clarence Webber, of Biddeford, for defendant.

Stone & Stone, of Biddeford, for trustee.

DUNN, J. While she was yet living, Walter S. Ladd brought a civil suit against Martha J. Merrill, relying upon an implied or quasi contract, to recover a balance claimed to be due as wages for labor performed by him, from an indefinite time in the year of 1911 to December, 1915, on a farm in Saco, the title to which Mrs. Merrill then recently had acquired by inheritance from her father, but which she did not personally occupy. The case came on for trial, at a York term, in January, 1918, after Mrs. Merrill's death, and was defended, under a general denial of liability, by the executrix of her will.

In his writ the plaintiff says that from 1911 to 1912 he worked for the decedent 120 days, from 1912 to 1915 for 450 days, and in the year last mentioned 70 days, at \$1.75 a day in each instance. Without being more specific, he extends debits which foot up to \$1,220. He credits house rent, 43 months, at \$5 a month, \$215, and hay for his horse, 3 years, \$219, the sum total of the two being \$434, leaving a balance of \$786. But there is error in his computation of the amount of the second debit item. It should be \$100 less than as stated. Correction of this, and amendment likewise through the bill, would leave the balance \$686. Verdict was for \$582.42, equivalent to an allowance of approximately \$1.59 a day.

For the establishment of his case, the plaintiff, himself precluded to testify (R. S. c. 87, § 117), called four witnesses, from a reading of the transcript of the testimony of whom it appears that the Merrill farm consisted of 25 to 30 acres of sterile land, with a 1½-story house and a barn, where Mr. Ladd came to live in 1911, and thence continued to dwell to and including all or a portion of 1915. During his occupancy, as these witnesses either traveled by the place or went there to traffic or for neighborly converse, they saw him at work on or about it. The farm was mainly set apart to the growing of grass for hay, but the annual yield was meager, not far from one-half ton to the acre—10 to 12 tons in all. The plaintiff help-

and the fair inference of the case is that he fed out, 12 to 15 bushels of oats. His tillage comprised an acre, possibly an acre and one-half. On this he every year raised for his own use, and therefrom may have sold, too, potatoes, turnips, beans, corn, squash, cabbage, and other plants and vegetables. At odd times he cut down bushes growing along the wall by the roadside; he made slight repairs to the buildings, namely, by causing a plank to be put in the barn door that it might open and shut the better, and by renewing an outside door for the cellar. Not infrequently he worked away from home. The extent of his labor at the farm is variously estimated from one-third to one-half of the time in each year, and the usual daily wage of men in like employment stated to have been \$1.50 to \$1.75, with increase to \$2.25 through the haying season.

[1] It is elementary to say that where one renders beneficial services to another, and the latter knowingly and with approbation accepts and avails himself of these services, the law ordinarily supposes a request and a promise to pay what they are reasonably worth; but the hypothesis is by no means conclusive. If a plaintiff produce evidence ample to prove a case unless answered, and the defendant replies, it then remains to be seen, following the ebb and flow of the testimony, whether that response be sufficient.

In this case a witness testified that, in his presence and hearing, Mrs. Merrill and Mr. Ladd, at the home of the former, entered into an agreement by the terms of which, for the consideration of its use and its revenue, exclusive of the hay crop (and of that enough, as is otherwise shown, for the feed of his horse), Ladd was to live on and take care of her farm, during the term, as the court concludes, of their mutual pleasure from year to year. Said the witness:

"They [Mrs. Merrill and Mr. Ladd] were talking about going on the farm. * * * He was to raise whatever he could there, and he was to have it, and he was to help Mr. Merrill to gather the hay, keep the bushes cut down, and look after things up there for the rent, as they wanted somebody there to cover the insurance."

[2, 3] Witnesses are to be judged, not so much by numbers, as by the weight of the evidence given by them; and the weight of the evidence depends upon its effect in inducing belief. Simple, natural, and reasonable narration by a single witness, from his personal knowledge, of the essentially complete details of a transaction should and does, stamp conviction on an impartial mind conscientiously seeking truth, to a greater degree than the aggregate testimony of several witnesses, each apparently as reliable and as honest as the single one, but aware only partially of the facts of the case, and whose attestations are equally consistent

with the defendant's witness is discredited, uncontradicted, and of credibility challenged. The tale that he told is there is evidence that the plaintiff, the farm and buildings in dilatory stance with Mrs. Merrill's request to remove. That asking may have caused to be displeased with a compact fairly But to rue his contract so created, with the reason, would not justify its removal and the recovery of damages, less thereof, for the law will not estimate of proper advantage to man the undue ing of the word that he plighted in stance with her terms. In fine, with performance of the agreement which he and the defendant's testate made, the plaintiff ought to be content and satisfied. At all events should cease to complain.

The verdict was not founded on a full scrutiny and examination of the evidence. It is so palpably wrong as to vitiate the court to set it aside and grant a new trial.

Motion sustained.

New trial granted.

(117 M

HOBBS v. HURLEY.

(Supreme Judicial Court of Maine. No 1918.)

1. CONTRIBUTION §5—"JOINT TORT-FEASORS."

As between "joint-feasors" in part d which means persons who by concert of intentionally commit the wrong complained there is no right of contribution.

[Ed. Note.—For other definitions, see V and Phrases, First and Second Series, Tort-Feasors.]

2. CONTRIBUTION §5—JOINT TORT-FEASORS.

Contribution may be enforced between tort-feasors not intentional and willful wrongdoers, but such only by legal inference of contribution.

3. CONTRIBUTION §5—JOINT TORT-FEASORS—NEGLIGENCE.

Rule denying contribution as between tort-feasors has no application to torts which are result of mere negligence in carrying on full transaction, as transportation of passengers in automobile; parties being tort-feasors willfully but by inference of law.

4. MASTER AND SERVANT §301(1)—LIABILITY FOR SERVANT'S NEGLIGENCE—CHAUFFEUR.

Where chauffeur driving automobile agent of borrowers of car, though they were in it, his want of care toward third person in eye of law was imputable to them, under doctrine of respondeat superior.

5. CONTRIBUTION §5—JOINT TORT-FEASORS.

Where plaintiff and defendant borrowed automobile and their agent, the chauffeur, negligent in driving it, to injury of third person, plaintiff could have contribution from defendant for damages he paid, as their wrongdoing was not intentional, and they were tort-feasors only by implication of law.

6. JUDGMENT ¶470—COLLATERAL ATTACK.

A judgment unreversed is not open to collateral attack, unless it was obtained by fraud, or unless want of jurisdiction appears on face of record.

7. CONTRIBUTION ¶7—JOINT TORT-FEASORS—AMOUNT.

Where plaintiff's and defendant's chauffeur injured third person, and latter sued plaintiff and defendant, and two others, in whose favor judgment was given, but against plaintiff and defendant, which was paid by plaintiff, he could recover as contribution one-half of his payment from defendant, and was not limited to a quarter.

8. MASTER AND SERVANT ¶801(4)—LIABILITY FOR NEGLIGENCE OF ANOTHER'S SERVANT.

A passenger in an automobile was not liable for injuries to third person caused by negligence of chauffeur.

9. MASTER AND SERVANT ¶813—TORT OF SERVANT—JOINT LIABILITY OF MASTER AND SERVANT.

Where chauffeur whose negligence caused injury to third person was servant of plaintiff and defendant, judgment could not be rendered against him, and also against plaintiff and defendant in joint suit against them, as master and servant cannot be held jointly liable for servant's negligent act, except for trespass at command of master.

10. JUDGMENT ¶240—JOINT JUDGMENT—AGAINST SERVANT AND MASTER.

Third person injured by negligence of chauffeur in driving automobile had right to bring suit either against the chauffeur or against his masters, but could not recover joint judgment against all.

Report from Supreme Judicial Court, Knox County, at Law.

Action by Josiah H. Hobbs against William P. Hurley. On report from the Supreme Judicial Court. Judgment for plaintiff.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Charles T. Smalley, of Rockland, for plaintiff. A. S. Littlefield, of Rockland, for defendant.

CORNISH, C. J. This is an action on the case to recover from the defendant the sum of \$274.05 as contribution towards the payment of a joint judgment rendered against both the plaintiff and defendant, the entire sum having been paid by the plaintiff.

The material facts leading up to this action are, briefly, as follows: On September 7, 1912, one Jethro D. Pease was thrown from his wagon and injured by reason of an automobile, driven by one Herrick as chauffeur, suddenly backing against and frightening the horse of Pease and causing him to cramp the wheels. The automobile was owned by Mr. Montgomery, and an action of negligence was first brought against him by Pease; but it was held that the suit could not be maintained, because, while Mr. Montgomery was the owner of the machine, he was not in the possession, control, and management of it, nor was the chauffeur act-

ing as his servant at the time of the injury. *Pease v. Montgomery*, 111 Me. 582, 88 Atl. 978.

Then suit was brought by Pease against Messrs. Gardner, Hobbs, Hurley, and Herrick, and judgment was rendered in favor of the then plaintiff against Messrs. Hobbs and Hurley, the parties in the case at bar, in the sum of \$500, and judgment in favor of Gardner and Herrick. *Pease v. Gardner*, 113 Me. 284, 98 Atl. 550. The liability of Messrs. Hobbs and Hurley was placed upon the ground that they had secured this automobile from its owner, Mr. Montgomery, to take Mr. Gardner, and perhaps others, who were on a political speaking campaign, from Rockland to other towns in Knox county; that for that trip they had the legal possession, control, and management of the car and were responsible therefor; that the engagement and operation of the car was a joint enterprise on their part as chairmen of certain political committees, and Herrick, the chauffeur, was for the time being their servant.

The defendant raises two contentions: First, that the parties to this action against whom the judgment was rendered were joint tort-feasors, and that one joint tort-feasor cannot enforce contribution from another; second, if the plaintiff is legally entitled to recover, it is only for one-fourth of the amount of the joint judgment, as four persons were involved in the original transaction which was the basis of the judgment.

1. Right of Contribution.

[1] It is undoubtedly a general rule of law that as between joint tort-feasors, in pari delicto, there is no right of contribution.

The reason of the rule is that the law will not lend its aid to him who founds his cause of action upon an immoral or illegal act. It leaves him where it finds him. The leading case is *Merryweather v. Nixan*, 8 T. R. 186, and this has been uniformly and consistently followed. The term "tort-feasor," as used here, applies to persons who by concert of action intentionally commit the wrong complained of.

[2] But an exception to this rule is equally well settled, and that is that when the parties are not intentional and willful wrongdoers, but are made wrongdoers by legal inference or intentment, are involuntary and unintentional tort-feasors, so to speak, then the preceding rule does not apply, and contribution may be enforced. The rule ceases because the reason for it has ceased. Contribution is not contractual. It is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law.

The exception was suggested by Lord Kenyon in *Merryweather v. Nixan*, supra, which

announced the rule, and has been fully developed and recognized by later decisions, both in England and this country. *Betts v. Gibbons*, 2 Ad. & Ell. 57; *Pearson v. Skelton*, 1 Mees. & Wels. 504; *Wooley v. Batte*, 2 Car. & P. 417; *Bailey v. Bussing*, 28 Conn. 455; *Id.*, 37 Conn. 349; *Acheson v. Miller*, 2 Ohio St. 208; 59 Am. Dec. 663; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; *Nickerson v. Wheeler*, 118 Mass. 295; 6 R. C. L. 1055, and cases cited.

The distinction between the two classes of cases, and therefore between the rule and the exception, was clearly set forth by the Massachusetts court in these words:

"It is undoubtedly the policy of the law to discountenance all actions in which a party seeks to enforce a demand originating in a willful breach or violation, on his part, of the legal rights of others. Courts of law will not lend their aid to those who found their claims upon an illegal transaction. No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed. But justice and sound policy, upon which this salutary rule is founded, alike require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves, or others, although they have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know, that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a willful ignorance and disregard of those rights, which deprives a party of his legal remedy in such cases. It has therefore been held that the rule of law, that wrongdoers cannot have redress or contribution against each other, is confined to those cases where the person claiming redress or contribution knew, or must be presumed to have known, that the act, for which he has been mulcted in damages, was unlawful." *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, *supra*.

[3] It may be safely asserted that the rule denying the right of contribution as between joint tort-feasors has no application to torts which are the result of mere negligence in carrying on some lawful transaction. In such cases the parties are tort-feasors, not willfully, but by inference of law, and the term itself seems disproportionately harsh under such circumstances.

[4, 5] The application of this exception to the facts in the case at bar is obvious. As was said in the former case:

"The engagement and operation of the car on this special trip seem to have been a joint enterprise on the part of Capt. Hurley and Mr. Hobbs, who were interested in a common undertaking." *Pease v. Gardner*, 118 Me. at 267, 93 Atl. 550.

That undertaking was entirely lawful, the transportation of certain parties from one place to another. No element of wrongdoing attached to it. In fact, so far as the evidence discloses, neither the plaintiff nor the defendant was present at the time of the accident. But as the car was legally under

their possession and control, as they were the owners pro hac vice, as Herrick the chauffeur was their agent, his want of care toward third persons in the eye of the law was imputable to them under the doctrine of respondeat superior. However, there was no voluntary, willful, and intentional wrongdoing on their part. There was no community of wrong, and there could have been none. Therefore, the plaintiff having paid the entire sum for which he and his quondam partner were jointly liable, he can recover of the defendant his proportional part or one-half thereof. Any other result would be illogical and unjust.

2. Amount of Contribution.

[6, 7] As four persons seem to have been concerned with the transaction, Messrs. Gardner, Hobbs, Hurley, and Herrick, the defendant claims that, if forced to contribute at all, contribution on his part should be limited to one-fourth of the amount of the judgment.

The answer to this contention is twofold:

In the first place, all four of these persons were joined as defendants in the former suit, and their liability or nonliability was there determined. Judgment was rendered against Hobbs and Hurley, while it was held that the action should not be maintained against Gardner and Herrick. That judgment still stands unreversed and is not open to collateral attack unless it was obtained by fraud or unless want of jurisdiction appears on the face of the record. *Toothaker v. Greer*, 92 Me. 546, 48 Atl. 498; *Winslow v. Troy*, 97 Me. 180, 53 Atl. 1008. The rights of the parties were fixed by that judgment, and it constitutes the impregnable basis of this suit. Contribution must be of one-half the amount.

[8] In the second place, the result is as it should be under the law. Mr. Gardner was merely a passenger, and no liability attached to him.

[9] The chauffeur, Herrick, was the active party in the negligent act creating the liability; but, as he was at the time the servant of Hobbs and Hurley, judgment could not be rendered against him and also against Hobbs and Hurley in a joint suit, as both master and servant cannot be held jointly liable for a negligent act. The reason is that joint tort-feasorship in cases of negligence necessarily implies a community of interest in the object and purposes of the undertaking and an equal right to govern and direct the conduct of each other in respect thereto, and master and servant cannot be said to engage in a common enterprise because that relation is inconsistent with the relation of master and servant. Hence the rule. *Parsons v. Winchell*, 5 Oush. (Mass.) 592, 52 Am. Dec. 745; *Mulchey v. Meth. Relig. Soc.*, 125 Mass. 487; *Hill v. Murphy*, 212 Mass. 1-4, 98 N. E. 781, 40 L. R. A. (N. S.) 1102, Ann. Cas. 1913C, 374; *Bailey v. Bussing*, 37 Conn. 349; *Bet-*

cher v. McChesney, 255 Pa. 394, 100 Atl. 124. In this we are not speaking of actions of trespass where the wrong is inflicted at the command of the superior, but of ordinary actions of negligence.

We are aware that in some jurisdictions joint actions against master and servant have been allowed even in cases of negligence. *Mayberry v. No. Pac. Ry. Co.*, 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754 and note. But our court has adopted with approval the doctrine and reasoning of the Massachusetts court. *Campbell v. Portland Sugar Co.*, 62 Me. 552, 566, 16 Am. Rep. 503.

[10] The injured party, Pease, had the right to bring suit against either the servant or the masters, but could not recover a joint judgment against all. *Duryee v. Hale*, 31 Conn. 217; *Bailey v. Bussing*, 37 Conn. 352.

Here judgment was obtained against the masters alone, and the servant was properly omitted.

Our conclusion therefore is that this action for contribution is maintainable, and the entry should be

Judgment for plaintiff for \$274.05, with interest from date of the writ.

(117 Me. 465)

MORRILL v. ROBERTS et al.

(Supreme Judicial Court of Maine. Nov. 16, 1918.)

1. WILLS \Leftrightarrow 695(4) — ACTION TO CONSTRU — HYPOTHETICAL QUESTIONS.

Where bill is brought under Rev. St. c. 82, § 6, subd. 10, to determine if remainder can be distributed prior to occurrence of an event, and to determine distributees, the court, upon holding that final distribution cannot take place until occurrence of condition precedent, will not name distributees.

2. WILLS \Leftrightarrow 707(1) — BILL TO CONSTRU WILL — DISTRIBUTION OF ALLOWANCE FOR ATTORNEY'S FEES.

In proceedings under Rev. St. c. 82, § 6, subd. 10, to construe a will, where counsel cannot agree as to how the allowance for attorney's fees should be distributed between the attorneys for the different parties, the distribution should be determined by the sitting justice who signs decree.

Appeal from Supreme Judicial Court, Cumberland County, in Equity.

Bill by Carroll W. Morrill, executor and trustee under the will of Alfred Roberts, against Alfred Roberts, Jr., and others. Bill sustained. From the decree rendered an appeal is taken. Appeal sustained, and temporary injunction made permanent. Decree in accordance with opinion.

Argued before CORNISH, C. J., and HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Woodman & Whitehouse, of Portland, for complainant. W. K. & A. E. Neal, Linwood F. Crockett, Samuel L. Bates, John J. Devine, and William H. Murray, all of Portland, Collins, Collins & Burke, Sydney B. Larrabee, of Portland, and John Mitchell Jones, of Los Angeles, Cal., for respondents.

PHILBROOK, J. This is a bill in equity, brought under R. S. c. 82, § 6, subd. 10, to determine the construction of certain provisions of the will, in which the plaintiff is named as executor and trustee. He declares that:

"He is in doubt as to the true and proper construction of said will, to wit, as to whether he may lawfully distribute the remainder of said trust estate at the present time, prior to the death of said Sarah M. Roberts, and before the happening of all the three events which were expressly made, by the terms of said will, a condition precedent to the final distribution of said estate, and as to whether or not the estate of said Annie B. Roberts is entitled to any part of the balance of the estate of said testator under said will, and, if so, what part, when a final distribution may lawfully be made; also as to what is the proper time for the final distribution of the balance of said estate, and as to who are the legatees, or class of legatees, among whom it is to be distributed when the proper time for distribution arrives, and also at what time the balance of said estate is to vest in such legatees."

In the court below the bill was sustained. The decree of the learned justice, with some minuteness of detail, also answered the many other questions raised by the plaintiff. From this decree the case comes to this court by appeal.

Time of Final Distribution. The testator provided for final distribution after the occurrence of three events, viz., the death of his sister, Sarah E. Roberts, the death of his brother's widow, Sarah M. Roberts, and the maturity of a certain endowment bond in which Alfred Roberts, Jr., was the original beneficiary, either by the lapse of the time mentioned in the bond or by the death of Alfred Roberts, Jr. It is conceded that the sister, Sarah E. Roberts, is dead, that the bond has matured by lapse of time, but that Sarah M. Roberts is still living. On February 16, 1917, one John Mitchell Jones, who now claims to be attorney in fact and of record for Alfred Roberts, Jr., filed in the probate court a petition for the distribution of the balance of the estate, alleging that said Sarah M. Roberts was ready and willing to waive, and had waived any and all right, title, or interest, present or prospective, accruing or accrued to her under any of the terms of said will. In her answer to this bill, Sarah M. Roberts declared that such waiver, release, or assignment was obtained by fraud, false representations, and duress, that there was no consideration for the same, and that it was and always had been null, void, and of no effect. The decree of the learned justice, upon this contention of fact,

upheld the claim of Sarah M. Roberts, and we unhesitatingly approve this finding. The final distribution of the balance in the hands of the plaintiff is therefore postponed until the death of Sarah M. Roberts, and the plaintiff is ordered to pay her all annuities overdue and unpaid, with interest from the dates when each annuity became due, and to pay her such annuities in the future as may be demanded by the terms of the will.

[1] Until such time as final distribution is to be made, it is not necessary to determine or advise as to whom such distribution shall be made, since future conditions, and future existence of the persons to whom distribution may be made, can only be determined hypothetically.

[2] The decree of the sitting justice provided for payment of counsel fees, costs, and expenses, out of the estate; but it is the opinion and order of this court that, exclusive of cash disbursements, the total amount to be allowed for attorney's fees shall be \$500; the sitting justice by whom decree below will be signed, to determine the distribution of such sum among counsel, providing they cannot agree thereto.

Appeal sustained.

Bill sustained.

Temporary injunction made permanent.

Decree in accordance with opinion.

(117 Me. 468)

BATCHELDER v. BICKFORD.

(Supreme Judicial Court of Maine. Nov. 19, 1918.)

1. EQUITY \S 373—WAIVER OF REPLICATION—STIPULATION—EFFECT.

Case being by agreement reported for decision on the bill and answer, plaintiff waives her replication, and allegations of answer are to be taken as true.

2. MORTGAGES \S 596, 597 — REDEMPTION — ADVERSE POSSESSION BY MORTGAGEE.

Facts stated in answer in suit to redeem from mortgage held to show that mortgagee's possession for 20 years was unequivocally adverse to mortgagor and those claiming under him, barring right of redemption.

3. MORTGAGES \S 596, 597 — REDEMPTION — RIGHT OF MORTGAGOR'S WIFE.

By reason of the right by descent which under Rev. St. c. 80, § 17, a widow has in land mortgaged by her husband before marriage, she during marriage has a right of redemption, as regards the running of time therefore against mortgagor in adverse possession.

Report from Supreme Judicial Court, Penobscot County, in Equity.

Suit by Matilda H. Ferguson Batchelder against Edwin F. Bickford. Case reported. Bill dismissed.

Argued before SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

U. G. Mudgett, of Bangor, for plaintiff. Morse & Cook, of Bangor, for defendant.

MORRILL, J. [1] This is a bill in equity to redeem from a mortgage. The plaintiff

filed a general replication, but by agreement of parties the case is reported to the law court for decision upon the bill and answer. The plaintiff thereby waived her replication, and the facts stated in the answer are to be taken as true. *Dascomb v. Marston*, 80 Me. 223, 230, 18 Atl. 888.

The mortgage was dated and delivered March 16, 1878. The mortgagor, Isaiah Ferguson, and the plaintiff were married in the year 1886. He died May 8, 1901, leaving the plaintiff as his widow. The answer contains the following material statement of facts:

"The defendant admits that on the 22d day of July, 1895, he entered upon and took possession of the premises described in said mortgage and has ever since continued in possession and received the rents and profits of said real estate; and the defendant alleges that he entered peaceably and openly, no one opposing, in the presence of two witnesses, and took possession of the premises in the character of mortgagee, and by virtue of his mortgage only, and that since the 22d day of July, A. D. 1896, he has held possession of the premises without acknowledging a subsisting mortgage, and without accounting, and without admitting that he held only as mortgagee, during which period last named he has treated said real estate as his own and as if said mortgage never existed."

The mortgage contains an agreement:

"That the right of redeeming the above-mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclosure by any of the methods now provided by law."

[2] The sole question for decision upon these undisputed facts is whether on the day of demand, July 21, 1917, the plaintiff had a right to redeem from the mortgage. The question must be answered in the negative.

It is well settled, as claimed by the defendant, that, if a mortgagee enters into possession of the mortgaged premises after condition broken without taking the steps provided by statute to foreclose the mortgage, it is open to redemption for 20 years. But if the mortgagor and those claiming under him permit the mortgagee to hold possession for 20 years without accounting and without admitting that he holds only as mortgagee, his title becomes absolute and the right of redemption is lost. *Roberts v. Littlefield*, 48 Me. 61; *Frisbee v. Frisbee*, 86 Me. 444, 29 Atl. 1115; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142, and cases cited in 2 *Rose's Notes*, p. 66; *Munro v. Barton*, 98 Me. 250, 56 Atl. 844.

"It is obviously the adverse character of the possession, however, and not the mere fact of possession by the mortgagee for 20 years, that will operate to convert the mortgage title into an absolute one. . . . To constitute a bar to such right (of redemption), it must appear that the mortgagee's possession is unequivocally adverse to the mortgagor, or to those claiming under him." *Munro v. Barton*, supra.

It is the opinion of the court that the admitted facts stated in the answer clearly show that defendant's possession was "unequivocally adverse" to the mortgagor and those claiming under him.

[3] Plaintiff's counsel earnestly contends that the defendant's possession did not begin to operate against his client's right to redeem until her husband's death. Her husband having died seised of premises mortgaged before their marriage, the plaintiff was entitled to her right and interest by descent in the mortgaged premises, as against every person except the mortgagee and those claiming under him. R. S. c. 80, § 17. It is plain that she had such an interest in the mortgaged premises as would permit her to redeem from the mortgage in the lifetime of her husband. *Tuttle v. Davis et al.*, 114 Me. 109, 95 Atl. 513. "It may be stated in general terms that any one who has an interest in the premises, and who would be a loser by foreclosure, is entitled to redeem." *Frisbee v. Frisbee*, 86 Me. 444, 29 Atl. 1115. Therefore the plaintiff had the full period of 20 years in which to redeem, and her right must now be considered barred.

Bill dismissed, with costs.

(117 Me. 471)

LAMBERT v. LAMBERT.

(Supreme Judicial Court of Maine. Nov. 19, 1918.)

1. DESCENT AND DISTRIBUTION ¶52(1) — RIGHT OF SURVIVING SPOUSE — PROPERTY AFFECTED — "ESTATE OF A TESTATOR OR TESTATRIX."

Rev. St. 1916, c. 80, § 14, as to right of surviving spouse in "estate of a testator or testatrix," applies only to property left by deceased at death, and does not relate to personal property with which deceased had parted during life, either by gift or sale.

2. WILLS ¶90 — "GIFT CAUSA MORTIS" — DISTINGUISHED FROM "TESTAMENT."

"Gift causa mortis" is distinguished from "testament," in that testament requires no delivery and takes effect at death, while gift causa mortis requires delivery and (subject to revocation) takes effect on delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift Causa Mortis; Testament.]

3. GIFTS ¶71 — GIFTS CAUSA MORTIS — VALIDITY.

Gifts causa mortis, clearly proved, or admitted, are valid and operated against all but creditors, unless they may be invalidated for fraud.

4. DESCENT AND DISTRIBUTION ¶69 — GIFTS CAUSA MORTIS — FRAUD.

A gift causa mortis is not necessarily and inevitably fraudulent against surviving spouse of donor.

Exceptions from Supreme Judicial Court, Franklin County.

Action by Mertie A. Lambert against James M. Lambert, with an appeal by James M. Lambert from decree of judge of probate. In both cases the trial justice ruled against said James M. Lambert and he brings exceptions. Exceptions overruled.

Argued before CORNISH, C. J., and HANSON, PHILBROOK, DUNN, MORRILL, WILSON, and DEASY, JJ.

McGillcuddy & Morey, of Lewiston, for Mertie A. Lambert.

C. W. Blanchard, of Wilton, and J. B. Morrison, of Phillips, for James M. Lambert.

DEASY, J. One point only is presented by the exceptions in these cases, to wit: That under existing statutes gifts causa mortis are in this state invalid.

James M. Lambert is defendant in one case, and appellant in the other. For convenience we shall refer to him as the defendant.

Augusta E. Lambert, owning a promissory note of the defendant, indorsed and delivered it to Mertie A. Lambert as a gift causa mortis. Augusta E. Lambert afterward died testate, and Mertie A. Lambert was made executrix of her will. The executrix did not include the note in the inventory of the estate. Individually she brought suit upon it. Hence the two proceedings. In both the presiding justice ruled that "a gift causa mortis of personal property, as in this case, is a valid gift." To these rulings the defendant excepted.

The printed case does not show the relationship between the defendant and Augusta E. Lambert. Counsel for both parties, however, in their briefs assume that he is her surviving husband. If the defendant's contention is that gifts causa mortis are under all circumstances invalid, we perceive no reason and find no authority to sustain such proposition. There are, however, respectable authorities holding that gifts causa mortis, being in the nature of testaments, are invalid as to surviving husbands or wives. For the purpose of reaching and passing upon what we understand to be the real merits of the case, we shall assume that the defendant is the surviving husband of Augusta E. Lambert, and that the exceptions raise the question of the validity of such a gift as against him.

[1] The defendant bases his claim upon chapter 160 of the Public Laws of 1903, as amended by chapter 260 of the Public Laws of 1906, and incorporated in the Revised Statutes of 1916 as section 14 of chapter 80.

One contention is that under the statute above cited a husband has an interest in the nature of a vested right in his wife's personal property, which he cannot be deprived of without his consent. Were this contention well founded, it would, of course, follow that a wife has a similar interest in her husband's personal property. This doctrine, if admitted, would invalidate, not only gifts causa mortis, but also gifts inter vivos, and sales by husbands or wives without consent of the other. But the statute neither creates nor recognizes such rights. It applies only to property left by a husband or wife at death. The statute refers only to "estate of

has parted with during life, either by gift or sale.

[2, 3] The defendant contends that a gift causa mortis is tantamount to a testamentary disposition, without the safeguards and formalities required in the case of a testament. To so hold we would have to go contrary to the multitude of cases wherein courts and jurists have uniformly sustained and sanctioned such gifts. The distinction between testaments and gifts causa mortis is clear. The former require no delivery and take effect at death. The latter require delivery and (subject to revocation) take effect upon delivery.

The defendant cites and relies upon *Nichols v. Nichols et al.*, 61 Vt. 490, 18 Atl. 153. This case is not quite in point. It does not involve the validity of gifts causa mortis, nor does it mention or refer to such gifts. The case of *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211, also cited by the defendant, holds an alleged gift causa mortis ineffective for want of delivery.

The defendant also relies upon the New Hampshire cases of *Baker v. Smith*, 66 N. H. 422, 23 Atl. 82, and *Jones v. Brown*, 84 N. H. 439. These cases arose under a statute substantially similar to ours. They hold that gifts causa mortis are valid, but, being "a form of testamentary disposition," are inoperative as to surviving husbands.

The great weight of authority, however, is to the effect that gifts causa mortis clearly proved, or, as in the cases at bar, admitted, are valid and operative against all but creditors. We might cite numerous authorities, but think it necessary to refer only to *Wright v. Holmes*, 100 Me. 508, 62 Atl. 507, 3 L. R. A. (N. S.) 769, 4 Ann. Cas. 583, and *Marshall v. Berry* (Mass.) 13 Allen, 43, and cases cited therein.

[4] Whether or not conditions may exist invalidating an attempted gift causa mortis by reason of fraud we are not called upon to decide. Nothing in these cases shows fraud, unless such a gift is necessarily and inevitably fraudulent as against a surviving spouse. The law does not justify this court in so holding.

The entry in both cases must be:
Exceptions overruled.

(88 N. J. Eq. 368)

WALSH v. WALSH.

(Court of Errors and Appeals of New Jersey.
Nov. 19, 1917.)

HUSBAND AND WIFE — 297 — SEPARATE MAINTENANCE—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support a decree for separate maintenance upon the ground of the husband's cruelty, compelling the wife to live apart from him.

Walsh for separate maintenance. Decree for plaintiff, and defendant appeals. Affirmed.

On appeal from a decree of the Court of Chancery advised by Vice Chancellor Leaming, who filed the following opinion:

The evidence in this suit fully establishes the fact that defendant's conduct toward his wife has been such as to deny to him the right to now require her to share his home.

In this state to justify a wife in leaving her husband's home or in refusing to share the home of his selection on account of his cruelty, physical violence need not be shown, but such conduct of the husband must be shown as will reasonably convince the court that at or prior to the time of their separation her life or health was in danger; or that her life was by his conduct rendered one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife; or that the conduct of the husband, if continued, would have brought about those conditions. Unless complainant and the several children of the marriage who have testified in her behalf have willfully and deliberately testified to falsehoods touching defendant's conduct, the very conditions above suggested existed in defendant's home at the time of the separation. I am unable to doubt the truth of their statements and am equally unable to believe the denials of defendant.

A review of the testimony seems unnecessary. Much of defendant's misconduct may be attributed to the influence of alcohol and his dissatisfaction with some of his children and their presence in his home; but that fact affords no justification for his misconduct. I am convinced that the children fully believed that their presence in the home was necessary for their mother's safety, and I share with them that belief.

It follows that an order must be made compelling defendant to contribute to complainant's support.

In making an order of that nature, I believe it to be the duty of a court to carefully limit the order to the demands of necessity as discerned by the condition and station in life of complainant and the ability of defendant to pay. An order for an amount calculated to render separation attractive to complainant is, in my judgment, unwarranted by a statute that favors cohabitation and contemplates only suitable support and maintenance during the period of separation. Complainant has some means of her own; defendant's income is limited. At this time complainant is occupying a property owned by defendant and is paying no rent. I will advise an order for the payment of \$10 per week. In the event of complainant being denied the occupancy of the property where she now lives, the amount may be suitably increased. Complainant's solicitor may be allowed a counsel fee of \$100.

Linton Satterthwait, of Trenton (John T. Van Cleef, of Trenton, on the brief), for appellant. Peter Backes, of Trenton, for respondent.

PER CURIAM. This is a suit by a wife for maintenance under the statute. The vice chancellor advised a decree for complainant. The case turns on findings of fact alone, and, after a full examination of the evidence, we conclude that it is adequate to support the decree made, which will therefore be affirmed.

(88 N. J. Eq. 496)

DUNLAP v. CHENOWETH et al.

(Court of Chancery of New Jersey. Nov. 17, 1917.)

*(Syllabus by the Court.)***1. USURY §53—REQUISITES—WITHHOLDING OF PART OF LOAN AS BONUS.**

A corrupt bargain, to contravene the statute, is essential to sustain a plea of usury. Withholding of a part of the loan as a bonus, without a previous agreement to that effect, does not constitute usury.

2. USURY §111(2)—PLEADING—ANSWER.

The defense of usury must be timely and strictly pleaded, and the answer must set out the particular facts and circumstances of the alleged usurious agreement.

3. USURY §117—DECREE—REDUCTION.

Under the evidence in this case, *held*, that complainant is entitled to a decree, with a reduction in the amount claimed.

Bill for foreclosure by James M. Dunlap against Emma L. Chenoweth and others, defended on the ground of usury. Decree for complainant, less certain amounts, with interest, etc.

Horace F. Nixon, of Camden (Bleakly & Stockwell, of Camden, of counsel), for complainant.

John Boyd Avis, of Woodbury, for defendants.

BACKES, V. C. This is the usual foreclosure bill, and the defense is usury. The bond and mortgage were made by the defendant Emma L. Chenoweth to Horace F. Nixon, a member of the Camden bar, who evidently deals extensively in mortgage investments. According to his own statement, he has negotiated loans for more than \$9,000,000, mostly in small sums. Mrs. Chenoweth, sorely pressed by creditors, applied to him for a loan of \$12,000 on her home in Woodbury, and agreed to pay him \$240 to procure it. The mortgage was to be for one, two, or three years, at 5 per cent., if possible; if not, at 5½ or 6 per cent. Apparently unable to find a lender as quickly as her circumstances demanded, Mr. Nixon advanced the money himself. He liquidated the fixed liabilities upon the mortgaged property and gave to Mrs. Chenoweth his check in payment of the difference, after deducting a brokerage of 2 per cent., the alleged usury. The bond was written at 6 per cent., with the understanding that Mr. Nixon was to place the loan at 5 per cent., if possible. He sold the mortgage to the complainant, Dunlap, giving him his written guaranty for the prompt payment of the principal and interest, for a commission of 1 per cent., a practice that was quite common with him. Although the defendant is in arrears since August, 1914, Mr. Nixon has regularly paid the interest at the rate of 5 per cent. His dealings with the complainant, and through them his ability to reap, for a time, 1 per cent. on the loan, were not disclosed by Mr. Nixon to his client, Mrs. Che-

noweth. Now, advised by counsel of the consequences of this lapse of duty, and moved, perhaps, by the intimations in a memorandum opinion filed in this suit by another judge, he has, in open court and in the brief submitted, offered restitution and reduction of interest. That closes the incident.

[1, 3] The defense of usury, which involves forfeiture of interest and costs of suit, even if it were timely and properly pleaded, is not made out by the proofs. Mr. Nixon was hired to secure a lender, and, if successful, he was to receive the remuneration agreed upon. He was not and there that particular bargain ended. Under the new arrangement, and when Mr. Nixon himself advanced the money, there was no agreement between him and Mrs. Chenoweth that he should have a commission of 2 per cent. out of his loan. Such a bargain, executed, would be clearly usurious. In making the settlement, Mr. Nixon arbitrarily withheld \$240 for his compensation, to which Mrs. Chenoweth, at the time, submitted. That this was the true situation was affirmed by Mrs. Chenoweth, as well on the stand as by her original answer, in which she asserted that "the charge of fee or commission was without any previous agreement, and was simply deducted from the proceeds of the mortgage loan by the said Horace F. Nixon." A corrupt bargain, to contravene the statute, is essential to sustain the plea of usury. Withholding of a part of the loan as a bonus, without a previous agreement to that effect, does not constitute usury. *Howell v. Auten*, 2 N. J. Eq. 44; *Ware v. Thompson*, 18 N. J. Eq. 66; *Muir v. Newark*, 18 N. J. Eq. 537; *Auble v. Trimmer*, 17 N. J. Eq. 242; *Kase v. Bennett*, 54 N. J. Eq. 97, 33 Atl. 248. The remedy for the wrongful detention is to correct the settlement, and not to forfeit the interest, if there was no contract to evade the statute. *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 11 Sup. Ct. 321, 34 L. Ed. 969.

Mr. Nixon's subsequent success in placing the mortgage at 5 per cent., as he had promised to do, entitles him to his brokerage of one-half of 1 per cent., the maximum rate under the fifth section of "An act against usury." 4 Comp. St. 1910, p. 5706, § 7. It is insisted that the loan from Mr. Dunlap to the defendant was for a term of five years, and hence the charge of \$240 was within the statute. I can find nothing in the record justifying this claim. The mortgage was drawn for one year, and there was no binding obligation to extend the time.

[2] Now, as to the pleadings: The defense of usury must be timely and strictly pleaded; otherwise, it will be indulged only to promote the equities of the cause. *Richards v. Weingarten*, 58 N. J. Eq. 206, 42 Atl. 739; *Van-deveer v. Holcomb*, 22 N. J. Eq. 555. The first answer, filed within time, on January 6, 1916, set up, as already stated, that the 2 per

cent. was charged for services without previous agreement, and a deduction was prayed. After notice of motion to strike it out, an order was entered February 14th allowing an amendment. On February 24th, by way of counterclaim (7), the charge and deduction of \$240 commission was again set up, substantially in the language of the original answer, but characterized as usury, and allowance was prayed. The cause came on for hearing on April 4th, when counsel associated with Mr. Nixon applied for a continuance and consented to a further amendment setting up usury in proper form. This consent was withdrawn the following day on the ground that it had been given under a misapprehension. At the final hearing the defendant filed an amended counterclaim, in form herein-after stated. This amendment will be permitted to stand as an answer to abate the principal debt, but not to plead the defense of usury. It is out of time. There is no order allowing it, and the consent to its filing, which was hastily given and promptly withdrawn, ought not to prejudice the complainant. Had the application to amend been made to the court, it would have been denied upon terms. *Richards v. Weingarten*, supra.

The amendment does not allege usury, as required by the rules of pleading. After setting up the facts and circumstances of making the loan, as hereinbefore related, the answer continues:

"And in making settlement therefor the said Horace F. Nixon deducted and retained from said principal sum the sum of \$240, which these defendants by their acquiescence at that time agreed to pay to said Horace F. Nixon for the loan and use of said sum of \$12,000 in addition to interest at the rate of 6 per cent. per annum upon the loan or forbearance thereof."

This is argumentative. It disclosed no corrupt bargain for the loan of the money, and is no more than an averment that in making the settlement Mr. Nixon retained \$240 for his compensation, to which for the time being the defendant's attitude was passive. One of the four essential allegations of the defense of usury is that the contract for the loan of money was made between the parties, with the intent to violate or evade the statute against usury. *Kase v. Bennett*, supra. The further allegation:

"That the said bond or obligation, made upon the contract as aforesaid, between the said Horace F. Nixon and these defendants, for the loan of money, and the bond and mortgage set forth in the said bill of complaint, were given in pursuance of the agreement above set forth, with corrupt intent to violate and evade the statute against usury"

—was intended to supply another required averment, viz., that the bond and mortgage were given in pursuance of the corrupt intent that influenced the contract for the loan. This, too, is faulty, because it assimilates the infirmities of the previous insufficient allegation of a corrupt bargain upon which it is predicated. Combined, the allega-

tions do not supply the deficiencies. In setting up a defense of usury in a suit in chancery, the defendant must in his answer, as in a plea of usury in an action at law, set out the particular facts and circumstances of the supposed usurious agreement, that the court may see that the agreement was in violation of the statute. *Taylor v. Morris*, 22 N. J. Eq. 606.

The complainant is entitled to a decree for the amount of principal, less \$180 (the difference between the brokerage, charged and allowed), with interest at six per cent. to the date the complainant purchased the mortgage (September 27, 1912). He paid for it in three installments. Interest will be calculated at the same rate to the date of final payment, December 7, 1912, on the unpaid portions, and after that date at 5 per cent. Credit is to be given for all payments made on account of interest. Under the circumstances, no costs will be allowed. Mr. Nixon is the real prosecutor of the suit, upon whom the costs should fall, and, as the complainant has his guaranty, and has been paid his interest in full, an adjustment can readily be made.

(88 N. J. Eq. 612)

WARREN v. WARREN. (No. 29.)

(Court of Errors and Appeals of New Jersey.
Jan. 31, 1918.)

HUSBAND AND WIFE ~~as~~ \$240—MARRIAGE SETTLEMENTS—EQUITIES ON SEPARATION.

A transfer of land to a wife paid for by husband, when both contemplated sharing its benefits by living together through life, must be presumed a settlement or gift, and complete estrangement, or even divorce, raises no new equity in favor of the husband.

Appeal from Court of Chancery.

Equitable action by William H. Warren against Cora B. Warren. Decree for defendant, and plaintiff appeals. Affirmed.

The following is the opinion of the Vice Chancellor:

"In the above-stated cause my conclusion is that the complainant has failed to establish his case, and that the bill must therefore be dismissed.

"The equitable principles applicable to the situation presented by the pleadings and proofs are well settled—so well settled that there was no dispute in regard to them in the argument of counsel.

"As to the facts, I think I may say that the evidence not only failed to rebut the presumption of a settlement or gift, but convinced my mind that there was a gift; that this was the common case where a man buys land and has it conveyed to his wife with the natural expectation that the settlement will be advantageous to both parties. When the relations of the man and his wife cease to be harmonious, when divorce or separation comes, the man finds himself disappointed in his expectations, and he very much regrets the disposition of property which he theretofore made. No doubt there are situations of this kind where there is hardship, and some future laws may provide for the readjustment of family settlements in case of divorce. Under our present system of laws the destruction of harmonious and confidential relations between

the man and wife, their complete estrangement, and even divorce, create no new equity in favor of the husband with respect to land which he originally donated to his wife when both parties contemplated that their affectionate and confidential relations would endure throughout their lives, and that both would therefore share in the benefits of the donated property.

"I am disposing of this case without considering the origin of the money which paid for the land or some other questions of fact. I am assuming, for the purposes of this decision, that the full price of the land came from money which belonged to the husband alone, together with the rents which the land yielded through a course of years."

Ziegner & Lane, of Jersey City, for appellant. Lum, Tambllyn & Olyer, of Newark, for appellee.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor STEVENSON.

(263 Pa. 48)

In re BOWERS' ESTATE.

Appeal of PEOPLE'S TRUST CO. OF LANCASTER.

(Supreme Court of Pennsylvania. July 17, 1918.)

WILLS §767—ADEMPTION—CHANGE OF REALTY TO PERSONALTY.

Where testator, owning realty and personalty, devised his estate in trust, to put "money" at interest and to lease realty and to pay over annual income to his daughter for life, and required trustees, on her request, to sell realty and pay from proceeds such sum as she might request, and, on her death, gave remaining estate to collaterals, and in his lifetime converted realty into securities, such securities passed as personalty, and could not be awarded daughter on her request, her interest therein being for life only.

Appeal from Orphans' Court, Lancaster County.

Petition by Mary Bowers for payment to her of a trust fund created by the will of Jacob Bowers, deceased. From a decree directing payment of principal of trust fund, the People's Trust Company of Lancaster, one of the testamentary trustees, appeals. Reversed.

Argued before BROWN, C. J., and MOSCHZISKER, FRAZER, WALLING, and SIMPSON, JJ.

William H. Keller, of Lancaster, for appellant. John E. Malone and William H. Keller, both of Lancaster, for appellee.

MOSCHZISKER, J. Jacob Bowers, a widower with one child, a daughter named Mary, died July 6, 1915, leaving a will dated March 4, 1913. Testator gave all his property in trust to place "the money" at interest, lease the real estate, and pay over the entire net income, each year, to Mary Bowers, during her life. He further provided that, if at any time this daughter should ask the trus-

tees to sell real estate, they should do so, and pay her, out of the proceeds, such sum as she might in writing request, her receipt therefor to be a sufficient release. When testator's will was made, he possessed certain personal property, a farm, and another piece of real estate; on April 1, 1915, he sold this farm and invested the proceeds in securities valued at \$14,839.29, which he owned at the time of his death. Letters testamentary were granted to Mary Bowers and the People's Trust Company of Lancaster, whose account showed a balance of \$16,102.27, which was awarded to these executors as trustees under the will.

July 26, 1917, the trustees filed an account, showing a balance of principal amounting to \$16,025.42. Thereupon Mary Bowers presented a petition to the Orphans' Court, setting forth that, under the provisions of her father's will, she had requested payment to her of the net purchase price of the farm sold by decedent during his life, and praying an award accordingly. The trust company answered, denying petitioner's right to the desired award; but, upon the adjudication of the trustees' account, the court below directed them to pay her the sum of \$14,839.29, as principal derived from the sale of the farm. Exceptions to this order were dismissed, and the daughter's cotrustee appealed.

When the will before us was executed, the testator had personal as well as real estate; the trust which he created for the benefit of Mary Bowers embraces both species of property, and, at her death, "whatever estate remains" is to go to certain collateral legatees. He gave his daughter the right to consume principal invested in real estate, but made no such provision as to personal estate. The impelling reason for this distinction between realty and personalty is undisclosed; but the distinction exists, and must be adhered to as a material part of testator's scheme of distribution. When, in Mr. Bowers' lifetime, he sold his farm and invested the proceeds in securities, at his death the latter passed under his will as personal estate, and must be treated as such in all respects. The truth of this becomes plain when we consider the proposition suggested by counsel for appellant:

"Suppose the situation were reversed, and decedent had invested the personal property, which he owned at the time of making his will, in real estate, and then died; would any one contend that such real estate, so purchased, was not real estate for the purposes of his will, but was to be considered as if it still remained personal property?"

Clearly not, and no more can the fund here in question be treated as though it still remained real estate. The award under attack cannot be sustained, for it constitutes a plain departure from the terms of testator's will.

Decree reversed; costs to be paid out of the estate.

(Supreme Court of Vermont. Nov. 19, 1918.)

1. APPEAL AND ERROR ¶1178(6)—REVERSAL—ORDERING NEW TRIAL OF CERTAIN ISSUES ONLY.

Although, upon reversal for error which inheres in a single issue, the ends of justice are in general met by a new trial of that issue alone, the scope of retrial rests in the sound discretion of the appellate court.

2. APPEAL AND ERROR ¶1221—REVERSAL—ORDERING NEW TRIAL OF CERTAIN ISSUES ONLY—ENLARGING REVERSAL.

Where, after a reversal and remand for new trial on a certain issue only, a petition is seasonably brought for enlargement of the reversal, the matter should be regulated by a flexible rule, and the rules governing petition for new trials in general do not necessarily obtain.

3. APPEAL AND ERROR ¶1221—REVERSAL—RETRIAL OF CERTAIN ISSUES ONLY—ENLARGING REVERSAL.

Where a judgment for plaintiff in an action for malpractice was reversed and remanded upon the question of damages only, and the affidavit upon petition to enlarge reversal showed newly discovered evidence bearing upon important issues connected with the allowance of damages, held that the reversal should be enlarged and a retrial had without restrictions.

Action by R. N. Baldwin against J. H. Gaines. Judgment upon a verdict was rendered for plaintiff, and the defendant brings exceptions. Whereupon the case was reversed and remanded for new trial as to damages only (92 Vt. 61, 102 Atl. 338). Hearing upon petition for enlarging reversal and granting unrestricted retrial. Petition granted.

Argued before WATSON, C. J., and HASELTON, POWERS, and TAYLOR, JJ.

W. W. Reiriden, of Barton, and E. A. Cook, of Lyndonville, for petitioner.

Frank D. Thompson, of Barton, and J. Rolf Searles, of St. Johnsbury, for petitioner.

HASELTON, J. The case of Baldwin v. Gaines for malpractice was tried in the county court at the September term, 1916, and the plaintiff had judgment. The case came to this court on exceptions, and at our October term, 1917, the judgment was reversed as to damages, and the cause was remanded for a new trial on that question only. Baldwin v. Gaines, 92 Vt. 61, 102 Atl. 338.

We have here a petition for an unrestricted retrial. We are informed by the brief of the petitioner that the remanded case has been continued in county court pending the determination of this petition for an enlargement of the reversal.

[1] Until about nine years ago it was the practice on reversal and remand for prejudicial error to grant a new trial on all questions and issues. But during the time just mentioned it has been considered that where the error inheres in a single issue, the ends of justice are in general met by a new trial

per Mills, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128; Austin v. Langlois, 83 Vt. 104, 74 Atl. 489; Kennett v. Tudor, 85 Vt. 190, 81 Atl. 633; Griffin v. Boston & Maine Railroad, 87 Vt. 278, 89 Atl. 220; Green v. La Clair, 89 Vt. 346, 95 Atl. 499; Cross v. Passumpsic Fibre Leather Co., 90 Vt. 397, 98 Atl. 1010; Ryder v. Last Block Co., 91 Vt. 158, 99 Atl. 733; Adams v. Cook, 91 Vt. 281, 100 Atl. 42.

The practice has become the general rule, but the rule is to be applied with caution, with a view to the furtherance of justice, and whether or not it shall be applied is always a matter within the sound discretion of the court. Griffin v. Boston & Maine Railroad, 87 Vt. 278, 89 Atl. 220; Carpenter v. Central Vermont Ry. Co., 90 Vt. 35, 96 Atl. 373; 20 R. C. L. 222.

[2] At the time of a decision requiring a new trial on one issue, suggestions may be made by counsel to the effect that justice will be promoted by an unrestricted trial of all questions in the case. Griffin v. Boston & Maine Railroad, 87 Vt. 278, 89 Atl. 220.

It follows that where, as here, a petition is seasonably brought for the enlargement of a reversal, the rules governing petitions for new trials in general do not necessarily obtain.

The rule here should be somewhat as flexible as the rule that where a case comes before us on findings of facts, if a reversal is had, judgment will here be rendered such as the trial court should have rendered on the facts found. Reynolds v. Bean, 91 Vt. 247, 99 Atl. 1013; Phillips v. Cutler, 89 Vt. 233, 95 Atl. 487; Davis v. Davis' Estate, 48 Vt. 502; Smith v. Hill, 45 Vt. 90, 12 Am. Rep. 189.

[3] The defendant to this petition resided in Irasburg and was injured in an automobile accident at Newport. He suffered a fracture of the right femur or thigh bone. The petitioner, Dr. Gaines, was one of the physicians who set the bone, and he attended Baldwin as his surgeon at Newport for about three weeks, when the patient was removed to his home in Irasburg. Dr. Templeton, of Irasburg, was the family physician of the Baldwins, and one of the issues in the case was whether after the removal of Baldwin to Irasburg the latter was under the care of Dr. Templeton or of Dr. Gaines as attending physician and surgeon.

Upon this important question the affidavits of newly discovered evidence attached to the petition have a very considerable bearing. The affidavits also have some bearing upon the question of whether or not the deformity in Mr. Baldwin's right leg (it is now about 2¼ inches shorter than the other) resulted from his own imprudence. If this were a petition to open litigation that has been ended we might not be able to say

that the affidavits are sufficient for that purpose. And we might have difficulty in holding that the affidavits of diligence are specific enough. *Gillfillan v. Gillfillan's Estate*, 90 Vt. 94, 96 Atl. 704; *Usher v. Allen*, 89 Vt. 545, 95 Atl. 809; *Willard v. Norcross*, 86 Vt. 426, 85 Atl. 904; *Ploof v. Putnam*, 83 Vt. 494, 76 Atl. 145; *Flint v. Holman*, 82 Vt. 513, 74 Atl. 232; *Hemmenway v. Lincoln*, 82 Vt. 465, 73 Atl. 1073; *Lucia v. State*, 77 Vt. 279, 59 Atl. 1016; *May v. State*, 77 Vt. 330, 60 Atl. 1.

But here the question is not whether there shall be a new trial, but relates to the scope of such trial. Much of the newly discovered evidence will necessarily be admissible on the question of damages, for the petitioner can be held liable only for injuries attributable to his fault. *Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813; *Hathorn v. Richmond*, 48 Vt. 557; *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 838.

We think it will subserve the ends of justice, and will consist with the rules governing new trials in general, to enlarge the reversal upon the showing made and order a new trial without restrictions. Having reached this conclusion, we purposely refrain from a detailed comment upon the affidavits, and from expressing an opinion as to the probable result of an unrestricted new trial, as we ordinarily do when we have under consideration a petition for a new trial which looks to the renewal of litigation once ended.

Petition granted.

(92 Vt. 435)

LARROW v. MARTELL et al.

(Supreme Court of Vermont. Windham. Nov. 8, 1918.)

1. MUNICIPAL CORPORATIONS \S 706(8)—AUTOMOBILE ACCIDENTS—"UNAVOIDABLE ACCIDENT."

In an action for injuries sustained by being struck by defendant's automobile, an instruction that plaintiff had the burden of showing defendant's negligence, sufficiently submitted the defense of "unavoidable accident," which as to a defendant is an accident occurring without any approximate negligence on his part.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unavoidable Accident.]

2. MUNICIPAL CORPORATIONS \S 706(5)—AUTOMOBILE ACCIDENTS—EVIDENCE.

In action for injuries sustained by being struck by an automobile at a street intersection, evidence held to warrant a finding that the acts of defendant were willful and malicious.

Exceptions from Windham County Court; Zed S. Stanton, Judge.

Action by Frank A. Larrow against George Martell and another. Verdict for plaintiff, and defendant Martell alone excepts. Affirmed.

Argued before WATSON, C. J., and HAS-ELTON, POWERS, TAYLOR, and MILES, JJ.

Robert C. Bacon, of Brattleboro, for plaintiff.

Herbert G. Barber and Frank E. Barber, both of Brattleboro, for defendant.

WATSON, C. J. This is an action of tort to recover for injuries to person and damages to property. During the course of the trial the case was discontinued as to defendant Cobb, and we hereinafter use the word "defendant" as referring to Martell only. The verdict was for the plaintiff. The case is here on defendant's exceptions.

The act of defendant of which complaint is made was done within the limits of the incorporated village of Brattleboro, and at the intersection of Frost, Flat, and Elm streets, which intersection makes four corners, though not all right-angled. Elm street runs northerly and southerly, extending each way beyond such intersection. At approximately right angles therewith is Flat street, running easterly, and Frost street, running westerly. At the time in question the plaintiff was driving a horse and road cart westerly on Flat street, intending to make a left-about turn within the four corners; and the defendant was operating an automobile on Elm street, going northerly toward and over the crossing of this intersection. When the plaintiff was within the four corners, the exact place being in dispute, the automobile operated by the defendant ran against the plaintiff's cart, resulting in the damage to it, and in the injuries to the plaintiff, complained of. No question as to contributory negligence by the plaintiff is presented, the exceptions taken to the charge of the court upon that branch of the case not being briefed.

Defendant excepted to the failure of the court to instruct the jury that if this was an unavoidable accident—that is, if it was what is known "as a pure and simple accident"—the plaintiff could not recover, even though he received an injury; and in his brief defendant says the court properly instructed the jury on the questions of negligence and contributory negligence as far as it went, but that it did not go far enough, for the law in regard to unavoidable accident, and its application to and effect upon the rights of the parties, were not explained.

To be an unavoidable accident as to the defendant, it must have occurred without any proximate negligence on his part. Exclusive of contributory evidence of the plaintiff, the test of liability is not whether the injury was accidental, but whether the defendant was at fault. *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 98. The words "mere accident" and "pure accident" have been held to exclude the idea of negligence (*Ullman v. Chicago, etc., Ry. Co.*, 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949), and we think

the words "pure and simple accident" are to be understood as having the same significance.

It appeared that the automobile was provided with a suitable horn for signaling, but the defendant did not give any signal with it, nor with any other device for signaling, when approaching the crossing of the intersection of streets where the collision took place.

The plaintiff's evidence tended to show that he came down on the north side of Flat street, and was west of the center line of Elm street and north of the center line of Flat street when struck by the automobile; that when the car first came in sight of the plaintiff (and inferentially when the plaintiff's team first came in sight of the defendant) the car was 75 or 80 feet away, was running at a rate of speed from 20 to 30 or 35 miles an hour, and did not slacken in speed before it collided with the plaintiff's cart; that, when the car struck plaintiff's team, his horse was standing still or just moving westerly; that, seeing the car coming, the plaintiff raised his left hand and holloed to defendant, and went to gather up his reins to move along, but before he could get his reins gathered up the car struck him; and that, going northerly, as was the defendant, there was ample room for the car to pass on the right-hand (east) side of plaintiff's team, there being a clear space of between 20 and 25 feet, and still be within the limits of Elm street, to say nothing of the further room resulting from the intersection of Flat street.

The defendant's evidence tended to show that the place of collision was practically in the center of the intersection of Flat and Elm streets, on the east side of the latter; that he was running the car on the east (his right-hand) side of Elm street; that as he came past the building on the corner of Elm street (being the southwest corner of Flat street) he saw the plaintiff just leaving the northwest corner of Flat street (going west), whereupon defendant turned the car to the right, and, within a second or two, the plaintiff was struck by the left side of the car; that, on seeing the plaintiff, the defendant slowed down the car as much as he could; that in approaching the crossing, instead of using the horn, he relied upon the noise made by the car as a means of signaling, the muffler cut-out being open and the noise such that it could be heard for a long distance away. Some of the defendant's evidence, including his own testimony, tended to show that in coming along Elm street, and to the time of the collision, the automobile was not running at a rate of speed exceeding 10 miles an hour, and that plaintiff's horse was going at the rate of 20 miles an hour, while some of his evidence tended to show that the car was running at a speed not exceeding 15

miles an hour at the time of the collision, and that plaintiff's team was then standing still, the plaintiff holloing and his arms outstretched. A written statement of the accident, signed by defendant within a week after its occurrence, was put in evidence, in which he stated that he was driving the automobile about 20 miles an hour.

[1] The court charged the jury that the burden of proof was with the plaintiff, and if they found on all the evidence that on the occasion in question, while the defendant was proceeding over Elm street immediately up to, and at the point of, the accident, he used the care and prudence of a prudent man, and therefore was not negligent, their verdict must be for the defendant. As before observed, no fault is found with this part of the charge. It is said, however, that the court should have gone further and instructed the jury with reference to the law of unavoidable accidents. But the law of such accidents was, as to the defendant, involved in the instruction given, that in order to recover the plaintiff must show negligence on the part of the defendant, and, failing this, the verdict must be for the defendant. This eliminates the possibility of a recovery if the jury should find an unavoidable accident, and the exception is without merit. In *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629, 21 L. R. A. 723, the plaintiff sought to recover the value of a pair of horses which were drowned in Lake Champlain, through the alleged negligence of the defendants in not properly guarding an opening in the lake where they had been taking ice near a line of public travel. The plaintiff's evidence tended to show that the horses, when being driven on the lake, became frightened, escaped from the driver, and ran into the opening, which was but little guarded. On plaintiff's exception to the charge, the court said the question whether the horses were in such fright and running at such speed that they would have been turned from their course by such guards as reasonably prudent men would have erected was a material question of fact for the jury to decide before they could say whether defendants' negligence in respect to the guard was the cause of the casualty, and that both questions were involved in the instruction that the plaintiff must make out "that the horses were drowned by reason of the failure of the defendants to properly guard the opening." The judgment was affirmed. In the case of *Flanagan v. Chicago City Ry. Co.*, 248 Ill. 456, 90 N. E. 688, the question here presented was raised by the court's refusal to charge as requested, and a similar holding was had.

[2] Exception was taken to the granting of the motion for a certified execution, on the ground, in short, that the evidence did not warrant the finding by the court that—

"The cause of action arose from the willful and malicious act of the defendant, and for will-

ful and malicious injuries to the person and property of the plaintiff, and defendant ought to be confined in close jail."

It is enough to say that the evidence particularly noticed above, if believed in its most favorable light to the plaintiff, afforded a sufficient basis for the finding. Whether the evidence should be so believed was a matter resting wholly with the trial court, and its decision, based upon the finding of such facts, is not revisable here. *Melendy v. Spaulding*, 54 Vt. 517; *Sheeran v. Rockwood*, 67 Vt. 82, 30 Atl. 689; *Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

Judgment affirmed.

(92 Vt. 442)

WALKER v. WALKER (two cases).

(Supreme Court of Vermont. Windsor.
Nov. 11, 1918.)

1. DIVORCE ¶129(17) — ADULTERY — EVIDENCE.

In a suit for divorce by a wife against her husband, wherein the husband filed a cross-bill, evidence *held* to support a finding of adultery on the part of the wife.

2. DIVORCE ¶104—PLEADINGS—AMENDMENT.

In a suit by a wife for divorce on the ground of refusal to support, wherein her husband filed a cross-bill, it was not error to refuse to permit the wife at the close of the evidence to amend her petition so that it would set up intolerable severity.

3. DIVORCE ¶104—DEFENSES—RECRIMINATION—AMENDMENT.

In a suit for divorce by a wife on the ground of nonsupport, wherein the husband filed a cross-bill based on adultery, the wife might defend against her husband's petition by way of recrimination without an amendment of pleadings.

4. DIVORCE ¶54—DEFENSES—ADULTERY.

Adultery committed by a wife bars a suit by her for divorce on any ground.

Exceptions from Windsor County Court; Frank L. Fish, Judge.

Suit by Olivette C. Walker against Grover C. Walker for divorce, with cross-bill by defendant against plaintiff. A decree was rendered, granting a divorce to Grover C. Walker and dismissing the petition of Olivette C. Walker, and the latter excepts. Affirmed.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Herbert H. Blanchard and Herbert G. Tupper, both of Springfield, for Grover C. Walker.

Herbert G. Barber, Frank E. Barber, and C. Menzies Miller, all of Brattleboro, for Olivette C. Walker.

HASELTON, J. [1] We have here two petitions for divorce tried together in county court and heard together here. Olivette C. Walker petitioned for a divorce from her husband, Grover C. Walker, on the ground of refusal to support. Her petition was de-

nied. Grover C. asked for a divorce from his wife, Olivette C., on the ground of adultery. His petition was granted. Olivette C. brings exceptions. She claims, as the vital question in the cases, that the testimony was not sufficient in law to support the finding by the court of adultery on her part. The testimony is referred to, and it tended to show the following facts: Mr. and Mrs. Walker lived in Springfield in this state. About the latter part of September, 1916, Mrs. Walker became acquainted with one Johnson. Thereafter she went to dances with him at Bellows Falls, Springfield, and Claremont. She ran around with Johnson considerably, told her husband that she hated him and liked Johnson, and that if she felt like going around with Johnson she would. March 17, 1917, Mrs. Walker and Johnson attended a dance at Bellows Falls. From the dance hall they went to the Hotel Rockingham and spent the night in the same room, containing only one bed. To bring about this opportunity they registered as man and wife, and the evidence tended to show that both understood how they were registered. Not only did they register as man and wife, but they registered under an assumed name. These facts were amply sufficient as circumstantial evidence to support a finding of adultery. *Taft v. Taft*, 80 Vt. 256, 67 Atl. 703, 130 Am. St. Rep. 984, 12 Ann. Cas. 959; *Lewis v. Roby*, 79 Vt. 487, 65 Atl. 524, 118 Am. St. Rep. 984; *Lindley v. Lindley*, 68 Vt. 421, 35 Atl. 349; *State v. North*, 90 Vt. 125, 128, 129, 96 Atl. 702; *State v. Brink*, 68 Vt. 669, 35 Atl. 492.

Mrs. Walker and Johnson both testified, and both admitted staying together in the same bedroom at the hotel on the night of March 17, 1917, but both denied having sexual intercourse. They testified that Johnson was taken suddenly ill at the dance in question, and was in great pain, and that thereupon they went to the hotel and registered and occupied the same bedroom during the night, she making cold applications upon him throughout the night as for appendicitis, upon his statement to her that such was his trouble. He testified that he told her he was suffering from appendicitis, but on trial he testified that that was not so, but that he was suffering from stricture following gonorrhea. Evidence as introduced ending to show the improbability of sexual intercourse if his condition was as he claimed it to have been. No one at the hotel was informed of his alleged suffering, no doctor was called. The next morning, without waiting for breakfast, they took the train for Springfield, arriving there at noon or a little after. The following day, which according to the calendar was Monday, Johnson did a little work, but on the Friday following he went to a hospital in Rutland and was there operated upon. He testified that

the operation was for stricture, and was made by an incision through the bladder. After the operation, Mrs. Walker, his companion of the night in question, went to Rutland to be with him, and stayed there three days, visiting him much as a friend, but having nothing to do with nursing him.

Counsel for Mrs. Walker claimed that the testimony of Mrs. Walker and Johnson was such that there was really no conflict in the evidence, and no ground for the finding of adultery. But it is no new thing for people charged with crime to deny it, and to invent circumstances to make their denial probable. It was for the court to weigh all the evidence together, and we are convinced and hold that the whole evidence so taken warranted the finding of the trial court as to adultery on the part of Mrs. Walker.

[2] Near the close of all the evidence, counsel for Mrs. Walker moved to be allowed to amend her petition so that it would set up intolerable severity as a ground for divorce. After some discussion the court declined to permit the amendment at the stage to which the cases had progressed. In so ruling the court did not abuse its discretion. Upon this question there is no occasion to cite authorities.

[3] Without amendment of the pleadings it was, however, open to Mrs. Walker to defend against her husband's petition by way of recrimination. *Hemenway v. Hemenway*, 65 Vt. 623, 27 Atl. 609; *Tillison v. Tillison*, 63 Vt. 411, 416, 417, 22 Atl. 531; *Shackett v. Shackett*, 49 Vt. 145.

[4] And without condonation, of which there is no suggestion, the adultery found to have been committed by Mrs. Walker was a bar to her having a divorce on any ground. *Shackett v. Shackett*, 49 Vt. 195, 197.

We have considered all the exceptions relied on by the excepting party.

The decree dismissing the petition of Olivette C. Walker is affirmed. The decree granting the petition of Grover C. Walker is affirmed.

(79 N. H. 74)

COBB v. MORRISON.

(Supreme Court of New Hampshire. Merrimack. Oct. 1, 1918.)

1. APPEAL AND ERROR \Leftrightarrow 889(3)—REVIEW—NECESSITY OF SPECIAL PLEA.

Where release was introduced in evidence, and issue as to whether it was a bar to suit was fully tried, reviewing court will not interfere, although a special plea setting up release was necessary.

2. ACTION ON THE CASE \Leftrightarrow 5—UNLAWFUL INTERFERENCE WITH ELECTION—EVIDENCE.

In case to recover for alleged unlawful interference by defendant member of school board with plaintiff's re-election as school superintendent, evidence held insufficient to show interference by defendant after the date when the parties had a settlement.

3. RELEASE \Leftrightarrow 57(2)—FRAUD IN PROCURING—EVIDENCE.

In the absence of evidence that plaintiff relied on defendant's silence, or that he would not have signed a release if there had been a full disclosure of the facts and circumstances, the charge of fraud in obtaining the release cannot be sustained.

4. RELEASE \Leftrightarrow 83—FROM CONSUMMATED ACTS—SUBSEQUENT ACTS INCLUDED.

A release from liability for acts theretofore done will bar suit for injuries due to effect of such conduct, although effect did not become manifest until a later date.

Transferred from Superior Court, Merrimack County; Sawyer, Judge.

Action by Ernest Cobb against Obe G. Morrison. Defendant's motion for nonsuit, at close of plaintiff's evidence, was granted. Case transferred on plaintiff's exception. Exception overruled.

Robert W. Upton and Joseph W. Worthen, both of Concord, for plaintiff. Frank P. Tilton, of Laconia, and Martin & Howe, of Concord, for defendant.

PEASLEE, J. The plaintiff was superintendent of schools for the supervisory district consisting of the towns of Tilton, Northfield, and Belmont, and the defendant was a member of the school board of the Tilton-Northfield union district, which is included in the supervisory district. The evidence tended to prove that the defendant was opposed to supervision generally, and particularly to the plaintiff's work, and that the defendant, prior to June 11, 1910, had been active in opposing the plaintiff's wishes, and in inducing other members of the school boards to vote against the plaintiff's re-election.

The plaintiff employed counsel to obtain redress for the defendant's alleged infringement of the plaintiff's rights in the premises, a suit was threatened, and on June 11th parties and their counsel met to consider their differences. After some discussion they came to an agreement and the plaintiff gave the following release:

"Tilton, N. H., June 11, 1910.

"All matters of discussion between Obe G. Morrison and myself having been amicably adjusted, I hereby agree to refrain from bringing any action against said Morrison for slander or other matters that have occurred before this date, and will not be a party to any suit against him concerning school matters in the town of Tilton and Northfield, N. H., arising before this date."

He now claims that this release is not a bar to the present suit for several reasons:

[1] I. The release was not pleaded. There is no occasion to inquire whether a special plea setting up the release was necessary at common law. The release appeared in evidence, the plaintiff had full opportunity to answer it, if he could, and he attempted to do so. The issue was fully tried. If it appears to the trial court that justice and convenience require the filing of a special plea, it can be done now.

[2] II. It is claimed that, after the settlement on June 11, the defendant interfered with the plaintiff's attempt to be re-elected on June 17, 1910. There is no substantial evidence of such interference. The claim is that the defendant then went to Belmont in company with one Sanborn, and induced committeemen of that town to vote against the plaintiff. The defendant denied going to Belmont after June 11, except upon one occasion, when at the close of a day's business he and Sanborn went there upon a trip which did not include any visit to the committeemen claimed to have been influenced. A witness testified to seeing the defendant and Sanborn "in the village of East Tilton just before they crossed the bridge leading into Belmont," that this was "the very first of June," that as he remembered it was after the written resignation, and that he was unable to state the time of day, but as between forenoon and afternoon was of the impression it was the former. There was no other evidence on the question. The utmost that can be said is that the defendant was shown to be on a road in Tilton leading to Belmont at the time in question. Whether he then went to Belmont, or stopped short of there, or turned off on a side road, is left wholly to conjecture.

[3] III. It is said that the release was obtained by fraud, in that the defendant did not disclose to the plaintiff the fact that influence had theretofore been brought to bear upon the committeemen. The parties were dealing at arm's length. Each was represented by counsel, and the subject of having seen other committeemen was not mentioned. There was no representation by the defendant, either express or implied, that he was disclosing to the plaintiff the full extent of the wrong done, in order that the plaintiff might correctly estimate his damages. The extent of the defendant's activities does not appear to have been discussed. The point of the negotiations seems to have been that the defendant had been active against the plaintiff, and was to retire from the whole affair. There is no suggestion in the evidence that the plaintiff relied upon the defendant's silence and was deceived by it. The plaintiff did not testify to any reliance whatever upon what the defendant said, or upon his silence, nor that the release would not have been given if there had been a full disclosure. In the absence of some evidence of such facts, the charge of fraud in obtaining the release cannot be sustained. *Connelly v. Brown*, 73 N. H. 193, 60 Atl. 750, and cases cited.

[4] IV. The damage alleged not accruing until after the settlement was made, it is argued that the cause of action did not then exist, and that therefore it was not the intent to bar it by the release. The contention does not require extended consideration. The evident purpose of the writing was to release

all liability for acts theretofore done. Whether a cause of action had then accrued is immaterial. The argument that the defendant's interference had not then been consummated, so far as action on his part was concerned, is not supported by the evidence. On the testimony, his interference was then a thing of the past. The effect of this conduct upon others might be manifested at a later date, but the release affords no evidence of an intent to reserve the right to recover for past wrongs which might cause future loss.

The nonsuit was properly ordered.

Exception overruled.

(30 N. J. Eq. 331)

COLE v. COLE. (No. 42/241.)

(Court of Chancery of New Jersey. Sept. 5, 1918.)

(Syllabus by the Court.)

HABEAS CORPUS ~~—~~99(3)—CUSTODY OF CHILD
—GRANT TO STRANGER.

The court may, in determining the custody of infant children after divorce, award the custody to a stranger if circumstances of weight and importance connected with the welfare of child exist to overbear the strict legal rights of the parents.

Habeas corpus by Hulda A. Cole against Obediah S. Cole, for custody of a child, Winifred Cole. Decree awarding the custody of the infant to her aunt.

John P. Manning, of Newark, for complainant.

Charles M. Mason, of Newark, for defendant.

LANE, V. C. After I had determined that cross-petitioner was entitled to a decree for divorce on the ground of adultery, and had awarded the custody of the infant child, Winifred, to the father (complainant not appearing upon the hearing), application was made to open the proofs, and I heard further testimony bearing upon the permanent custody of the child. The child was brought before me as if upon habeas corpus in aid of the exercise by this court of its general jurisdiction as *parens patriæ*. The father lives with his mother, a widow of upwards of 50 years of age. The child, a girl of 5, has been in the custody of an aunt, a sister of the mother, for a considerable space of time. The mother desires that the child should remain with the aunt, the father that she should be given to him, so that she may be brought up by his mother.

For reasons which I announced orally at the conclusion of the hearing, and which I will not reiterate, I reached the conclusion that the welfare of the child required that it should, at this time, be left with the aunt. The question was then raised as to the power of the court to award the custody of the child to the aunt, the father being anxious to take it.

The statute provides that after a decree for divorce, the court may make such order touching the care, custody, and maintenance of the children as the circumstances of the parties, and the nature of the case, shall render fit, reasonable, and just. Section 25, Divorce Act, 2 Comp. St. 1910, p. 2035. An Act Concerning Infants, § 9 (arbitrary section 21, 2 Comp. Stat. p. 2810), provides that in making an order or decree relative to the custody of children, the rights of both parents, in the absence of misconduct, shall be held to be equal, and the happiness and welfare of the children shall determine the custody or possession. In *Richards v. Collins* (1889) 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 728, it was held that while the parents had the strict legal right, the Court of Chancery may, in the exercise of its inherent jurisdiction, permanently fix the status of infants, even in disregard of the strict legal rights of parents, where the welfare of the infants requires it.

This case is important because many of the circumstances which induced the court to award the custody of the child to a stranger are present in the instant case. *Richards v. Collins* has been uniformly cited with approval.

In the matter of *Cunningham's Case*, 61 N. J. Eq. 454, 48 Atl. 391, Vice Chancellor Stevens refused to award to the mother the custody of a 16 year old child as against the House of the Good Shepherd, although that institution had no legal authority to hold the child. Vice Chancellor Leaming, in *Kopcinski v. Richardson*, 94 Atl. 32, after quoting from *Richards v. Collins*, supra, said:

"It will thus be seen that a child cannot be lawfully regarded as a mere inanimate chattel which must be restored to the lawful owner in all circumstances. Like the parent, the child has rights, and the strict legal rights of a father, as such, can only be enforced in this court with proper regard to the best interest of the child."

Vice Chancellor Stevenson, in *Re Flynn*, 87 N. J. Eq. 413, quoted from *Richards v. Collins*, at page 416, 100 Atl. 861, 863.

The considerations which ought to influence the court are referred to in the cases above cited, and in *Giffen v. Gascoigne*, 60 N. J. Eq. 256, 47 Atl. 25, and *Titus v. McGloskey*, 87 N. J. Eq. 709, 63 Atl. 244. Giving all due consideration to the legal right of the parents, and to the rule that that right will be recognized, unless circumstances of weight and importance connected with the welfare of the child exist to overbear it, and that it is not sufficient that greater material benefits will be secured by the child in the custody of a stranger, I am still of the opinion that the custody of the child at this time should be committed to the aunt, and will advise an order to that effect. I think that the fact that the mother desires the child left in the custody of the aunt is entitled to some consideration.

Vice Chancellor Stevens declined to pass upon a similar question because not necessary in *Cunningham's Case*.

The order to be made will provide for the right of visitation by the father and the grandmother at certain intervals, for visits by the child to the father and grandmother, and will direct and enjoin all of the parties hereto, including the father, the grandmother, the aunt and the mother, not to take, or permit to be taken, the child out of the jurisdiction of this court without an order of this court first obtained. The order will be so drafted that a disobedience of it will constitute a crime committed within this state, so that any person guilty may be extradited, and counsel drawing the order should have regard to the case of *State v. Dudley*, 89 N. J. Law, 42, 97 Atl. 772, and to the form in which the statutes providing for the crime of desertion are drawn. If the record does not show that the aunt is a formal party to the proceedings, it should be perfected. This may be done, if not already done, by the award of a writ of habeas corpus, directed to her, her return thereto, and traverse by the husband and a consolidation of the divorce case and of the habeas corpus proceedings for trial.

Settle decree and order on three days' notice.

The order will also reserve the right to any party to apply for a modification at any time.

(88 N. J. Eq. 606)

BOWERS v. BOWERS. (No. 8.)

(Court of Errors and Appeals of New Jersey.
Jan. 31, 1918.)

DIVORCE ~~§~~129(16)—EVIDENCE—SUFFICIENCY—ADULTERY.

Evidence of defendant's conduct with co-respondent held sufficient to sustain decree of divorce on ground of adultery.

Appeal from Court of Chancery.

Action for divorce by Jessie Louise Bowers against John O. Bowers. Decree for plaintiff, and defendant appeals. Decree affirmed.

The following is the opinion of the Vice Chancellor:

"This is an action for divorce on the ground of adultery. While there was no direct proof of the commission of the offense, the testimony satisfied me that the defendant and co-respondent had both the inclination and the opportunity to commit the act, and on the conclusion of the hearing I announced that I was satisfied of their guilt and would advise a decree for the petitioner.

"The parties were married on March 17, 1892, and for six years prior to the filing of the petition they had resided in Metuchen, Middlesex county, where defendant conducted a garage business. Petitioner is about 53 years old and the defendant is about 4 years younger. The co-respondent, Mrs. Waite, has been an acquaintance of theirs for some years, and in June, 1915, she moved to 162 Chadwick avenue, Newark. Petitioner first noticed an intimacy between him and Mrs. Waite in October, 1913. In July, 1914, she told her husband, who had been

staying out at night until 2, 3, or 4 o'clock in the morning, that he would have to give her up or give up Mrs. Waite, to which he made no reply. That same night she spoke to Mrs. Waite, telling her she had broken up her home, to which Mrs. Waite replied, 'Oh, yes; I believe Leonard (her son) had something to say about that this afternoon;' and added, 'You go down the block and go home and mind your own business.' After this defendant neglected petitioner, left her alone night after night, even when she was ill, and never took her riding in his automobile, and they did not speak to each other except when absolutely necessary, and he showed no affection for her, and, although he paid the household bills, he refused to give her any money. His excuse is that if he gave her money she would spend it in employing detectives to get evidence against him.

"A few days after petitioner had spoken to defendant and Mrs. Waite about their relations, she again spoke to her husband on the subject, and he told her, 'You can have anything you like or you ask for, but I will go with any woman I damn please.'

"Since March, 1914, petitioner and defendant have not cohabited and have occupied separate rooms. And while Mrs. Waite lived in Metuchen defendant occasionally took meals at her home, and after her removal to Newark he was a very frequent visitor to her home, calling there three or four times a week, apparently driving from Metuchen to Newark in his car. He usually arrived late at night and left very early in the morning, leaving usually from 1 to 4 a. m. During this time people living across the street saw him hugging and kissing Mrs. Waite while she was dressed only in her nightgown, or in nightgown and some wrap over it. Petitioner herself saw some of this conduct while boarding opposite Mrs. Waite's for a few days in November, 1915. On December 7, 1915, petitioner closed her home in Metuchen and moved to 161 Chadwick avenue, opposite Mrs. Waite's, where she obtained board with a Mrs. Kratzig, for the purpose of obtaining what evidence she could of her husband's visits to Mrs. Waite's, and she remained there about three months, and saw her husband leaving the Waite house nearly every morning and arriving there nearly every evening. She and others saw defendant and Mrs. Waite out riding in the automobile at late hours of the night or in the early hours of the morning. They saw the affectionate greetings exchanged between them when he left in the morning. Mrs. Waite was seen to put her arms around him and kiss him while they were sitting in the front room of her home, and Mrs. Waite taunted and laughed at Mrs. Bowers when she met her on the street. Defendant admits calling at Mrs. Waite's frequently after her removal to Newark, at late hours of the night, and leaving at early hours in the morning. He states that the calls were made because he and Mrs. Waite's 20 year old son were working together on an engineering course in some correspondence school; and when petitioner closed their home he began to board with Mrs. Waite, and is still boarding with her, because he claims there is not a suitable place in Metuchen, where he carries on business, in which he could board; but the testimony shows that this is not true. Defendant and Mrs. Waite deny that any illicit relations exist between them; they claim Mrs. Bowers is unreasonably jealous and is of a nagging disposition. She impressed me as a very mild, respectable woman, saddened by the trouble that had come upon her and by the breaking up of her home; and her appearance and conduct upon the witness stand, and the manner in which she gave her evidence, were in marked contrast to the brazen, cynical, and indifferent conduct and manner of the defendant and Mrs. Waite.

In fact, the defendant seemed to realize the unpleasant position in which he was placed much more than Mrs. Waite did, who treated the offense with which she was charged in the lightest possible manner. A sample of her denial is shown by the following extract from her testimony when being examined by counsel for defendant: 'Did he ever kiss you? A. No, sir; when that happens, I want to be alone, not with an audience.' Again, on cross-examination, she stated defendant informed her that she had been named as correspondent in this case when he asked for board, and then: 'Q. Notwithstanding that he acquainted you with the fact that you were openly charged as the correspondent in this case, you nevertheless permitted the doors of your home to be opened to him? A. Surely. Q. The mere fact that you were charged as a correspondent in this case of record, you opened the doors of your home and said there is nothing there from which the public can gather anything? A. No. Q. Is that the only answer you can give me? A. Yes.'

"I cannot believe an innocent woman would act or testify as Mrs. Waite has done in this case. The excuse offered by the defendant for boarding with her, even while this case has been pending and the hearing held, is so flimsy that it cannot be believed. I am convinced defendant and Mrs. Waite committed the offense charged, and that petitioner has shown herself entitled to a decree."

Russell Watson, of New Brunswick, for appellant. A. C. Strettwolf, of New Brunswick, for appellee.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor FOSTER.

HARLOW et al. v. WELD. (No. 432)
(Supreme Court of Rhode Island. Nov. 21, 1918.)

WILLS — 886(1) — CONSTRUCTION — TRUSTS — TERMINATION.

Though a will directs that the property shall be kept together until the death of every annuitant, the trust might be terminated in part and the remainder of the estate distributed on the consent of all living annuitants, upon retaining a sufficient amount to secure the payment of the annuities, in view of the intent of the testator as exhibited by the will as a whole.

Certified Questions from Superior Court, Newport County.

Suit by J. Edwards Harlow, trustee, and others, against Mary Weld, for the construction of the will of William G. Weld, deceased. On certified questions. Questions answered.

Sheffield & Harvey, of Newport, for complainants.

Charles H. Koehne, Jr., of Newport, for respondent.

PER CURIAM. The trustees under the will of William G. Weld, late of Newport, R. I., together with all of the living beneficiaries thereunder, except the defendant, who is the residuary devisee of the corpus of the trust estate, have joined as complainants in a bill for construction of cer-

tain parts of the will, and for instructions to the trustees as to the disposition of the corpus of the trust fund.

The will and first codicil, after giving certain specific bequests and legacies, vest in trustees all of the residuary estate, and after providing for the use and occupation of certain dwelling houses, and for the care and upkeep thereof, direct the payment by the trustees of certain annual sums, amounting in the aggregate to \$5,500, to certain persons named in the will and to the survivors of them until the death of the last survivor.

The will then provides as follows:

"Fifth. I direct my trustees to pay over, after deducting all charges, annuities, and gifts, the balance of the net income of all of my estate, in quarterly payments, to my wife, Caroline L. Weld; on the event of her death or second marriage, I direct my trustees to pay over the whole income (except as before disposed of) to my last son, Charles Goddard Weld (after the death of my wife or second marriage). I repeat that all, all the income must be paid over to Charles G. Weld, as long as he shall live; on the death of this last son, then, the trustees, or their successors, must hand over the entire estate, in whatever it may consist of, to any grandchildren of mine, that may be born and living after date of this will. Should there be no grandchild living after the death of my wife and my only son, then the trustees will hand over my entire estate, as it then exists, to any great-grandchildren there may be of mine," etc.

The said will also provides:

"I give my trustees unlimited powers, but none of the principal of this estate is to be sold or exchanged unless par is obtained for the railroad bonds, but (with the exception of the gifts outright) is to be kept together, until after the death of every individual who is named as an annuitant in this will."

It appears that the said Charles G. Weld died before his mother, June 18, 1911; that Caroline L. Weld, widow of the testator, did not remarry and died April 14, 1918; that the defendant, Mary Weld, is the granddaughter and only surviving grandchild of the testator, and is the person entitled to take under the provisions of the "fifth" clause above quoted.

The prayer of the bill asks for instructions as follows:

"(3) That your honors will construe and determine the true intent and meaning of the said provisions of the said will of William G. Weld, and may instruct and direct your orators, as trustees under said will, as to their duties with reference to the said residuary estate and the times when and to whom they shall pay over the same.

"(4) And if it shall be the direction of your honors that your orators should set aside a sufficient fund to provide for the payment of the said annuities aggregating \$5,500 per annum, before distributing the balance of the said residuary estate, that your honors will determine the securities and the amount thereof that should be so reserved, and direct and instruct your orators with respect to the same."

These questions as to the construction of the will and the powers and duties of the trustees arise from an apparent inconsistency between the direction contained in the "fifth" clause above quoted, viz., "the trustees, or

their successors, must hand over the entire estate, in whatever it may consist of, to any grandchildren of mine, that may be born and living after date of this will," and the direction, as to the principal of the estate, contained in the last clause quoted, viz., "but (with the exception of the gifts outright) is to be kept together, until after the death of every individual who is named as an annuitant in this will."

The above-quoted clause was before this court for construction as to the powers of the trustees to sell and to invest and reinvest in *Weld v. Weld*, 23 R. I. 311, 50 Atl. 490, and it was there held, in effect, that the trustees were to have full powers of management, and of investment and of reinvestment, and of sale in their discretion, subject to the exception that the railroad bonds should be retained until they could be sold at par. The court there gave a reasonable construction to language which was apparently inconsistent and repugnant.

So in the case at bar we think the repugnancy and inconsistency of the language above quoted is more apparent than real. We do not find that by the language last quoted it was the plain intention of the testator to override his positive direction that the trustees "must hand over the entire estate * * * to any grandchildren," etc. It is plain from a reading of the whole will, "every word in this will being written by my own hand," as the testator says at the conclusion, that there are several slight ambiguities and inconsistencies therein, which may have arisen from lack of legal advice and from lack of skill in clearly stating his intentions. We think that, in the provisions which, literally interpreted, would impose limitations upon the "unlimited powers" given to the trustees in the last-quoted clause, the testator was rather vaguely expressing a desire that the trustees should not indulge in unnecessary changes of investment, but should, so far as possible, keep his estate together as he had left it for the security of income for the benefit of his wife and his only son, and of the annuitants.

It appears that the entire estate in the hands of the trustees is valued at upwards of \$8,000,000. It also appears that the only active duty of the trustees now remaining to be performed, beyond the management of the estate, is the payment of \$5,500 annually out of the income to the survivors of the 11 annuitants, some 8 in number at the date of filing the bill (May 25, 1918), all of whom appear joined with the trustees as parties complainant, and represented before the court by counsel, and joining in the prayers for construction.

It is suggested and urged in effect by counsel for all these complainants, as well as by the counsel and guardian ad litem for the defendant, Mary Weld, that it is hardly conceivable that the testator, if he had foreseen

the present situation of affairs, would intentionally have directed that an estate of upwards of \$3,000,000, with an annual income of upwards of \$120,000, should be kept together as a whole solely for the security of an annual payment of \$5,500 for an indefinite period, which may last for 25 years. And it is further urged that the substantial intention of the testator, as shown from the whole will, can best be carried out by directing the trustees to continue to hold a sufficient amount of the assets in their hands for the security of said annual payments, aggregating \$5,500, and to "hand over" the rest of the assets to the defendant, who is now equitably entitled to the entire fund, subject only to said annual payments.

We are of the opinion that, inasmuch as the only parties now interested in the trust estate, other than the defendant, are all before the court urging this course of conduct, and in effect waiving the literal interpretation of the language of the will (which can only apply to their interests), a case is presented for the termination of the trust as to so much of the estate in the hands of the trustees as shall remain after it has been ascertained how much and what particular portions of the trust estate should be retained in the hands of the trustees for the security of the annual payments of \$5,500.

As the bill also asks for the examination and approval of the accounts of the trustees, it will be appropriate that the cause be remanded to the superior court sitting in the county of Newport, with direction that the cause be referred to a master in chancery for the purpose of examining the accounts of the trustees, with a view to their settlement, and also for the purpose of inquiring and reporting as to what portions of the trust estate shall remain in the hands of the trustees for the security and payment of said annual sum of \$5,500, and for such further proceedings as may be properly incident to the conclusion of the cause.

The parties may present for approval by this court a form of decree in accordance herewith.

(42 R. I. 8)

SPRAGUE v. TOWN COUNCIL OF TOWN OF WEST WARWICK. (No. 803.)

(Supreme Court of Rhode Island. Nov. 20, 1918. On Motion for Reargument Nov. 22, 1918.)

1. ELECTIONS ¶194(3) — INDICATION OF CHOICE—ERASURES—INTENT.

Where a voter placed a mark in the wrong square and then blotted out that square partially with pencil and marked another square, the ballot was illegal, regardless of his intent in view of Gen. Laws 1909, c. 11, § 46, providing that no voter shall place any mark on his ballot by which it may be identified, since such mark furnished a means for identification.

2. ELECTIONS ¶194(6)—MARKING BALLOTS —IMPROPER PLACES.

A ballot whereon the voter placed a cross in the circle at the head of the ticket and in the square opposite each candidate's name was invalid, under Gen. Laws 1909, c. 11, § 46.

3. ELECTIONS ¶194(6) — INDICATION OF CHOICE—MARKING BALLOTS.

A ballot whereon the voter placed a cross wholly outside the party circle and between it and the party emblem at the top of the ballot was invalid, in view of Gen. Laws 1909, c. 11, § 46.

4. ELECTIONS ¶194(3) — BALLOTS — INDISTINCT MARKS.

Where a ballot in addition to the regular cross contained dim and very fine pencil marks, which evidently were mere inadvertent touches of the pencil during the marking of the ballot, it was nevertheless valid, notwithstanding Gen. Laws 1909, c. 11, § 46.

5. ELECTIONS ¶194(11) — BALLOTS — INDISTINCT MARKS.

Presence of indistinct pencil mark in immediate vicinity of party circle on ballot when there was a cross within the circle did not invalidate the ballot, notwithstanding Gen. Laws 1909, c. 11, § 46.

6. ELECTIONS ¶194(11) — BALLOTS — INDISTINCT MARKS.

An indistinct pencil line through the party circle at the top of the ballot did not invalidate the ballot, where the voter also placed proper crosses in the squares opposite the names of the candidates, notwithstanding Gen. Laws 1909, c. 11, § 46.

Petition by Charles H. Sprague for the certiorari to review the canvass of votes by the Town Council of the Town of West Warwick. Record of the Council quashed in so far as it declared that there was no election for first councilman, and that certain ballots were illegal.

Alexander L. Churchill, John F. Murphy, and Felix Hebert, all of Providence, for petitioner.

Joseph C. Cawley, of Providence, and Patrick F. Barry, Town Sol., of Riverpoint, for respondent.

VINCENT, J. This is a petition for a writ of certiorari brought by Charles H. Sprague of the town of West Warwick in the state of Rhode Island, and sets forth that the petitioner was a candidate for the office of first councilman of the town council of said West Warwick at the election held on November 5, 1918; that at such election he received a majority of the votes cast for that office; that the votes were counted by the several moderators of the several voting districts in said town, and that by such count it appeared that the petitioner had received a majority of the votes for said office; that said votes were duly transmitted to the town clerk of said town of West Warwick, and that on November 6, 1918, the town council of West Warwick, sitting as a board of canvassers, counted the ballots cast for the office of first councilman, and declared that the petitioner, Charles H. Sprague, the Republican candidate for said office, and Frank P. Duffy, the Democratic candidate for said office, had each

received the same number of votes; and thereupon said town council, acting as a board of canvassers as aforesaid, declared that there had been no election for the office of first councilman in said town of West Warwick at said election held on November 5, 1918.

The petition further alleges that said town council of West Warwick, acting as a board of canvassers as aforesaid, wrongfully and illegally held that certain ballots cast for the said Charles H. Sprague bore distinguishing marks, and therefore were defective and void, and could not be counted for the said Charles H. Sprague, whereas in truth and in fact said ballots were lawful ballots, and should have been so declared and counted.

Upon this petition a writ of certiorari was issued to the town council of the town of West Warwick, commanding the production, before this court, of the ballots cast for first councilman at said election, together with the record of said town council, acting as a board of canvassers, relating thereto.

The record of the proceedings referred to and the ballots alleged to have been improperly rejected are before us. These ballots are six in number. They were offered in evidence at the hearing by the petitioner, and marked as exhibits from 1 to 6, both inclusive.

In Exhibit No. 1 it is evident that the voter, after making crosses in the squares at the right of the greater part of the names comprising the Republican ticket, either changed his mind regarding one of the names to which he had appended the cross, or had placed the cross in the square unintentionally. To make the correction which he desired, he blackened the square with his pencil, partially concealing the cross, and placed a cross in the square opposite the name of the candidate for the same office on the Democratic ticket.

In Exhibit No. 3 the voter, with the apparent intention of voting the straight Republican ticket, placed a cross entirely without the circle and in the blank space between the circle and the eagle.

In Exhibit No. 6 the voter seems to have placed a cross in the circle and also a cross in the square opposite each name on the Republican ticket. The crosses opposite the names bear evidence of an attempt to erase them, although they are still apparent without close scrutiny. At the bottom of this same ballot are the words, "Will this town grant licenses for the sale of intoxicating liquors?" These words are inclosed between two horizontal and parallel lines. These lines are extended to the right so as to include two squares one above the other. On the left of these squares and between the horizontal lines the word "Yes" is placed opposite the upper one and the word "No" opposite the lower one. The voter failed to place any mark within either of these squares, but instead partially blotted out with his pencil the word "No."

[1, 2] The markings upon the ballots, Exhibits 1 and 6, though probably not in either case designed by the voter to be a distinguishing mark, for the purpose of subsequent identification, would nevertheless furnish the means by which such identification would be feasible. The nature of these markings leaves no ground for an inference that they resulted from accident or inadvertence. They were made deliberately and intentionally, to serve a purpose which the voter had in mind. While the voter in each case may not have had any actual wrongful intent he has, as a matter of fact, placed something upon his ballot rendering it capable of identification.

[3] In regard to the ballot, Exhibit 3, there is little that need be said. The cross being entirely without the circle, there is a failure to comply with the statute, and the petitioner does not claim that such ballot should be counted.

We think that these ballots, Exhibits 1, 3, and 6, were properly rejected.

[4] Upon the ballot Exhibit 2 there are two pencil marks. These marks are very fine, somewhat dim, and are not such as would readily attract the attention of an ordinary observer. Their position and appearance fail to suggest any connection between them and anything else appearing upon the ballot. They have no descriptive form or characteristics, and seem to be nothing more than inadvertent touches of the pencil during the operation of marking the ballot.

[5, 6] Upon the ballot, Exhibit 4, there is a cross within the circle and a pencil mark in the immediate vicinity of the circle, and upon the ballot, Exhibit 5, there is a somewhat faint pencil line extending across the circle, the circle not having been used, the voter placing crosses in the squares at the right of the names of the candidates for whom he desired to vote. What we have said as to the ballot Exhibit 2 is equally applicable to the ballots Exhibits 4 and 5.

By General Laws 1909, c. 11, § 46, it is provided that:

"No voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him."

In the case of Rice v. Town Council of Westerly, 35 R. I. 117, at pages 122 and 123, 85 Atl. 553, this court has clearly stated the rule which should be applied in determining the validity of ballots bearing additional marks, and has distinguished those ballots where the voter places upon his ballot a mark unconnected with the voting mark, which additional mark appears to have been knowingly and intentionally placed, from those where it appears that the voter has made some additional mark inadvertently or through want of skill in the handling of the pencil.

We think that the three ballots, Exhibits 2, 4, and 5, are valid ballots, and should have been counted for the petitioner Charles H. Sprague.

So much of the record of the town council of West Warwick, acting as a board of canvassers, as declares that there was no election for first councilman, and that the three ballots, Exhibits 2, 4, and 5, are defective and void and could not be counted for the said Charles H. Sprague, is quashed.

On Motion for Reargument.

PER CURIAM. Upon motion for reargument on behalf of the respondents filed November 22, 1918, it is ordered that the motion be denied.

(43 R. I. 12)

STATE ex rel. SPRAGUE v. TOWN COUNCIL OF TOWN OF WEST WARWICK.

(No. 305.)

(Supreme Court of Rhode Island. Nov. 29, 1918.)

1. ELECTIONS ~~305~~258 — CANVASSING BOARD — EXPIRATION OF TERM.

Where, pending certiorari against a town council as canvassing board, new councilmen qualified, except the one bringing certiorari, who had been declared not elected, the old council was not functus officio as a canvassing board and must carry out an order of the Supreme Court directing that votes thrown out be counted for petitioner.

2. ELECTIONS ~~305~~305(9) — CONTEST OF ELECTION — CERTIORARI — DETERMINATION — NECESSITY FOR RECOUNT.

Where canvassing board declared an election a tie, and on certiorari court ordered that certain votes thrown out be counted for petitioner, it is not necessary that all the votes be recounted; the only question being as to the validity of votes thrown out.

Petition for writ of mandamus by the State of Rhode Island, by Herbert A. Rice, Attorney General, on the relation of Charles H. Sprague, against Walter A. Hoxie and others, Town Council of Town of West Warwick. Writ granted.

Wilson, Gardner & Churchill, of Providence, for petitioner.

Joseph C. Cawley, of Providence, and Patrick F. Barry, Town Sol., of Riverpoint, for respondent.

VINCENT, J. This is a petition for a writ of mandamus brought by Herbert A. Rice, Attorney General of the state of Rhode Island, upon the relation of Charles H. Sprague, of the town of West Warwick, against Walter A. Hoxie, Alfred Richard, Joseph E. Maynard, Eugene C. Baxter, and George W. Godfrey.

At the election in the town of West Warwick on November 5, 1918, the name of Charles H. Sprague appeared on the ballots as the Republican candidate for first councilman and the name of Frank P. Duffy as the Democratic candidate for that office. On the day following the election the town council met and, sitting as a board of canvassers, proceeded to count the ballots cast at said election, including those cast for the respective candidates for the office of first council-

man. After rejecting six of the ballots cast for Sprague on the ground that they were illegal and void, because they bore distinguishing marks, the board of canvassers found that each of the said candidates, Sprague and Duffy, had received an equal number of votes, whereupon it was declared by said board of canvassers that there was no election of first councilman and a record to that effect was accordingly made.

On November 7, 1918, Charles H. Sprague filed his petition for writ of certiorari against the town council of the town of West Warwick, which appears on the files of this court as miscellaneous petition 303. The record of the board of canvassers in that case disclosed that six ballots for Sprague had been thrown out as bearing distinguishing marks, leaving an equal number of votes for Sprague and Duffy, and that there was no election for first councilman in the town of West Warwick.

After a hearing upon the petition for a writ of certiorari, this court handed down an opinion on November 20, 1918, in which it was held that three of the rejected ballots, Exhibits 2, 4, and 5, were valid ballots, and should have been counted for the petitioner, Charles H. Sprague, and that so much of the record of the town council of the town of West Warwick, acting as a board of canvassers, as declared that there was no election for first councilman, and that the three ballots aforesaid were defective and void, and could not be counted, should be quashed.

The petition for a writ of mandamus now before us sets forth that Walter A. Hoxie and the other above-mentioned respondents were on November 21, 1918, duly notified of the finding of this court upon the petition for a writ of certiorari, and also of the modification of a former restraining order, such modification permitting and authorizing the said Walter A. Hoxie to act as a member of said town council sitting as a board of canvassers, to complete the count of votes for office of first councilman of the said town of West Warwick, etc.; that said Walter A. Hoxie, president of the town council as aforesaid, has refused to call a meeting of said town council to act as a board of canvassers to complete the count of said ballots as aforesaid for the office of first councilman as aforesaid, and that the other respondents named have refused and neglected and still do refuse and neglect to meet as a board of canvassers for the purposes before mentioned; and the petitioner prays for an order of this court to said respondents to show cause, if any they have, why a writ of mandamus should not issue, requiring and commanding them immediately to call a meeting of the town council of the town of West Warwick to sit as a board of canvassers to complete the count of ballots cast for the office of first

councilman of said town on November 5, 1918.

[1] At the hearing upon the petition for a writ of mandamus the respondents appeared by counsel and objected to the issuance of such writ, upon the ground that the town council of West Warwick, upon whom devolved the duty of counting the ballots and recording the result of such count, had gone out of existence and was functus officio. They argued that, the board of canvassers having counted the votes for first councilman and declared the result of such count, and four newly elected members of the town council having qualified, there is now no existing board of canvassers competent to act in the matters now before this court. They further argue that, the board of canvassers having counted the votes for first councilman, excluding certain ballots as defective, and declared the vote for first councilman to be a tie, the former first councilman elected in 1916 would hold over.

We cannot accept the view put forward by the respondents. We think that the members of the former town council still comprise the board of canvassers, upon whom devolves the duty to complete their record in the respects indicated by this court in its opinion upon the petition for a writ of certiorari. Through certain errors committed by the board of canvassers in their count, three votes for Charles H. Sprague were improperly rejected as defective, and were not counted as ballots for the office of first councilman. Having found that such ballots were improperly rejected, and should have been counted for Charles H. Sprague, it naturally followed that the record of the board of canvassers to the effect that there was an equal number of votes for Sprague and Duffy and that there was no election for first councilman should be quashed, and that the board of canvassers must give effect to the three ballots found to have been improperly rejected, and make such a declaration and such a record as would be conformable to the opinion of this court.

[2] The respondents contended at the hearing that, if there was to be any further counting in the matter on the part of the board of canvassers, they should again count or recount the whole number of votes cast at the election for the office of first councilman. We do not see that another count of the whole number of votes cast for the first councilman is called for. The board of canvassers made its count and declared the result thereof, which was that each candidate had an equal number of votes; six ballots having been rejected as bearing marks of identification. This court found that three of those ballots were properly rejected, and three were improperly rejected. It is not claimed that the count of the other ballots was improper, and such count therefore

stands. The only question which was before us under the petition for the writ of certiorari was the validity of the six ballots before referred to, and the only matter now devolving upon the board of canvassers is to deal with the ballots found to have been improperly rejected, and to make its declaration and record in accordance with the opinion of this court heretofore rendered.

In the present case there would seem to be, in effect, little practical difference between the two forms of the order submitted for entry.

It has been argued that the respondents have shown a willingness, if not a desire, to evade the findings of this court as set forth in its opinion heretofore rendered upon the petition for a writ of certiorari, and to do things which would not be in conformity with the spirit thereof. We cannot assume that such a situation will arise. We think our former opinion upon the petition for a writ of certiorari and the views which we have now here expressed set forth with sufficient clearness the duty which now devolves upon the respondents, and that they will not disregard or undertake to evade that course of conduct in the matter which we have so explicitly pointed out.

A writ of mandamus is issued, directing the respondent Walter A. Hoxie to forthwith call a meeting of the town council of the town of West Warwick as it was constituted on the 6th day of November, 1918, consisting of Walter A. Hoxie, Alfred Richard, Joseph E. Maynard, Eugene C. Baxter, and George A. Godfrey, to sit as a board of canvassers to complete the count of votes for the office of first councilman of the town of West Warwick cast at the election on November 5, 1918, and that the said Walter A. Hoxie and the other above-named respondents, acting as a board of canvassers for the town of West Warwick, shall forthwith proceed to complete the count of the votes for the office of first councilman cast at the election on November 5, 1918, and upon the completion of said count forthwith declare and record the result thereof.

(7 Boyce, 151)

In re KILLCOURSE.

(Court of General Sessions of Delaware. New Castle. Sept. 30, 1918.)

CRIMINAL LAW §576(6)—CUSTODY OF PRISONER—GRAND JURY'S FAILURE TO INDICT—DISCHARGE.

Prisoner held on charge of highway robbery, who is not indicted at term during which he was committed, will not be discharged, but, under Rev. Code 1915, §§ 4492, 4847, will be held to bail until the next term.

In the matter of Thomas Killcourse, in custody on a charge of highway robbery. On motion for his discharge. Denied.

PENNEWILL, C. J., and RICE and HEISEL, JJ., sitting.

David J. Reinhardt, Atty. Gen., and P. Warren Green, Deputy Atty. Gen., for the State.

L. Irving Handy, of Wilmington, for accused.

Motion for the discharge of Thomas Killcourse, in custody on a charge of highway robbery. Motion denied.

Mr. Handy moved for the discharge of the prisoner from the workhouse, for the reason that the grand jury had been discharged for the then term to which the prisoner had been held, without returning an indictment against him. In *re Tomer et al.*, 3 Pennewill, 31, 50 Atl. 268, was relied on.

The Attorney General opposed the motion, relying on the statute, Rev. Code, 1915, §§ 4492, 4847, being the same, as follows:

"If any person shall be committed for treason, or felony, and shall not be indicted and tried at the next term of the court where such crime is cognizable, he shall be set at liberty on bail, unless it appear by affidavit that the witnesses for the State (naming them) could not then be had; and if such prisoner shall not be indicted and tried at the second term after his commitment, he shall be discharged from prison."

HEISEL, J. We think the statute is perfectly clear, and that it applies to this case; that this being the first term, the defendant may be held to bail until the next term, and must be indicted and tried at the next term or discharged. We distinguish this case from the case of *In re Tomer et al.*, 3 Pennewill, 31, 50 Atl. 268, because in that case the offense charged was a misdemeanor.

Killcourse was held in \$1,000 bail for his appearance at the following November term.

(7 Boyce, 153)

STATE v. FITZSIMMONS.

(Court of General Sessions of Delaware. New Castle. Sept. 27, 1918.)

1. LARCENY — 1—DEFINITION.

Larceny is the felonious taking and carrying away of the property or goods of another without the consent of the owner, and with intention on part of taker to convert them to his own use.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Larceny.]

2. LARCENY — 14(1)—"LARCENY BY TRICK."

"Larceny by trick" is the felonious or wrongful taking, by means of securing possession thereof, by deception practiced on owner.

3. LARCENY — 14(1)—LARCENY BY TRICK—SWITCHING DIAMONDS.

Where defendant, offered three unset diamonds for sale, took prospective customer to jeweler who tested and found diamonds to be genuine, refused to sell at purchaser's price, and after having left purchaser substituted glass stones for the diamonds, and returned and sold stones as though they were the ones previously tested, he was guilty of larceny by trick.

William Fitzsimmons was indicted for larceny by trick. Verdict of guilty.

HEISEL, J., sitting.

David J. Reinhardt, Atty. Gen., and P. Warren Green, Deputy Atty. Gen., for the State.

James Saulsbury, of Wilmington, for accused.

Indictment No. 128, September term, 1918.

William Fitzsimmons was indicted for larceny by trick. The defense was an alibi. Verdict guilty.

The proof was that the method employed by the accused was what is known as "switching" diamonds. The accused and another met H. on Market street in Wilmington on the morning of the 13th and showed him three unset diamonds which they wished to dispose of. H. took the diamonds into a jewelry store, where he had them tested and found that the diamonds were stones of the first water. He thereupon offered to the accused \$250 for the three diamonds which was refused by the latter; he remarking that if they were unsuccessful in selling the stones at the price desired they might see H. later. Later in the day H. went to his home and found the accused and his companion waiting for him at a nearby grocery store. The accused after some conversation with H. agreed to accept the offer as made by H. earlier in the day. Thereupon they accompanied him to his home, where he secured the money and after examining the stones and satisfying himself that they were genuine he laid them down and proceeded to pay the accused for the same. After the accused and his companion had left H. became suspicious about the three stones and upon taking them to a jeweler's for examination found that they were glass. H. claimed that during the process of paying for the stones at his house the accused had switched or removed the three diamonds which he purchased and had substituted glass for the same. It was also shown that after the arrest of the accused, the \$250 as restitution money was returned to H. through his counsel, who received the same through counsel for the accused.

HEISEL, J., charging the jury:

Gentlemen of the jury: In this case the accused, William Fitzsimmons, is charged with the larceny of certain paper money of the aggregate value of \$250 from one William E. Hance.

[1, 2] Larceny is the felonious taking and carrying away of the property or goods of another without the consent of the owner and with the intention on the part of the taker to convert them to his own use. There is a species of larceny that is known as larceny by trick; that is, where the felonious or wrongful taking is brought about by reason of some deception upon the part of the taker practiced upon the owner of the goods, whereby he gets the possession of the goods.

The law says that if a man gets property from another in that way for the purpose of converting it to his own use he is guilty of larceny.

In this case the state charges that the defendant took three diamonds after they had been selected and purchased from him by the prosecuting witness, and substituted in place of them three worthless pieces of glass, and in that manner got possession of \$250, the property of the prosecuting witness.

[3] The defendant denies that he had anything to do with the transaction, and claims he was not in Wilmington at the time. The only disputed point in this case is whether or not the accused is the man who substituted the pieces of glass for the diamonds. You have heard all of the evidence in this case, and after considering that evidence, if you are satisfied beyond a reasonable doubt that the accused is the man who committed the offense charged in the indictment and you also believe the other facts testified to by witnesses for the state, you should find this defendant guilty; otherwise, you should find him not guilty.

Verdict guilty.

(7 Boyce, 155)

ROBERTSON et al. v. WILMINGTON & P. TRACTION CO. et al.

(Superior Court of Delaware. New Castle. July 3, 1918.)

1. CARRIERS \S 18(2) — RATES — ORDER OF UTILITY COMMISSIONERS — NOTICE OF APPEAL.

A notice of appeal by citizens and taxpayers from an order of the board of public utility commissioners for a city, made on a given date and granting to a traction company "the right to charge a seven-cent fare per passenger riding on cars of such company," is sufficient under 26 Del. Laws, c. 206, § 6, requiring the notice of appeal to set forth the order appealed from.

2. CARRIERS \S 18(2)—RATES—APPEAL FROM ORDER OF COMMISSIONERS—SUFFICIENCY.

That a petition by citizens and taxpayers for the stay of an order by the board of public utility commissioners of the city, from which an appeal has been taken, was also signed by others than the parties signing the notice of appeal, does not invalidate the notice.

3. CONSTITUTIONAL LAW \S 62—DELEGATION OF LEGISLATIVE POWER—UTILITIES COMMISSION.

An order of the board of public utility commissioners, created by legislative act and given supervision over public utilities, fixing rates to be charged by traction companies, was not void as an exercise of delegated legislative power.

4. CONSTITUTIONAL LAW \S 135—IMPAIRMENT OF CONTRACTS — CARRIERS — CHANGE OF RATES.

A provision in the charter of a traction company, whereby the company shall not at any time be allowed to charge a greater amount than five cents for any one fare, may be changed by the consent of the parties, if the rights of the people are not injuriously affected; such change not constituting an impairment of an obligation of a contract.

5. CARRIERS \S 12(1)—PUBLIC SERVICE COMMISSIONS—POWERS—INCREASE OF RATES.

The board of public utility commissioners for the city of Wilmington may allow an increase of rates to a traction company under a law giving it supervision over all public utilities, and power to make such orders as it may deem proper concerning rates.

6. CARRIERS \S 12(6½) — HEARINGS—FIXING RATES—PARTIES ENTITLED TO BE HEARD.

Under the statute creating the board of public utility commissioners for the city of Wilmington, a public utility, as well as a citizen, has the right to be heard and to obtain a change in its rates.

7. CARRIERS \S 12(6½) — PUBLIC SERVICE COMMISSIONS—HEARING—NOTICE OF HEARING.

Under a statute creating the board of public utility commissioners for the city of Wilmington, rates of a traction company cannot be changed on ex parte application of the company, without an opportunity accorded upon public notice to citizens and taxpayers to be heard.

Appeal from Order of Board of Public Utility Commissioners.

Proceeding by the Wilmington & Philadelphia Traction Company before the Board of Public Utility Commissioners for the City of Wilmington to increase its rates. From an order allowing the increase, James W. Robertson and others appeal. Modified and affirmed.

Argued before PENNEWILL, C. J., and RICE and HEISEL, JJ.

Robert G. Harman, of Wilmington, for appellants.

Herbert H. Ward and Andrew C. Gray, both of Wilmington, for appellee Wilmington & P. Traction Co.

Thomas F. Bayard, City Sol., for Board of Public Utility Commissioners for city of Wilmington.

Appeal by James W. Robertson and others from an order of the Board of Public Utility Commissioners for the city of Wilmington, granting the Wilmington & Philadelphia Traction Company the right to charge a seven-cent fare per passenger. Order not affirmed but, by consent, amended.

The Wilmington & Philadelphia Traction Company, on May 7, 1918, presented a petition to the Board of Public Utility Commissioners asking for the right to increase the rate of fare from five cents to six cents per passenger. On June 3, 1918, the company presented an amendment to the petition asking for the right to increase the fare to seven cents per passenger, and on the same day without an opportunity for objection to be heard, a decision was reached by the board granting the prayer of the amended petition for a seven-cent fare, and, on June 5, 1918, the board formally adopted an order or resolution to that effect. An appeal from the order was taken, under chapter 206, volume 26, Laws of Delaware, and a special session of the Superior Court to hear and determine the appeal was called for June 14, 1918, at 11 o'clock a. m., as pro-

vided by Superior Court Rules Nos. 85 and 86. The court being convened on the last mentioned date, Mr. Harman, for the appellants and many other citizens and taxpayers of the city of Wilmington and patrons of the respondent company, presented and read to the court a petition asking for a stay of the order appealed from and a restraining order against the respondent company preventing them from charging more than a five-cent fare, pending final determination of the appeal.

Mr. Bayard, for Board of Public Utility Commissioners, first objected that the notice of appeal filed did not set forth the order appealed from, in accordance with the requirements of the statute creating the board. Chapter 206, vol. 26, Laws of Delaware.

PENNEWILL, C. J. The statute provides:

"Sec. 6. All orders made by said board pursuant to the power and authority given by this act, shall be served on the public utility to be affected thereby, within a reasonable time after such order is made, by the delivery of a certified copy thereof to the person to be affected thereby, or to any officer or agent of any corporation, association or joint-stock company upon whom a summons may be served in accordance with the provisions of the laws of this state. Such order or orders shall take effect within a reasonable time, such time to be fixed in such order. Within thirty days from the date of service of any such order or orders, any party to the proceedings, person or company affected may appeal from such order or orders to the Superior Court of the state of Delaware, by filing a notice of appeal, setting forth the order appealed from, with the prothonotary of the said court, which said court is hereby given jurisdiction to hear and determine such appeal on the merits of the matters forming the basis of the order. The taking of an appeal shall not stay the operation of the order appealed from, but a stay may be granted by the court in its discretion, either with or without terms and conditions. * * *

The order appealed from is an "order of the Board of Public Utility Commissioners for the city of Wilmington, made on Wednesday, the 5th day of June, A. D. 1918, granting to the Wilmington & Philadelphia Traction Company the right to charge a seven-cent fare per passenger riding on the cars of said company."

[1] We think the notice of appeal is in substantial compliance with the requirements of the statute.

Mr. Bayard, for Board of Public Utility Commissioners, then objected to the petition for a stay of the order appealed from, on the ground that it was signed by persons who were not parties to the notice of appeal.

PENNEWILL, C. J. [2] Since the filing of the notice of appeal, certain remonstrants have filed a petition signed by the parties who signed the notice of appeal, and by many others. We do not see how that invalidates the notice of appeal, if the petition includes the same names, even though it embraces others also.

Mr. Ward, of counsel for Wilmington & Philadelphia Traction Company, stating that he was appearing *amicus curiae*, asked the court to define the status of Mr. Gray and himself, as no citation had been issued or served on the Wilmington & Philadelphia Traction Company, asking for a stay of the said order, and that he and Mr. Gray were in court only upon verbal notice given them by Mr. Harman that the court would be sitting.

PENNEWILL, C. J. The application now before the court is for an order to stay the order made by the Board of Public Utility Commissioners, and nothing more. It is in the nature of a restraining order in the Court of Chancery; and, in analogy to the practice in that court, we hold that the notice of the application given by counsel is sufficient, and the company is now permitted to resist the application, if it desires to do so.

Superior Court Rule 86 is as follows:

"Upon the filing of the notice of appeal from an order made by the Board of Public Utility Commissioners, the prothonotary shall forthwith issue citation to the appellee returnable within ten days, and shall also forthwith issue notice to the said Board of Public Utility Commissioners to be served upon any member thereof, and to be returned within ten days, commanding them to send to said court, together with the notice, the record of their proceedings in the case, certified under the hand of the secretary and seal of the commissioners."

It is unnecessary now to determine who is meant by the word "appellee" in the rule of court, but we will direct the prothonotary to issue citation to the company. Citation was thereupon issued, served and returned.

At this point, on the 14th day of June, 1918, after a conference and by agreement of counsel with the court, the company was permitted to charge a six-cent fare per passenger during the pendency of the appeal.

The court was then adjourned until the 24th day of June, 1918. On reconvening, the appellants contended that the Board of Public Utility Commissioners did not have the power or authority to grant the company the right to increase its fare from five cents to seven cents per passenger, and its order or resolution was therefore void. On the contrary it was contended that under the statute creating the Board of Public Utility Commissioners for the city of Wilmington, the board had power to raise or lower the rates charged by any public utility operating in the city of Wilmington.

PENNEWILL, C. J., delivering the opinion of the court:

The Wilmington City Railway Company and the Front and Union Street Railway Company were incorporated by special act of the Legislature before the passage of the General Incorporation Law, and by amendment to their charters the maximum rate of fare was fixed at five cents, in the following language:

"And the said company shall not at any time be allowed to charge a greater amount than five cents for any one fare, ticket or ride in their cars through the said city."

On the 5th day of June, A. D. 1918, the Board of Public Utility Commissioners made an order granting to said railway companies the right to charge seven cents for a fare, and from that order this appeal was taken.

The Board of Public Utility Commissioners was created by an act of the Legislature, and the parts of the act material to this case may be stated as follows:

"The said board shall have supervision over all public utilities operating within the limits of the said city of Wilmington. * * *

"The said board shall have general supervision over all public utilities as herein defined, within the limits of the city of Wilmington, and shall have power, after hearing upon notice, by order in writing * * * to hear and examine complaints concerning rates charged by any such public utility as herein defined, and to make such recommendations and orders as it may deem proper concerning such rates."

There are many other powers conferred upon the board by the act, and they are for the most part of a supervisory character.

The appellants deny the authority of the board to grant to the railway companies the right to charge a higher fare than that fixed by statute, viz. five cents, because—

First. The Constitution of this state vests all legislative power in the General Assembly, and such power cannot be delegated to any other body. The fixing of rates to be charged by a railway company is a legislative power, and, therefore, the act of the board was without authority and void.

Second. If the Legislature can confer upon said board the power to regulate rates under some circumstances, it cannot grant an increase beyond the maximum rate fixed by statute or by the charter of the company, because such an act would impair the obligation of a contract made between the state and the company.

Third. The act creating said board, when fairly construed, cannot be held to mean that the board has, under a right to regulate fares, the power to establish rates when a maximum rate of fare had already been fixed by statute.

Fourth. If the Legislature could delegate to the Board of Public Utility Commissioners the right to fix rates of fare to be charged by said railway companies, and the act of the board would not be an impairment of a contract between the state and the companies, but rather a police regulation, then such right could not be conferred except by express language, and certainly not by implication. The act did not confer such right by express language, or even by implication.

We will consider these grounds urged by the appellants, in the order in which they are stated.

[3] In support of the first ground, the well-known case of *Rice v. Foster*, 4 Har. 479, 489, is cited. The court are clearly of

the opinion that this case is not applicable to the present one. In the *Rice-Foster Case* the Legislature had passed "An act authorizing the people to decide by ballot whether the license to retail intoxicating liquor shall be permitted among them." It involved the right of the people of the county to pass a legislative act. In the case before the court the Legislature created a state agency and invested that body with power to perform a legislative act, viz. to regulate the rates that city railways should charge. In one case it was the delegation of legislative power to the people, and in the other it was the exercise of legislative power by an agency of the state, just as it would have been if the power had been given to the municipality, the city of Wilmington. The distinction, we think, is clear, and the case referred to cannot, therefore, be regarded as an authority in support of appellants' contention.

[4] Upon the second ground urged against the act of the board, the court were by no means free from doubt, and our difficulty was much increased because of the fact that there is a decision in our own state by the Court of Errors and Appeals that seemed to be against the decided preponderance of authority in other states.

Undoubtedly the important, indeed, the vital question in the present case is this: Was the statutory provision which fixed the maximum fare that the railway companies should charge, at five cents, a contract or a mere regulation or condition, subject to the police power of the state? In most states, and notably in New Jersey, every doubt in such controversies is resolved in favor of the police power, and a stipulation respecting the rate of fare to be charged by a railway company, in a statute or municipal ordinance, is held to be, wherever possible, a condition or regulation, and not a contract binding upon the state. But the authorities practically agree that it is possible for the state to make such a contract, and whenever the language clearly and unmistakably shows that such was the intention of the Legislature, it is binding, and cannot be changed except by the consent of the contracting parties.

In no case, perhaps, has the law upon the subject been more clearly and succinctly stated than in *Milwaukee v. R. R. Commission of Wisconsin*, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254. Mr. Justice Day, in delivering the opinion of the court, said:

"The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

To the same effect is the case of *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, 29 Sup. Ct. 50, 52 (53 L. Ed. 176), wherein the court said:

"For the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Undoubtedly the reason for the law as now recognized and declared by the courts is to some extent the growth and development of the police power of the state. The importance and necessity of such power is better understood now than formerly, and many acts are now regarded as within its scope which were not so considered in former years.

The Delaware case of *P., W. & B. R. R. Co. v. Bowers*, 4 Houst. 506, 534, was decided in 1873. In that case Chancellor Bates said:

"The power to adjust its tariff of charges by its own officers, according to their views of the necessities of business and of justice to the public, without supervision, was a part of the franchise as it was granted. The attempted regulation by the Legislature of this power materially abridges the beneficial exercise of it by the corporation, and without any doubt impairs the obligation of the contract in the sense of the Constitution as interpreted by the Dartmouth College Case."

It is true that since the decision by Chancellor Bates the police power of the state has been very much extended by statute and judicial decision, but such doctrine was urged by counsel and considered by the court in that case, and it was distinctly held that the power of the company "to adjust its tariff by its own officers according to the necessities of business and justice to the public, was a contract the obligation of which the Legislature could not impair," and not a regulation that was subject to the police power of the state. This was a decision by the highest court of the state and cannot be lightly considered or disregarded because of changed conditions. It would seem to dispose of the question so fully argued by counsel in the present case—whether the power given by the Legislature to a public utility company to charge certain rates is a contract or mere regulation.

We say very frankly that the *Bowers Case* will not be disregarded by this court unless the present case can be distinguished therefrom.

It clearly appears from the authorities that the fixing of rates to be charged by public service corporations is a governmental function, and that it can be conferred by the Legislature on a state agency, such as a municipality or public utility commission; that when the rate has been fixed by statute it cannot be changed by one party without the consent of the other, if the grant of the right clearly and unmistakably constitutes a contract between the parties; if it was not a contract, but a mere regulation, prohibition

or condition of franchise, the state may, under its police power, which is an attribute of sovereignty, regulate or alter the rate that had been fixed by statute, municipal ordinance or commission's order.

Applying to the present case the test contained in the opinion of Justice Day above quoted, was the fixing by statute of a maximum rate of five cents a renunciation of the sovereign right to fix rates evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction? Was it clearly a contract between the state and the companies, or merely the condition of a power or franchise granted? When the Legislature said the companies should not charge a rate exceeding five cents, there was, of course, an implied agreement that they should have a right to charge that much; but was it in fact anything more than a prohibition against charging a higher fare? It is true that, when the companies accepted the provisions of the statute that fixed the maximum rate, they impliedly agreed not to charge more than such rate; but was the language employed such as to evidence unequivocally an agreement that the state had renounced the right to fix a different rate?

In the absence of the *Bowers Case*, we would say the sovereign right of the state to regulate the rates to be charged by said companies in the future could not be defeated by such language as was employed in the statute, and that there was no contract between the state and the companies that precluded the state, in the exercise of its police power, from changing the rate of fare fixed by the statute. We feel, however, that so far as this question is concerned the decision referred to should be controlling upon this court, although, in view of the great weight of modern authority, the Supreme Court of the state might very well lay down a different rule from the one declared in the *Bowers Case*.

But this is not a case where the state, through the agency of the utility board, is endeavoring to reduce the fare below the sum which it had agreed might be charged, or to limit the right or power that had been given to the company, as in the *Bowers Case*. Neither is it a case where the company, upon its own motion, had charged more than five cents, which it had agreed not to exceed. It is a case where the state, which had fixed a maximum rate of five cents, agrees, through an agency it had created, that the companies may charge a higher rate, the other party to the contract consenting thereto. So that even though there was a contract binding on the parties that made it, it was possible for them to change it if it was right and proper to do so.

Our conclusion, therefore, is that, if there was a contract, the parties thereto could change it, provided the rights of the people were not thereby injuriously affected. From

what we have said it is obvious that the Bowers Case is distinguishable from the one now before the court, and that our conclusion is not in conflict with the decision given in that case.

We come now to the consideration of the appellants' last point, viz. that the act creating the Board of Public Utility Commissioners does not, when fairly construed, confer upon the board the power to regulate fares when a rate had been already established by statute.

Does the act creating the Board of Public Utility Commissioners for the city of Wilmington confer upon said board the power to regulate the fares to be charged by the railway companies aboved mentioned?

[5] It is difficult to escape the conviction when the entire act is considered, that one of its purposes was to regulate the charges of public utility corporations. The powers given to the board over public utilities of the city are so broad and controlling that it is impossible to believe that the Legislature did not intend that the power to regulate fares should be included. But there is a provision of the act which, in the opinion of the court, expressly gives such powers, viz. the provision "to hear and examine complaints concerning rates charged by any such public utility as herein defined, and to make such recommendations and orders as it may deem proper concerning such rates."

When the board is given power to hear complaints concerning rates charged by a railway company, or other public utility, and make such orders as it may deem proper concerning such rates, we must conclude that it had the power to change any rate that the Legislature could have changed. It was made an agency of the state and vested with all the power the Legislature possessed respecting the fixing of rates for public utilities in the city of Wilmington, subject, of course, to the right of appeal. And this power is given, we think, not only by implication from the general and broad language of the act, but also by express language.

[6] It would be placing upon the statute a construction entirely too narrow to say it means that an individual may complain, but not the company. It is hardly necessary to say that the act was meant to be fair and useful to both individual and company, and that there might be conditions in which either would have cause to complain.

The court having determined that the board had power to regulate fares, Mr. Harman requested that a day be fixed for the hearing of the appeal on its merits, and contended that it should be heard de novo, and not on the record. Without passing upon this question, the court thereupon, after examining the record, said:

PENNEWILL, C. J. We have carefully examined the record in this case, and as a

result of that examination we announce the following decision:

[7] The act creating the Board of Public Utility Commissioners manifestly contemplates that before an order shall be made regulating the rates that shall be charged by any public utility company, a hearing shall be given to citizens respecting the complaint filed, or a reasonable opportunity for such hearing. The board is clothed with large powers and they should be exercised fairly to both the company and the public. It was not intended that an order shall be made upon information received in an ex parte proceeding, or without a fair opportunity for any citizen to state his objection to complainant's application.

The petition presented to the board by the railway companies, on May 7, 1918, asked for the right to increase the rate of fare to six cents, and upon that application a reasonable opportunity was given to any one who might desire to be heard, but upon the amendment to the petition, which was presented to the board June 3, 1918, and which asked for the right to increase the fare to seven cents, we are of the opinion that such an opportunity was not given.

The first notice of a request for a seven-cent fare was made to the board by petition, on June 3d, and on the same day a decision was reached by the board granting said request; its solicitor being called in and directed to "prepare a resolution showing the findings of the board, based on the following":

"That an order be drawn that the Wilmington & Philadelphia Traction Company be permitted to charge a straight seven-cent fare, but shall be required to sell four tickets for twenty-five cents."

So it appears from the record that the public had no notice respecting the seven-cent fare before the board had determined to grant the company's request.

It is true that the order or resolution granting the right to charge a seven-cent fare was not formally adopted until June 5th, but there was no public notice given that it would be deferred until that date. It is also true that protest was made on the 3d and 5th of June, by certain persons, but that did not relieve the board of their duty to give reasonable notice to the public of the application before deciding the case. And, moreover, as to the protest made on June 3d and 5th, the secretary was instructed, on June 5th, to reply to the protestants "that the board has had two public meetings, and that they will decide the issue on the facts laid before them." By "two public meetings," reference could have been had only to the meeting of May 21st, which was with respect to a six-cent fare, and the meeting of June 3d, of which the public had no notice, so far as the record shows, and at which the question of an increase to seven cents was presented and determined.

The court have no doubt that the board have endeavored to do their duty to all parties, but we think it not improper to suggest that their duties might be made easier in the future if they should adopt some plain and simple rules governing their procedure, including a rule providing for a fair hearing on the part of both the public and the public utility.

For the reasons given, the court are of the opinion that the order of the board appealed from should not be affirmed on the record filed in the case.

Counsel for appellants and for the Wilmington & Philadelphia Traction Company, respectively, then conferred and announced an agreement to permit the company to give the six-cent fare a trial for a reasonable length of time, with the right, if found insufficient, to make a new application to the Board of Public Utility Commissioners.

PENNEWILL, C. J. We think the real parties before us are the appellants and the railway company, and with their consent we will amend the order made by the board so that it shall read as follows:

That the Wilmington & Philadelphia Traction Company be permitted to charge a straight six-cent fare.

(117 Me. 455)

COBB v. CUMBERLAND COUNTY POWER & LIGHT CO.

(Supreme Judicial Court of Maine. Nov. 15, 1918.)

1. STREET RAILROADS ¶85(4) — MUTUAL RIGHTS AND DUTIES.

An electric car and an automobile are on an equality at a street junction, and a close watch is required on the part of the motorman.

2. NEGLIGENCE ¶93(2) — IMPUTED NEGLIGENCE.

Negligence of plaintiff's husband, in full management of automobile which collided with defendant's street car, could not be imputed to plaintiff, who was merely a passenger in automobile.

3. STREET RAILROADS ¶114(6) — COLLISION AT STREET INTERSECTION—EVIDENCE.

In action for damages sustained by plaintiff when automobile in which she was riding collided with defendant motor company's electric car at a street junction, evidence held to warrant verdict for plaintiff.

4. STREET RAILROADS ¶83 — REGISTRATION OF AUTOMOBILE—WHAT CONSTITUTES.

Where automobile, registered under Rev. St. c. 26, § 24, as to registration "to purchase, demonstrate, sell, and exchange automobiles," was, at time of collision with street car, used for pleasure alone, it was the same as if the automobile had not been registered at all.

5. STREET RAILROADS ¶102(1)—COLLISION—FAILURE TO REGISTER AUTOMOBILE—PROXIMATE CAUSE.

Although Rev. St. c. 26, § 28, forbids operation of automobile upon any highway unless registered, nonregistration of automobile in which plaintiff was riding at time of collision with defendant's street car at street junction would not, where it had no causal connection

with injury, preclude recovery in common-law action for negligence.

6. LICENSES ¶14(1) — PENAL STATUTE — STRICT CONSTRUCTION.

Rev. St. c. 26, § 83, prescribing a fine not exceeding \$50 or imprisonment not exceeding 10 days for violation of preceding sections with reference to registration of automobile, etc., is penal in its nature, and is to be construed strictly.

7. LICENSES ¶5 — POWER OF LEGISLATURE — REGISTRATION OF AUTOMOBILE.

It was within power of Legislature to impose, within constitutional limits, penalties for failure to register automobile, procure operator's license, etc.

8. TORTS ¶18—ACTION—DEFENSE.

The right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided disobedience in no way contributed to injury.

Exceptions from Supreme Judicial Court, Cumberland County, at Law.

Action by Florence W. Cobb against the Cumberland County Power & Light Company. Verdict for plaintiff, and the case is before the law court on defendant's motion and exceptions. Motion and exceptions overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Frank H. Haskell, of Portland, for plaintiff.

Bradley & Linnell, of Portland, and William Lyons, of Westbrook, for defendant.

CORNISH, C. J. This is an action on the case, brought to recover damages for personal injuries received by the plaintiff while a passenger in an automobile operated by her husband, and struck by an electric car operated by servants of the defendant. A verdict for \$775 was rendered in favor of the plaintiff, and the case is before the law court on defendant's motion and exceptions.

Motion.

The accident occurred about 11 o'clock in the evening of April 17, 1917, in the city of Portland. Mr. and Mrs. Cobb, with five other passengers, entered Congress street, which runs in a general easterly and westerly direction, from Oak street, which runs in a general northerly and southerly direction. The approach to Congress street was from the southerly side. The purpose of Mr. Cobb was to cross the electric tracks on Congress street, and then turning to the left to proceed westerly on the northerly side. At the same time a car was approaching and moving easterly on the southerly track of the electric railroad.

The plaintiff and her husband claim that as they emerged from Oak street the electric car was quite a distance to the west on Congress street and seemed to be slowing down as if to stop; that they supposed they had ample time in which to cross without incurring any danger whatever; that the

husband gave the hand signal and proceeded slowly on his way straight across the tracks, and when the rear wheels of the automobile had passed nearly over the southerly track it was violently struck by the car, thrown around upon the northerly track, and headed toward the west.

The defendant's contention is that the electric car was coasting along Congress street at a rate of 4 to 5 miles an hour, and was under complete and watchful control; that the automobile, on emerging from Oak street, did not proceed straight on, but turned easterly and proceeded along Congress street in the same direction as the electric car for a distance of about 25 feet, and then darted suddenly toward the track and without warning went directly in the path of the car at a point so close to the car that, notwithstanding the immediate application of the brakes, the collision could not be averted. These were the sharp contentions as to the manner in which the accident happened. The evidence was flatly contradictory, and the jury evidently took the plaintiff's view.

[1] So far as the negligence of the defendant is concerned it should be remembered that the collision took place at a street junction, a place where the electric car and the automobile are on an equality, and a close watch is required on the part of the motorman. *Marden v. Street Railway Co.*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476. This rule as to the duties of drivers of all vehicles at street junctions must be strictly observed. It tends to safety in travel.

When questioned in regard to his conduct, the motorman testified:

"If we follow an automobile, and a hand signal is given, we understand he is going across in front of us, either in one direction or the other; but an automobile coming out of a side street to cross directly in front of us, and give us a hand signal, they either wait or take their chances of going across."

This answer may have given to the jury the impression that the motorman claimed a priority of passage, or was regardless of, or at least indifferent to, the rights of travelers approaching from a side street.

[2] So far as the plaintiff's want of due care is concerned, it should be noted that she was merely a passenger sitting on the rear seat; that her husband, an experienced driver, was in full management and control of the machine; and, even though he might be deemed guilty of contributory negligence, his negligence was not imputable to her. *Denis v. Street Railway Co.*, 104 Me. 89, 70 Atl. 1047. It further appears that she did not blindly rely on him, because she also looked, saw the car some distance up the street, and observed nothing to indicate peril in crossing the track.

[3] Without further discussion, we would say that, while the case is somewhat close, we do not regard the verdict so palpably wrong as to warrant our intervention.

Exceptions.

[4] The exceptions involve two questions: First, whether the automobile, considering the purpose for which it was being used at the time, was legally registered. Second, if not, whether nonregistration is a bar to recovery.

As to the first point, it appears that this automobile was registered under the provisions of R. S. c. 26, § 24, then in force. This section provided that, instead of the separate and individual registration of each car by a manufacturer or dealer, such manufacturer or dealer could obtain a certificate of registration bearing a general distinguishing number or mark, together with five number plates, so that for the specified number of cars the same number and distinguishing mark might be used. This was called a certificate of registration "to purchase, demonstrate, sell, and exchange automobiles." It was not a general and unlimited license for all purposes and uses, but for the restricted uses named. It did not include riding for pleasure, nor for hire. On this occasion the auto was being used obviously for no one of the restricted uses, but for pleasure alone, and therefore, so far as this particular trip was concerned, and as relating to this accident, it was the same as if the car had not been registered at all.

[5] This brings us to the second and vital point, whether, considering this as an unregistered car, the plaintiff is thereby precluded from recovering in this common-law action for negligence.

We are aware that the Massachusetts court has so construed the registration statute of that state as to render an unregistered car a trespasser and an outlaw, having no rights which even a negligent party is bound to respect, and to whose occupants no duty is owed by the traveling public, except to refrain from willful and wanton injury.

The leading Massachusetts case is *Dudley v. Northampton Street Railway*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561, a decision rendered by a divided court, and the opinion likens such an unregistered car to a runaway horse, citing *Richards v. Enfield*, 13 Gray (Mass.) 344, and *Higgins v. Boston*, 148 Mass. 484, 20 N. E. 105. Those citations are not precedents for *Dudley v. Northampton St. Ry.*, because they are not actions at common law, but statutory actions against municipalities arising from defects in the highway, a distinction which will be noted later in discussing *McCarthy v. Leeds*, 115 Me. 184, 98 Atl. 72, L. R. A. 1916E, 1212, and *McCarthy, Adm'r, v. Same*, 118 Me. 275, 101 Atl. 448. To the same class belongs *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156, 137 Am. St. Rep. 445.

But the decision in *Dudley v. Street Railway* has been followed by the Massachusetts court in subsequent cases, and is unquestionably the law of that commonwealth to-day. *Chase v. N. Y. Cen. R. R.*, 208 Mass. 187, 158,

94 N. E. 377; *Love v. Street Railway*, 213 Mass. 137, 99 N. E. 980; *Holden v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923; *Dean v. Boston Elevated Ry.*, 217 Mass. 495, 105 N. E. 616; *Gould v. Elder*, 219 Mass. 396, 107 N. E. 59; *Koonovsky v. Quellette*, 228 Mass. 474, 116 N. E. 243, Ann. Cas. 1918B, 1146; *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507.

It would seem, however, that this reaffirmation has been at times somewhat reluctant, because in *Bourne v. Whitman*, 209 Mass. 155, 172, 95 N. E. 404, 408 (35 L. R. A. [N. S.] 701), the court, in commenting upon the *Dudley Case*, said:

"Some of us were disinclined to lay down the law so broadly, and the opinion of the court was not unanimous; but the doctrine has been repeatedly reaffirmed and is now the established law of the commonwealth."

The Massachusetts cases rest wholly upon the interpretation of the words of the statute. They recognize and concede the common-law doctrine that the violation of a statute or ordinance does not constitute negligence per se, and does not prohibit a plaintiff from recovering in an action of negligence, unless such violation is the direct and proximate cause contributing to the act, but they hold that it does not apply. The most striking illustration, perhaps, is *Bourne v. Whitman*, 209 Mass. 169, 95 N. E. 408, 35 L. R. A. (N. S.) 701, cited supra, where it was held that an operator, who has violated the statute, which provides that "no person shall operate an automobile * * * unless specially licensed," etc., may recover in an action of tort; his unlawful act being regarded as punishable under another section of the statute, but not as rendering him a trespasser on the highway.

It is only in the case of nonregistration that the Massachusetts court has construed the statute so broadly, and we think they have read into the statute more than its language will permit, and have attached to the consequences of nonregistration more than the legislative enactment will warrant. The statutory provisions are almost identically the same in the two states, so that it is impossible to distinguish the Massachusetts cases by reason of a difference in the statutes.

We therefore take up our own statute, with a view to determining whether the Legislature, in the case of nonregistration, has created a duty to other travelers on the highway, or only a public duty to be enforced in the ordinary administration of the criminal law; in other words, whether the offender is in effect penalized beyond the express provisions of the statute.

[8] The general rule, which needs no citation of authorities, is that penal statutes are to be construed strictly, and not to be extended beyond their obvious import. The penalties to be imposed are those expressed in clear and explicit terms. Inferential penalties are not to be discovered and enforced.

Section 28 of R. S. c. 26, reads as follows:

"No motor vehicle of any kind shall be operated by a resident of this state upon any highway * * * unless registered as provided in this chapter, and no person, a resident of the state, shall operate a motor vehicle upon any highway * * * unless licensed to do so under the provisions of section 81."

Other minor requirements as to sale and exchange are added, and in section 33 it is provided that whoever violates any of the provisions of the nine preceding sections shall be punished by a fine not exceeding \$50 or by imprisonment not exceeding 10 days.

[7] No distinction is made between any of the offenses. The same penalty within fixed limits is meted out to all. Nonregistration of the machine is made no greater crime than nonlicensing of the driver. It was within the power of the Legislature to impose such penalties, within constitutional limitations, as it saw fit. It imposed a small fine or a short imprisonment. It might have added the forfeiture of the car, as in the case of the illegal transportation of intoxicating liquors (P. L. 1917, c. 294), or it might have subjected the owner of the unregistered car and the occupants to civil liabilities, but it did neither. The difference between wrongs to the public and to the individual is well marked and the Legislature in other acts recognizes both. Thus in R. S. c. 26, §§ 2, 6, the law of the road, so called, there are certain provisions as to travelers turning to the right, not obstructing passage, using bells, etc., and section 6 reads:

"Any person injured by violation of either of the previous sections, may recover damages in an action on the case, commenced within one year. Such violator forfeits not less than one, nor more than twenty dollars, to be recovered on complaint made within sixty days."

Here both a penalty and the liability to civil action are expressly stated.

An apt and striking illustration may be found in the legislation and decisions of Connecticut on the precise point under consideration. Under the Public Acts of Connecticut 1907, c. 221, automobiles were required to be registered and a penalty was provided for violation of the law. Under that act it was held that a party could recover against a municipality for injuries sustained from a defect in the highway although his car was unregistered. *Hemming v. New Haven*, 82 Conn. 661, 74 Atl. 892, 25 L. R. A. (N. S.) 734, 18 Ann. Cas. 240. It should be observed that the contrary rule prevails in this state (*McCarthy v. Leeds*, 115 Me. 134, 98 Atl. 72, L. R. A. 1916E, 1212; *McCarthy, Admr., v. Leeds*, 116 Me. 275, 101 Atl. 448); but that does not affect the force of the illustration. Subsequently the statute of Connecticut was amended and an additional liability was placed upon the violator. Pub. Laws Conn. 1911, c. 85. This expressly provided, in addition to the penalty previously imposed, that no recovery should be had by the owner, opera-

tor, or passenger of an unregistered motor vehicle "for any injury to person or property received by reason of the operation of said motor while in or upon the public highways in this state." Under this act the owner of an unregistered car has been held to be absolutely precluded from maintaining an action for negligence. *Stroud v. Water Commissioners*, 90 Conn. 412, 97 Atl. 336. No other conclusion could well have been reached, because the taking away of the violator's civil rights was distinctly specified. Nothing was left to implication.

The Legislature of Maine has not seen fit to impose this liability upon the violator of the registration section, and the court does not feel justified in reading such a drastic clause into the section, and in effect multiplying many times the fine imposed by statute.

We see nothing in the language of the registration clause which differentiates it from the license clause. They follow each other and together constitute one sentence. They are expressed in substantially the same language:

"No motor vehicle shall be operated * * * unless registered." "No person shall operate a motor vehicle unless licensed."

Their breach is followed by the same penalty. We can discover no legislative intent of civil disabilities lurking in one clause which does not pertain to the other. The license clause is held by the Massachusetts court to be nonpreclusive. Why should not the registration clause be also? If in practice either should be held prohibitive of the right to maintain a civil suit, there are more practical reasons for attaching the prohibition to the animate and nonlicensed driver than to the inanimate and unregistered car. An inert automobile of itself is harmless, whether registered or not. It is only when in motion that danger attaches. But an unlicensed driver operating a machine may be the cause of much mischief. "What is gained by the display of a license number is not the avoidance of collisions, but the more ready identification of the machine and its responsible owner," says the New Jersey court in *Shaw v. Thielbahr*, 82 N. Y. Law, 23, 81 Atl. 497. The act providing for registration has no tendency to prevent collisions, while that requiring the licensing of operators does have that tendency, in so far as it may prevent incompetent persons from managing an engine fraught with such capacity for injury. The Legislature, however, has made no distinction between the two and has provided merely a penalty in either case, and the same penalty.

[8] This construction brings us back to the familiar principle that the right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided this disobedience

in no way contributed to the injury. He is not placed outside the pale of the law merely because he was committing a misdemeanor. That would be a wrong to the public, but not to the other party in the civil action. Such violation may in certain cases be evidence of negligence, but it is not conclusive. *Gilmore v. Ross*, 72 Me. 194; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373, 46 Am. Rep. 400; *Neal v. Randall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668; *Wood v. Me. Cen. R. R. Co.*, 101 Me. 469, 64 Atl. 833; *Moore v. Same*, 106 Me. 297, 76 Atl. 871; *Kimball v. Davis*, 117 Me. 187, 108 Atl. 154; *Kidder v. Dunstable*, 11 Gray (Mass.) 342; *Spofford v. Harlow*, 3 Allen (Mass.) 176; *Counter v. Couch*, 8 Allen (Mass.) 436; *Hall v. Ripley*, 119 Mass. 135; *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788; *Slattery v. Lawrence Ice Co.*, 190 Mass. 79, 76 N. E. 459; *Jaehnig v. Ferguson Co.*, 197 Mass. 364, 83 N. E. 868; *Bourne v. Whitman*, 209 Mass. 169, 95 N. E. 404, 35 L. R. A. (N. S.) 701; *Holland v. Boston*, 213 Mass. 560, 100 N. E. 1009; *Holten v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923; *Conroy v. Mather*, 217 Mass. 91, 104 N. E. 487, 52 L. R. A. (N. S.) 801; *Carrington v. Worcester St. Ry.*, 222 Mass. 119, 109 N. E. 828.

The application of this governing rule to the case at bar is obvious. The nonregistration had no causal connection with the accident whatever. It no more contributed to the collision in this case than did the color of the car. The one was as immaterial as the other. Therefore the violation of the statute did not bar the plaintiff's right of recovery.

This view of the effect of the registration section is uniformly held, outside of Massachusetts, so far as we have been able to ascertain. *Birmingham Ry. & L. Co. v. Aetna Acc. & Liab. Co.*, 184 Ala. 604, 64 South. 44; *Stovall v. Corey Highlands Land Co.*, 189 Ala. 576, 66 South. 577; *Shimoda v. Bundy*, 24 Cal. App. 677, 142 Pac. 109; *Atlantic Coast Line R. R. Co. v. Weir*, 63 Fla. 69, 58 South. 641, 41 L. R. A. (N. S.) 307, Ann. Cas. 1914A, 126, and note; *Moore v. Hart*, 171 Ky. 725, 188 S. W. 861; *Lockridge v. Minneapolis R. R.*, 161 Iowa, 74, 140 N. W. 834, Ann. Cas. 1916A, 158; *Armstead v. Lounsbury*, 129 Minn. 34, 151 N. W. 542, L. R. A. 1915D, 628, and note; *Shaw v. Thielbahr*, 82 N. J. Law, 23, 81 Atl. 497; *Hyde v. McCreery*, 145 App. Div. 729, 130 N. Y. Supp. 269; *Black v. Moree*, 135 Tenn. 73, 185 S. W. 682, L. R. A. 1916E, 1216; *So. Ry. Co. v. Vaughan*, 118 Va. 692, 88 S. E. 305, L. R. A. 1916E, 1222, and note; *Derr v. R. R. Co.*, 163 Wis. 234, 157 N. W. 753; 2 R. C. L. 1208; 2 Elliott, Roads and Streets (3d Ed.) § 1115.

The defendant, however, contends that the recent decisions of this court have virtually adopted the Massachusetts rule. *McCarthy*

v. Leeds, 115 Me. 134, 98 Atl. 72, L. R. A. 1916E, 1212; McCarthy, Adm'r, v. Leeds, 116 Me. 275, 101 Atl. 448. Not so. The first case was brought by the owner of an unregistered automobile against the inhabitants of a town to recover for injuries sustained by reason of a defective bridge. The second was brought by the administrator of the estate of two of the passengers to recover on the same ground. Judgment was rendered in favor of the defendants in both actions and the decisions were based squarely and solely upon the proposition that the liability of a town for defects in its ways and bridges is purely statutory, and the duty owed by the town is only to lawful travelers; that the occupants of an unregistered automobile are not lawful travelers so far as the town is concerned, and therefore no duty is owed to them by the town, except to refrain from willful injury. This doctrine is well established in this state by a long line of analogous decisions; thus one using the street as a playground is not a lawful traveler, within the purview of the statutory liability of a town, *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; nor for horse racing, *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23; nor a traveler on the Lord's Day, under the old statute, *Bryant v. Biddeford*, 39 Me. 193; *Hinckley v. Penobscot*, 42 Me. 89; *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56. The cases of *McCarthy v. Leeds*, supra, simply enforce the same rule, and the court drew the distinction between that class of actions and a common-law action for negligence in these words:

"It must be distinctly borne in mind that this is not a common-law action of negligence against an individual or a corporation, but a statutory remedy against a municipality, and the rights of the traveling public and the liability of the municipality are limited by the scope of the statute. * * * Here, as in the case of the violation of the Sunday law, it is not a question of causal connection between the violation of the statute and the happening of the accident. The same causes would be at work to produce an accident on Monday, or Tuesday, as on Sunday. So in the case at bar the mere nonregistration can hardly be regarded as a contributing cause. The railing of the bridge had no more strength to withstand the impact of a registered than of an unregistered car. The decision does not rest upon the common-law principle of causal connection." *McCarthy, Adm'r, v. Leeds*, 116 Me. 275, 101 Atl. 448.

Evidently the court anticipated the probable necessity of determining at some future time the precise question which has arisen in this common-law action now under consideration, and left itself free to decide that question upon common-law principles when it should arise. The decisions in these two distinct classes of cases are entirely consistent.

It is therefore the opinion of the court that the entry should be:

Motion and exceptions overruled.

(117 Me. 576)

DYER v. CUMBERLAND COUNTY POWER & LIGHT CO.

(Supreme Judicial Court of Maine. Nov. 19, 1918.)

1. STREET RAILROADS ¶99(4) — COLLISION WITH VEHICLE — CONTRIBUTORY NEGLIGENCE.

Driver of motor truck, who was familiar with locality and knew that electric car was coming behind him, in stopping his truck in unobstructed road, 13 feet wide, so close to the track that the car would hit it within "a half to a minute," was guilty of contributory negligence, unless such action could be satisfactorily explained.

2. NEW TRIAL ¶72 — GROUNDS — WEIGHT OF EVIDENCE.

In action by motor truck driver for personal injuries, sustained by collision with street car, evidence held so strongly preponderating against plaintiff, upon question of negligence of defendant, as to require that verdict in favor of plaintiff be set aside and new trial granted.

On Motion from Supreme Judicial Court, Cumberland County.

Action by Ernest R. Dyer against the Cumberland County Power & Light Company. Verdict for plaintiff, and defendant moves for a new trial. Motion sustained.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Hinckley & Hinckley, of Portland, for plaintiff.

Bradley & Linnell, of Portland, and William Lyons, of Westbrook, for defendant.

PER CURIAM. On March 26, 1917, the plaintiff sustained severe injuries in a collision between an auto truck, which he was driving, and an electric car of the defendant corporation, and has recovered a verdict for the damages sustained by him. The defendant moves for a new trial on the usual grounds.

The collision occurred on Main street in that part of the city of South Portland, known as Ligonla, a short distance westerly of Vaughan's bridge. The defendant corporation maintains a double track across the bridge and for some distance beyond, or westerly of, the bridge; a short distance westerly of the bridge, on the right hand, or northerly, side of the double track, was a white post; and just beyond the post a freight track of the Portland Terminal Company, running into the yards of the Standard Oil Company, crossed Main street and the electric railroad. A car coming out of Portland, making a stop at the white post, crossed the steam railroad tracks before stopping. About 160 or 170 feet westerly of the white post the outbound, or northerly, track curves to the left, or southerly, connecting with the inbound, or southerly, track, and from that point westerly, towards Saco, the line is a single track, which, just beyond the switch-curves to the right, or northerly, and occupies

thus an electric car running from Portland to Saco, approaching the end of the double track, first takes a curve to the left, or southerly, until the single track is reached, and then takes a curve to the right, or northerly, until the location on the side of the highway is reached. On both sides of the double track is a roadway for teams, and there is a crossing of the single track where it curves to the side of the highway.

The collision occurred at the point where the two tracks connect. When the electric car stopped, the rear wheels of the forward truck were on the single track some eight or ten inches westerly of the switch points, and the rear truck was on the outbound, or northerly, track. At this point the roadway is 13 feet wide between the curb and the southerly rail.

The plaintiff asserts that upon the afternoon in question he was driving his auto truck to his residence in Scarborough along the right-hand side of the highway, on the northerly side of the defendant's tracks; that near the westerly, or South Portland, end of Vaughan's bridge he saw the electric car of the defendant bound for Saco, stationary on the track ahead of him, near the white post; that there were teams in the road ahead of him on the right-hand side, and that accordingly he turned his truck to the left, crossing the electric car tracks behind the Saco car, and, passing the car, stopped opposite the switch on account of some boys in the road in front of him; that, while thus stopped, the Saco car ran into his truck, overturning it, and causing the injuries which he sustained. He says that his truck had been stopped "perhaps between half and a minute" when the car struck it.

[1] It may well be said here that the action of the plaintiff, who was familiar with the locality and knew that the electric car was coming behind him, in stopping his truck in an unobstructed road, 13 feet wide, so close to the track that the car would hit it almost immediately, constituted contributory negligence, unless satisfactorily explained—as much so, as if he had stopped on the tracks. See *Smith v. Somerset Traction Co.*, 104 Atl. 788, recently decided.

[2] But the defendant asserts that the Saco car on that trip did not stop at the white post; that it slowed down to cross the steam railroad tracks, then increased its speed to 7 or 8 miles an hour for a short distance, and then again slowed down to 3 or 4 miles an hour to take the switch and curve at the end of the double track; that the auto truck was not stopped in front of the car, and that no boys were to be seen in the road. The motorman insists that his first sight of the truck was when the right forward wheel appeared from behind, in front

the instant of the collision, and that then he stopped his car at once.

The sole issue is upon the alleged negligence of those in charge of the Saco car.

Without quoting the testimony at length, we may say that the evidence entirely fails to establish the charge of negligence on the part of the defendant's employes. The testimony of the conductor, of five passengers on the Saco car, and of one White, a watchman for the Standard Oil Company, who saw the collision from the sidewalk, shows beyond question that, when the plaintiff crossed from right to left behind the electric car, the truck took the inbound track and ran for a short distance along the rails, until both truck and electric car were approaching the end of the double track and the switch; that then, in attempting to leave the track, the plaintiff turned his truck to the left, the rear wheels skidded upon the rails, and the truck ran diagonally across the roadway, there 13 feet wide, striking the curb on the southerly side of the street; then, in the plaintiff's attempts to regain control of the truck, it shot back across the street and collided with the electric car in the manner described by the motorman and other witnesses in the vestibule. The evidence is plenary that this unfortunate accident happened substantially in the manner we have stated, and that the motorman acted promptly in stopping his car upon the instant when danger became apparent.

Very serious injuries were undoubtedly sustained by the plaintiff, for which he has recovered a verdict. We are disposed to apply the most severe tests to the evidence before disturbing that verdict; but the evidence, carefully and painstakingly considered, "so strongly preponderates against the plaintiff upon points vital to the result as to amount to a moral certainty that the jury erred in the conclusion reached by them" (*Smith v. Insurance Co.*, 85 Me. 348, 27 Atl. 191), and the mandate must be:

Motion sustained. Verdict set aside. New trial granted.

(117 Me. 474)

STATE v. McDONALD et al.

(Supreme Judicial Court of Maine. Nov. 25, 1918.)

1. INSURANCE — § 811(3) — FIRE INSURANCE — VACANCY OF PREMISES — EFFECT UPON RIGHTS OF MORTGAGEE.

Where fire policy provided that it should become void if the premises became vacant, and as required by the Maine standard form, that if loss were payable to a mortgagee, no act of any other person should affect the right of such mortgagee in case of loss, the insurance continues as to the mortgagee notwithstanding vacancy caused by the owner and mortgagor.

2. ABSON — § 8 — OCCUPANCY OF BUILDING — RIGHTS OF MORTGAGEE.

Although fire policy provided for forfeiture in case of vacancy, its further provision preventing the interest of mortgagee from being af-

fectured by the act of any other person, continued the insurance, so that when the owner of the building intentionally set fire thereto, he was guilty of the offense defined by Rev. St. c. 128, § 22, of burning a building to defraud an insurer.

Report from Supreme Judicial Court, Penobscot County, at Law.

Duncan McDonald and Annette McDonald were prosecuted for willfully burning a building, insured against loss by fire. Case reported. Case remanded to nisi prius.

Argued before CORNISH, C. J., and HANSON, PHILBROOK, DUNN, MORRILL, and DEASY, JJ.

Albert L. Blanchard, Co. Atty., of Bangor, for the State.

Benjamin W. Blanchard, of Bangor, for respondents.

DEASY, J. Prosecution under Revised Statutes, c. 128, § 22, for willfully burning a building insured against loss or damage by fire, with intent to defraud the insurer. The case comes to the law court on report by order of the Presiding Justice as follows:

"This case is reported to the law court to have determined the question whether, upon the evidence in the case, any valid, existing insurance was upon the bungalow which was burned on the 28th day of August, 1917. If the law court finds that no such insurance did so exist, then the case is to be dismissed or to be nol. pros'd at nisi prius; otherwise the case to be sent back for trial upon the merits."

[1, 2] At the time the fire occurred the owner, Annette McDonald, had two policies of fire insurance on the building in force unless avoided by breach of the conditions of the policies. Both policies were in standard form. Both had vacancy permits attached. It is clear that on August 25th, when the building was damaged by fire, and on August 28th, when it was destroyed by another fire, it was unoccupied, and had been vacant so long and under such circumstances that the conditions of the policies and of the vacancy permits had been violated, and that the policies were void as contracts between the companies and the insured respondent. This conclusion is obvious from a reading of the evidence, and it would serve no useful purpose to state the reasons at length. *Dolliver v. Fire Insurance Co.*, 111 Me. 275, 89 Atl. 8, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765.

But one of the policies contained a mortgagee clause as follows:

"Payable in case of loss to the Maine Real Estate Title Company as its interest may appear as mortgagee."

One of the provisions of the Maine standard policy, which provision was contained in both of the policies involved in this case is as follows:

"If this policy shall be made payable to a mortgagee of the insured real estate no act or default of any person other than such mortgagee or his agents or those claiming under

him shall affect such mortgagee's right to recover in case of loss on such real estate."

Notwithstanding the nonoccupancy and the forfeiture by the respondents, the mortgagee's rights under the policy remain valid and enforceable provided that at the date named the mortgage on the building was outstanding and unpaid, and provided that the breach of condition was not due to the act or default of the mortgagee. *Gilman v. Commonwealth Insurance Co.*, 112 Me. 528, 92 Atl. 721, L. R. A. 1915C, 758, and cases cited.

If on August 28, 1917, the mortgage referred to running to the Maine Real Estate Title Company was in force, and if the non-occupancy was not wholly or in part due to any act or default on the part of the mortgagee, there apparently was at that date valid existing insurance upon the building in question; otherwise not.

Case remanded to nisi prius for further proceedings in accordance with this opinion.

(117 Me. 476)

LOOK v. WATSON et al.

(Supreme Judicial Court of Maine. Nov. 25, 1918.)

1. PARTNERSHIP ⇐55—RELATION—PROOF.

In an action against W. and others, as partners, allegation and proof by defendants that "W. & Sons" was the name of a corporation was not decisive on the question whether a partnership existed.

2. PARTNERSHIP ⇐204—GENERAL APPEARANCE—PROOF OF PARTNERSHIP.

A general appearance waives defects in service and want of jurisdiction over defendants' persons, but does not relieve plaintiff from proving that defendants were partners as alleged.

3. PRINCIPAL AND AGENT ⇐22(1)—PROOF OF RELATION.

While agency may be proved by testimony of the alleged agent, it cannot be proved by his admission out of court.

4. PARTNERSHIP ⇐38—ONE HOLDING HIMSELF OUT AS PARTNER—LIABILITY.

One who holds himself out as a partner is liable to another who, believing in and relying upon such partnership, enters into a contract involving the giving of credit to it, even though the former is not a partner, and notwithstanding that such supposed partnership is in fact, but without plaintiff's knowledge, a corporation.

5. PARTNERSHIP ⇐55—HOLDING OUT AS PARTNER—EVIDENCE.

In an action against alleged partners, evidence held to show that one of the defendants held himself out as a partner, and that plaintiff relied thereon.

6. PARTNERSHIP ⇐218(2)—DENIAL OF RELATION—AFFIDAVIT.

One sued as partner, who files no affidavit under Supreme Judicial Court rule 10 (70 Atl. viii), but who challenges the existence of the alleged partnership, is precluded from demanding affirmative proof upon that issue, but not from introducing negative proof.

7. PARTIES ⇐84(2), 92(1)—NONJOINER—MISJOINER—GENERAL ISSUE.

In actions of contract, when the situation does not appear upon inspection of the pleadings, nonjoinder must be pleaded in abatement, but misjoinder is available under the general issue.

eral as partners, but only proving that one held himself out as a partner, may, by amendment, have the names of those not proved to be partners stricken out.

9. PARTNERSHIP —218(4)—GENERAL VERDICT —LIABILITY OF ONE.

Where plaintiff sued several as copartners, but only proved liability of one, there being no evidence that the others were partners and no amendment having been made under Rev. St. c. 87, § 14, exceptions to a general verdict must be sustained.

Exceptions from Supreme Judicial Court, Franklin County, at Law.

Assumpsit by John H. Look against C. A. Watson, R. A. Watson, and George Watson, as copartners under the name of C. A. Watson & Sons. From a ruling directing a verdict for plaintiff, defendants bring exceptions. Exceptions sustained.

Argued before CORNISH, C. J., and HANSON, PHILBROOK, DUNN, MORRILL, and DEASY, JJ.

Frank W. Butler, of Farmington, for plaintiff.

Elmer E. Richards and S. P. Mills, both of Farmington, for defendants.

DEASY, J. John H. Look brings this action of assumpsit on account annexed against C. A. Watson, R. A. Watson, and George Watson, as copartners under the name of C. A. Watson & Sons. A check is also declared upon, but not printed. The case comes to the law court upon exceptions to the ruling of the presiding justice, directing a verdict for the plaintiff.

[1] The defendants allege and prove that "C. A. Watson & Sons" is the name of a corporation. This fact is not decisive. It is not very material, unless it also appears that the dealings involved in this action were between the plaintiff and that corporation. The plaintiff, on the other hand, contends that his dealings were with a partnership doing business under the same name. He claims further that, if he has not proved the partnership, he has at least proved facts and circumstances which estop the defendants from denying its existence and its liability.

[2] The plaintiff urges that the defendant's appearance was general and not special. This point relates to jurisdiction, but does not go to the merits of the controversy. A general appearance waives defects in service and want of jurisdiction over the defendant's person, but does not relieve the plaintiff from the burden of proving the allegations of his writ.

[3] Turning to the evidence in the case, it appears that the plaintiff's transactions were largely with Joel P. Barrett. The defendants say that Barrett was agent for the corporation and not for them, or any of

the individual defendants. He seeks to prove this by showing that Barrett, in reply to the plaintiff's inquiry, gave him the names of the defendants as his principals. But while agency may be proved by the testimony of the alleged agent, it cannot be proved by his admissions out of court.

"To permit the proving of the agency by proving the declarations of the agent would be assuming without proof that which is a prerequisite to the admissibility of the declaration." *Bennett v. Talbot*, 90 Me. 231, 38 Atl. 112; *Hazeltine v. Miller*, 44 Me. 177; *Sleeper v. Insurance Co.*, 61 Me. 272; *Eaton v. Provident Association*, 89 Me. 53, 35 Atl. 1015; *Hill v. Day*, 108 Me. 472, 81 Atl. 581, Ann. Cas. 1913C, 971.

The defendants cannot be held on the principle of liability of an agent for an undisclosed principal. Neither R. A. Watson nor George Watson were concerned in making the contract sued upon, and there is no evidence that C. A. Watson was agent for the corporation for the purpose of buying apples.

The plaintiff testifies that C. A. Watson gave him express directions to pack and ship the apples in question. But the testimony of C. A. Watson, not categorically but in effect, contradicts this. It cannot be said that the evidence of the plaintiff so greatly and manifestly outweighs that of the defendant as to justify a directed verdict. If the directed verdict can be sustained, it must be upon the well-established principle of law, which we state thus:

[4] A defendant who holds himself out as a partner is liable to a plaintiff who, believing in and relying upon such partnership, enters into a contract involving the giving of credit to it. This principle applies although the defendant is not a partner and notwithstanding that such supposed partnership is in fact, but without the plaintiff's knowledge, a corporation.

The bare statement of this principle defines and status of the defendant, C. A. Watson, as shown by undisputed evidence.

[5] In the autumn of 1917 a large business in buying and shipping apples was conducted in Maine by C. A. Watson & Sons. This business was so carried on not only with the full knowledge of the defendant, C. A. Watson, but in some transactions with his active participation. The plaintiff received several checks signed, "C. A. Watson & Sons, by J. P. Barrett, Agent." The name "C. A. Watson & Sons" signifies to the ordinary mind not a corporation, but a partnership of which C. A. Watson is a member. The plaintiff was engaged by Joel P. Barrett to buy apples for this concern. Barrett did not inform the plaintiff that C. A. Watson & Sons was a corporation. He did not know it himself. At the Exchange Hotel, before the apples

sued for were shipped, Barrett introduced the plaintiff to C. A. Watson as "the gentleman that was buying apples for him." The defendant, C. A. Watson, now says in substance:

"My name as used in connection with C. A. Watson & Sons did not mean me. It was merely a part of the name of a corporation in which I was not interested, either as officer, director, or stockholder."

But he said nothing tantamount to this, either to the plaintiff or Barrett, and said nothing and did nothing to correct in the mind of the plaintiff the very natural inference that he was dealing with a partnership in which C. A. Watson was concerned.

No question can well be raised as to the plaintiff's belief in and reliance upon the liability of C. A. Watson. Upon the undisputed evidence above summarized C. A. Watson held himself out as a partner, and is liable to the plaintiff as such.

This conclusion is abundantly supported by authorities.

Speer v. Bishop, 24 Ohio St. 598. This case arose under practice corresponding with a petition for review. The original action was against Henry Speer and others as co-partners under the name of Henry Speer & Co. It appeared that Henry Speer was not a member of the firm at the time the goods sued for were sold, and that there had been no previous dealings between the plaintiffs and the firm of Henry Speer & Co. The court in its opinion says:

"His (Henry Speer's) consent to such use of his name was, in effect, a continuing representation, to those ignorant of the facts, that he was one of the firm."

Hamilton v. Davis et al. (Sup.) 90 N. Y. Supp. 370. The defendants were sued as partners under the name of Davis & Darcy, upon a contract signed, "Davis & Darcy, per Chas. L. Young." Davis & Darcy was in fact (unknown to the plaintiff) a corporation, and the defendants contended that the action should have been brought against the corporation. The court holds:

"These circumstances justified the court below to hold that the defendant Davis was estopped from denying that the contract was made with a firm of which he and Darcy were the members. * * *

"It was apparent that the plaintiff was induced by Davis & Darcy to believe that she was contracting upon the faith of their liability as individuals and members of a firm. * * * The corporation bore a name, to their knowledge, and with their approval and consent, which would ordinarily indicate a copartnership, rather than an incorporated body."

Bourgeois v. Bustanoby, 78 Misc. Rep. 404, 138 N. Y. Supp. 366. This was an action for goods sold upon an order signed, "Bustanoby Bros., per Louis Bustanoby." The defendants proved in defense that Bustanoby Bros. was a corporation. In ordering judgment for the plaintiff the court says:

"The mere fact that a corporation existed under the name of Bustanoby Bros. does not prevent stockholders from making contracts individually, and, if they do make such contracts, they are personally liable; nor does it preclude the stockholders from forming a firm, and doing business under a firm name, even though the corporation may have also adopted the same name. In this cause the order was given under circumstances equivalent to a direct representation that the firm of Bustanoby Bros., composed of Louis, Andre, and Jacques Bustanoby, was giving the order, and the plaintiff had a right to make the contract with them and to hold them liable."

See, also, the following authorities: *Haug v. Haug*, 193 Ill. 645, 61 N. E. 1053; *Kahn v. Bowden*, 80 Ark. 23, 96 S. W. 126, 10 Ann. Cas. 132; *Cirkel v. Croswell*, 36 Minn. 323, 31 N. W. 513; *Kritzer v. Sweet*, 57 Mich. 617, 24 N. W. 764; *Harris v. Crary*, 67 Tex. 383, 3 S. W. 316; *Ellis v. Jameson*, 17 Me. 235; *Rice v. Barrett*, 116 Mass. 312; *Smith v. Hill*, 45 Vt. 91, 12 Am. Rep. 189.

We think that the liability of C. A. Watson is abundantly shown.

But the verdict is against C. A. Watson, R. A. Watson, and George Watson.

Whatever may be true of R. A. Watson, the undisputed evidence shows that George Watson was not a partner of C. A. Watson. It is not proved that he held himself out as such.

[6] The fact that no affidavit under Supreme Judicial Court rule 10 (70 Atl. viii) was filed is not decisive.

A defendant sued as a partner, who files no affidavit, but who challenges the existence of the alleged partnership, is precluded from demanding affirmative proof on that issue, but not from introducing negative proof. When not seasonably and on oath denied, the existence of an alleged partnership is *prima facie*, but not conclusively, presumed. *Hewins v. Cargill*, 67 Me. 554.

Misjoinder was not pleaded in abatement. It was not necessary.

[7] In actions of contract, when the situation does not appear upon inspection of the pleadings, nonjoinder must be pleaded in abatement, but misjoinder is available under the general issue.

"It is a well-established principle in the English law that in *assumpsit*, where too many defendants are joined, the plaintiff must fail in his action, though he prove an express or implied promise against some of them." *Outts v. Gordon*, 13 Me. 478, 29 Am. Dec. 520.

"If it [misjoinder] appears on the pleadings it gives rise to a demurrer; if it appears at the trial, to an adverse verdict." *State v. Chandler*, 79 Me. 174, 8 Atl. 553.

[8] Under the authority of R. S. c. 87, § 14, the plaintiff by amendment might have stricken out the name of any defendant not liable.

[9] This not having been done, and the verdict being general against all defendants, the entry must be:

Exceptions sustained.

1. WILLS §832—PERSONAL ESTATE—RIGHTS OF CREDITORS.

Creditors of a decedent may always claim payment out of the personal estate, regardless of what the debtor's will may provide.

2. WILLS §827—CHARGE—ACCEPTANCE CUM ONERE.

A testator, as between his distributees, may direct upon whom or upon what property any obligation of his shall ultimately fall, and if they accept his bounty they must do so cum onere.

3. WILLS §847(3)—PAYMENT OF DEBTS—RESORT TO OTHER THAN PERSONALTY—BURDEN OF PROOF.

The personal estate being the primary fund for the payment of debts, a devisee asserting that any other part of the estate must be resorted to for that purpose has the burden of showing that such was the testator's intention.

4. WILLS §832—CHARGE—INTENT.

The intention to exempt personalty bequeathed from application to the payment of indebtedness is sufficient if it appear by necessary implication collected from a sound interpretation of the whole will.

5. WILLS §836—CHARGE—DESCRIPTIVE WORDS.

Where testator gave a half-brother a farm and tenement house, "subject to the widow dower," along a certain creek known as the Stoltzfus Farm, it could not be assumed that the words "subject to the widow dower," though not needed for descriptive purposes, were none the less used for that purpose, so that they were to be given their natural meaning.

6. WILLS §827—CHARGE—INTENT.

No particular language is necessary to create a charge on land, and the intention to charge is to be carried out whenever it is discoverable from anything in the instrument.

7. WILLS §836—CONSTRUCTION—CHARGE ON LAND.

In order to construe a will with reference to a charge of debts on land devised, the court must put itself in the testator's place.

8. WILLS §840—CHARGE—CONSTRUCTION—"SUBJECT TO THE WIDOW DOWER."

Where testator gave to his half-brother a described farm and tenement house, "subject to the widow dower," the devisee took subject to the dower.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subject to.]

9. WILLS §439—CONSTRUCTION—EFFECT TO TESTATOR'S INTENTION.

A testator's intent must always be carried into effect unless inconsistent with established rules of law, and will not be defeated by any technical rules of construction.

10. WILLS §684(5)—TRUST ESTATE—CHARGE—PAYMENT.

Where testator, after giving a life estate in trust to his widow, gave his half-brother a certain farm charged with widow's dower, which was secured by mortgage on the land, the trustees who, during the lifetime of the widow, received all the income of the estate, were bound to pay the interest on the mortgage, unless the widow elected to surrender her life interest in the land.

Appeal from Orphans' Court, Union County.

Petition by Sarah Alice Hartman and Gideon T. Blehl, executors and testamentary

fer, deceased, for a citation against Charles Grant Shaffer to show cause why he should not be required to accept a devise and assume the dower debt and interest or forfeit all claims to the land in question. From a decree refusing the citation, the executors and testamentary trustees appeal. Reversed, petition reinstated, and decree rendered.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

Andrew A. Leiser and Andrew A. Leiser, Jr., both of Lewisburg, for appellants. Philip B. Linn, of Lewisburg, for appellee.

SIMPSON, J. Testator died leaving both real and personal estate. By his will he gave all his property in trust for his wife for life, and provided that—

"After the Death of my wife Angeline Shaffer, I will give and bequeath to my Half Brother Charles Grant Shaffer all that Farm and Tenement House, subject to the Widow Dower, along Buffalow Crick, known as the Stoltzfus farm and all the residue I will give and bequeath to Sarah Alice Hartman, Personal and real such as my Home stead along the Milton Road, Timber tract and the two Houses and lots in Lewisburg, Pa., by her paying one thousand dollars to the Bethany Orphans Home at Womelsdorf, Pa."

The widow's dower on the Stoltzfus farm consisted of the sum of \$3,600, charged thereon, on testator's purchase of the property in partition proceedings; the income thereof to be paid to the widow of Jacob Stoltzfus, the former owner, during her life, and at her decease the principal to be paid to his nine children in equal shares. It was also secured by nine bonds and mortgages of this testator for \$400 each. The widow of Jacob Stoltzfus died about eight months after the date of John W. Shaffer's will, and two days before his death, whereby the principal of the dower became forthwith payable to the nine children.

The trustees of the estate thereupon filed a petition, averring the above facts, praying that Charles Grant Shaffer, the devisee of the said Stoltzfus farm, after the death of testator's widow, should elect "whether or not he will accept the devise above mentioned cum onere," and forthwith discharge the said dower debt, "or forfeit all claim to said farm under said will." He answered the petition by electing to take the farm; but averred that the words "subject to the Widow Dower" were descriptive only, intended to designate the property referred to, and not meant as a charge thereon, and, as the obligation was a personal debt of testator, it was payable out of the personal and residuary estate. He declared his willingness, if that contention was not sustained, to take up the nine bonds and mortgages and have them assigned to himself; and in that event he prayed the court to decree that the trus-

tees and the widow should pay the interest thereon to him, as such assignee, during the lifetime of the widow.

Testimony was taken in the court below amplifying but in no respect affecting the facts above set forth, whereupon that court dismissed the petition, holding that the words "subject to the Widow Dower" were descriptive only, and that the personal estate, which is the primary fund for the payment of debts, should be used to discharge the principal of the dower. From that decree of dismissal the trustees prosecuted this appeal.

[1, 2] It is undoubtedly true that creditors of a decedent may always claim payment out of the personal estate, no matter what his will may provide. But it is equally true that a testator may direct, as between his distributees, upon whom or upon what property any obligation of his shall ultimately fall, and if they accept his bounty they must do so cum onere. *Stump v. Findlay*, 2 Rawle, 168, 19 Am. Dec. 632; *Crone's Appeal*, 103 Pa. 571; *Armstrong v. Walker*, 150 Pa. 585, 25 Atl. 53; *Zimmerman v. Lebo*, 151 Pa. 345, 24 Atl. 1082, 17 L. R. A. 536; *Cooley v. Houston*, 229 Pa. 495, 78 Atl. 1129.

[3, 4] It is also undoubtedly true that, as the personal estate is the primary fund for the payment of debts, he who asserts that any other part of the estate must be resorted to for the purpose has the burden of showing that such was the testator's intention. But it is likewise true, as quoted from 2 Powell on Devises, 671, that, when the testator declares his intention to be otherwise, the legatee or devisee who takes must take cum onere. As stated in *Evenson's Appeal*, 84 Pa. 172-178:

"It was formerly held that the intention to exempt the personalty must be expressly declared. Such is not the rule now. It is sufficient if it appear by necessary implication, collected from a sound interpretation of the whole will."

[5, 6] In this will the gift of the Stoltzfus farm is expressly made "subject to the Widow Dower." Those words are not needed to describe the farm. It is fully described without them. It is the "Stoltzfus farm." Testator had no other farm of that name. It is "along Buffalo Crick." Testator had no other property on Buffalo creek. We cannot assume that, though the words "subject to the Widow Dower" were not needed for a descriptive purpose, they were none the less used for that purpose, and hence they must be given their natural meaning. We have repeatedly held that "no particular language is necessary to create a charge on land; the intention to charge is to be carried out whenever it is discoverable from anything in the instrument." *Okeson's Appeal*, 59 Pa. 99; *Duval's Estate*, 146 Pa. 176, 23 Atl. 231; *Dickerman v. Eddinger*, 168 Pa. 240, 32 Atl. 41; *Hammond's Estate*, 197 Pa. 119, 46 Atl. 935.

[7, 8] It is not to be lost sight of, that this will was made by testator himself, or by some other person wholly ignorant of all technical rules. He did not know that clear expressions were needed to sustain a charge on land. He did know that he held the farm "subject to the Widow Dower," and he used apt words in his will to make his gift thereof likewise subject thereto. Probably every layman would read the will in precisely the same way; and putting ourselves in this testator's place, in order to construe his will, as indeed we must do (*Postlethwaite's Appeal*, 68 Pa. 477; *Follweiler's Appeal*, 102 Pa. 581; *Webb v. Hitchins*, 105 Pa. 91; *Hermann's Estate*, 220 Pa. 52, 69 Atl. 285), we also reach the same conclusion.

[9] A testator's intent must always be carried into effect unless inconsistent with established rules of law, and will not be defeated by any technical rules of construction. *Webb v. Hitchins*, supra; *Wood v. Schoen*, 216 Pa. 425, 66 Atl. 79; *Arnold v. Muhlenberg College*, 227 Pa. 321, 76 Atl. 30; *Thompson's Estate*, 229 Pa. 542, 79 Atl. 173. In the present instance, the intent being ascertained, there is no rule of law or construction standing in the way of carrying it into effect, unless we propose to wholly defeat it, and we have neither the right nor purpose so to do.

[10] We do not think, however, though the half-brother ultimately gets the farm subject to the dower, that he ought now to pay that dower. The devise to him does not take effect until "after the death" of testator's widow, who is still alive, and who receives, during her lifetime, all the income of the estate. When he gets the farm he gets it "subject to the Widow Dower," but not before. Consequently the trustees, who collect the income of the estate for the benefit of the widow, should pay the interest accruing on the mortgages during her lifetime, unless she elects to surrender her life interest therein. Any difficulty which might otherwise arise is met by the offer of appellee to pay the mortgages and take assignments of the mortgages, if it is decided that he is entitled to receive the interest thereon during the widow's life. Our decree will therefore so provide.

The decree of the court below is reversed, the petition is reinstated, and it is adjudged and decreed that the devise by John W. Shaffer, deceased, of his real estate known as the Stoltzfus farm to his half-brother Charles Grant Shaffer is expressly subject to the nine mortgages of \$400 each now thereon, but the same is not payable by him or out of his interest in said property until the death of Angeline Shaffer, widow of said John W. Shaffer, unless she elects to surrender her life interest therein; that the said Charles Grant Shaffer may purchase, or cause to be purchased, the said nine mortgages, obtain assignments thereof, and hold the same against said property, with all the rights

and remedies incident thereto, if the widow does not surrender her life interest in said property, and if the accruing interest on said mortgages is not paid during the lifetime of said widow; and upon her surrender of all interest in said property, or upon her decease, whichever shall happen first, said mortgages shall be satisfied of record.

The costs in the court below and in this court shall be borne equally by appellants and appellee.

(262 Pa. 55)

KREIS et al. v. CARTLEDGE.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. PARTNERSHIP §68(2)—PARTNERSHIP REALTY—STATUS.

While partnership realty is considered personality for partnership purposes, it is realty so far as the heirs and legal representatives of the partners are concerned.

2. PARTNERSHIP §68(2)—PARTNERSHIP PROPERTY—PRESUMPTIONS.

Where it did not appear that realty owned by former partners jointly was held by them for partnership purposes, it would be presumed that it was not partnership property.

3. EXECUTORS AND ADMINISTRATORS §129(1)—CONTROL OVER REALTY.

In the absence of a necessity, such as a sale for the payment of debts, and on default of express provision in the will, an executor or administrator as such is without authority over realty belonging to the estate.

4. EXECUTORS AND ADMINISTRATORS §39 — ASSETS—REALTY.

Realty belonging to an estate descends directly to the heirs, or to the persons designated in the owner's will.

5. EXECUTORS AND ADMINISTRATORS §131—COLLECTION OF RENTS—AGENCY.

Though an executor or administrator may collect rents from the real estate, he does so, not in his official capacity, but merely as an agent for the heirs.

6. EXECUTORS AND ADMINISTRATORS §138(4)—SALE OF REALTY—PROVISIONS OF WILL.

Where a will authorized executors to sell realty, but did not absolutely direct a conversion, and the estate was solvent, and there was no necessity to sell realty, an executor's power of sale was to be limited to the ordinary purposes incident to settling the estate, and the executor's power over the realty would not be indefinitely extended.

7. WILLS §728 — STATUS OF EXECUTOR — MANAGEMENT OF ESTATE.

Where a named executor, by consent of others interested under the will, continued to manage common property for 18 years, he was acting merely as agent.

8. PRINCIPAL AND AGENT §60(1)—DUTY OF AGENT.

An executor, acting as agent for other persons interested under a will in the management of common property, was bound to act in good faith and with loyalty to his principals, and could not deal with the property, so as to make a profit out of it, without disclosing the circumstances to his principals.

9. TENANCY IN COMMON §81—MANAGEMENT BY COTENANT—DUTY.

An executor, as tenant in common of property devised by will, not sustaining the relation of agent for his cotenants, except as expressly or impliedly agreed between himself and his cotenants, owed no higher duty than to re-

frain from profiting himself without disclosing the circumstances to his cotenants.

Stewart, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Bill for an accounting by Elizabeth Y. Kreis and another against Alfred B. Cartledge. From a decree dismissing the bill on final hearing, plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, MOSCH-
ZISKER, FRAZER, and WALLING, JJ.

R. D. Brown, of Philadelphia, for appel-
lants. Lewis Lawrence Smith, of Philadel-
phia, for appellee.

FRAZER, J. Thomas Cartledge died in 1898 leaving a will in which he gave to his son, Alfred B. Cartledge, his one-half interest in a partnership engaged in business under the name of Pennock Bros. The remainder of his real and personal estate he distributed, one-third to his wife for life, with remainder to his daughter, Elizabeth Kreis, and son, Alfred B. Cartledge, in equal parts; the other two-thirds to the above-named daughter and son, appointing the latter executors with power "to sell any or all of my real estate at public or private sale upon such terms as they shall deem most advantageous." Among the property belonging to testator's estate was his one-half interest in the real estate, No. 1514 Chestnut street, Philadelphia, occupied by the firm of Pennock Bros. Following the death of testator, the widow and executors joined with the survivor of the old firm in executing a lease of these premises from June 8 to August 1, 1908, to Alfred B. Cartledge and J. L. Pennock, new partners in the firm of Pennock Bros., at the annual rental of \$3,000, and also the payment of interest on a mortgage on the demised premises, together with taxes and water rent. The lease contained a provision that in absence of a notice of termination at the end of the term it should continue in force from year to year until ended by 30 days' notice, by either party, previous to the expiration of a current term. The active work incident to settlement of the estate was left to defendant, Alfred B. Cartledge, and no formal account was filed by the executors, nor was the estate divided between the parties; it being treated as a whole by mutual consent and the income apportioned.

Defendant attended to the business affairs of the family and collected rents from the various properties, including that leased to Pennock Bros. No claim is made that his accounts were not properly kept or the proceeds fully accounted for. The lease to the partnership continued to run for a period of 18 years without change of terms. In the meantime the property had greatly enhanced in value, and plaintiffs now contend the rent-

al paid since 1901 was totally inadequate and seek to procure payment from defendant for one-half the difference between the rental value received and what they contend would be a fair rental of the property based on the increased market value; their theory being that defendant occupied toward them a relationship of trust, which imposed on him the duty to suggest an increase in rent by the firm of which he was a member, and, in failing to do so, profits by his wrong to an extent represented by his one-half interest in the partnership. Plaintiffs contend further that defendant, having acted in the capacity of executor, the burden was on him to show he exercised the degree of care and business judgment in conducting the affairs of the estate a prudent business man would exercise in the management of his individual property. The court below excluded evidence to show increase of rental value and dismissed the bill, from which action this appeal was taken.

[1, 2] That the lease when made was reasonable and called for a fair rental based on value at that time is undisputed; also that, while plaintiffs left the management of their affairs to defendant, they received notice of an increase in the assessment of the property for taxable purposes, were regularly consulted with regard to the matters in which they were jointly interested, accounts submitted to them and settlement made each year, and no request was made by them at any time for an increased rental. Although the lease was signed by the son and daughter as executors of their father's estate, they had no control over the realty as such. While real estate belonging to a partnership is considered personalty for partnership purposes, it is realty so far as the heirs and legal representatives of the partners are concerned. *Haeberly's Appeal*, 191 Pa. 239, 43 Atl. 207. Furthermore, it does not appear from the record that the real estate in question though owned by the former partners jointly, was held by them for partnership purposes and in absence of such evidence we must presume it was not partnership property. *Shafer's Appeal*, 106 Pa. 49.

[3-5] Aside from this question the old firm was dissolved, the business given over to the sons of the former partners, and the realty retained; so that, even if it were formerly partnership property, it ceased to be such on the dissolution of the old firm, consequently, for the present purposes, it must be considered realty. In absence of necessity, such as sale for payment of debts, and on default of express provision in the will, an executor or administrator as such is without authority or control over the realty belonging to the estate. Such property descends directly to the heirs, or to the persons designated in

the will of testator. Although an executor or administrator may undertake to collect rents received from real estate, he does so, not in his official capacity, but merely as agent for the heirs. *Penna. Co. for Ins., etc., Appeal*, 168 Pa. 431, 32 Atl. 25, 47 Am. St. Rep. 898; *Herron v. Stevenson*, 259 Pa. 354, 102 Atl. 1049.

[6] In this case the will contained a provision authorizing the executors to sell real property belonging to the estate; there is, however, no absolute direction to sell sufficient to amount to a conversion of the realty, and no sale has been made, nor did necessity for sale arise. The estate was solvent and the personal property sufficient to satisfy all liabilities. Neither did the will contain a trust, or other provision, whereby it might be inferred the power of sale was intended to continue indefinitely, and we find nothing in the case imposing upon defendant the duties or obligations of an executor with reference to the property in question. Under such circumstances, the power of sale must be limited to the ordinary purposes incident to the settlement of the estate, and will not be construed as extending the power of the executors over the real estate for an indefinite period. *Penna. Co. for Ins., etc., Appeal, supra*; *Eberly v. Koller*, 200 Pa. 296, 58 Atl. 558.

[7-9] Defendant in continuing to act for the others in the care and management of the common property for a period of 18 years was acting merely as agent. As such he was bound to act in good faith and with loyalty to his principal, and could not be permitted to deal with the subject-matter of his agency, so as to make a profit out of it without disclosing all the circumstances to his principal. *Everhart v. Searle*, 71 Pa. 256; *Persch v. Quiggle*, 57 Pa. 247; *Wilkinson v. McCullough*, 196 Pa. 205, 46 Atl. 375, 79 Am. St. Rep. 702; 2 O. J. 694, § 854. The court below found there was no evidence of concealment or fraud on his part. Plaintiffs were aware defendant's interest as a member of the lessee firm was antagonistic to theirs as landlord, had ample opportunity during the 18 years to discover for themselves whether or not a fair income was being realized from the property, in view of the increase in valuation subsequent to the date of the lease, and, if not, terminate it at the end of an annual period. No higher duty was imposed upon defendant as tenant in common since, in that capacity, he did not sustain the relation of agent to the others, except so far as was expressly or impliedly agreed between them. *Caveny v. Curtis*, 257 Pa. 575, 101 Atl. 853.

The judgment is affirmed.

STEWART, J., dissents.

1. RAILROADS \S 350(7)—CROSSING ACCIDENT—QUESTION FOR JURY.

In action for death of plaintiff's husband in a crossing accident, *held*, on the evidence, that defendant's negligence in not sounding whistle or ringing bell when its train approached crossing, and in not keeping a headlight burning, was for jury.

2. RAILROADS \S 328(8)—CROSSING ACCIDENT—NEGLIGENCE.

The driver of an automobile, running it so near a track as to collide with a passing train without having stopped to look and listen, was negligent; the darkness at the time being no excuse.

3. NEGLIGENCE \S 98(1) — IMPUTED NEGLIGENCE—BAILEE OF AUTOMOBILE.

That plaintiff's husband, killed at a grade crossing, and a friend driving plaintiff's automobile as a bailee, were engaged in the common purpose of an automobile trip, would not of itself cause the negligence of one to be imputed to the other.

4. NEGLIGENCE \S 136(30)—IMPUTED NEGLIGENCE—QUESTION FOR JURY.

In action for death of plaintiff's husband in a crossing accident, *held*, on the evidence, that whether the one driving the automobile or deceased, to whose wife it belonged, had actual control of the automobile, was for the jury.

5. RAILROADS \S 327(12) — CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE — PASSENGER IN AUTOMOBILE.

Passenger in automobile, who knowingly and without protest suffers driver to drive upon railroad crossing without stopping to look and listen, is negligent, as he is bound to use reasonable care to protect himself, and so far as he knows or could discover approaching danger to warn the driver.

6. RAILROADS \S 350(21) — CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether deceased, riding in an automobile driven by another, was bound to know of the existence of a crossing, and if he did discover it, and saw first an approaching train, whether he should have kept a sharper lookout, or have done anything more than warn the driver, *held* for the jury.

7. RAILROADS \S 327(12) — CROSSING ACCIDENT — DUTY OF PASSENGER IN AUTOMOBILE.

While the fixed duty to stop, look, and listen before going upon a railroad track applies to the driver under all circumstances, the duty of calling upon him to do so devolves upon a passenger only where he has knowledge of the crossing.

8. RAILROADS \S 327(12) — CONTRIBUTORY NEGLIGENCE—PASSENGER IN AUTOMOBILE.

The extent to which suggestions should be made by a passenger to a chauffeur depends upon the circumstances, and the duty of one passenger may differ from that of another, though each must exercise ordinary care for his safety.

9. TRIAL \S 191(8)—INSTRUCTION — ASSUMPTION OF FACT.

Where a locomotive so violently struck an automobile as to crush the skull of a man seated therein and to throw him to the ground, almost instantly killing him, it was not error for trial judge to tell jury that on the testimony they might find that death resulted from collision.

band in a crossing accident, declarations of a member of the automobile party, made three-quarters of an hour after the accident, were properly rejected as too remote to constitute a part of the res geste.

Appeal from Court of Common Pleas, Adams County.

Trespass by Annie K. Eline against the Western Maryland Railway Company for the death of plaintiff's husband. Verdict for plaintiff for \$10,000, judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

Richard E. Cochran and George S. Schmidt, both of York, and Charles S. Duncan, of Gettysburg, for appellant. J. Donald Swope, of Gettysburg, and J. Cookman Boyd, of Baltimore, Md., for appellee.

WALLING, J. This action in trespass is for the death of plaintiff's husband, J. Frank Eline, resulting from a grade crossing accident. Mr. and Mrs. Eline resided at Baltimore, and he, being in ill health, spent the summer of 1913 on a farm about 15 miles from that city. While there an automobile trip was arranged for himself and four gentlemen friends, including Frank D. Rogers, to be taken in Mrs. Eline's car. Mr. Rogers and the Elines were intimate friends, and he often went driving with them in her car, and on such occasions uniformly acted as chauffeur; Mr. Eline being unable to do so. According to the evidence for plaintiff, she loaned the car to Mr. Rogers for the proposed trip, placing it entirely in his charge, so as to constitute him a bailee thereof. This was because of her husband's ill health and lack of ability to manage the car. The party started on the morning of September 12, 1913, drove to Harper's Ferry, from there to Emmitsburg, and arrived at Gettysburg the next day, where they spent some time, and in the afternoon left for York, passing through Abbottstown. About 7:45 p. m. they came to Smyser's Crossing, where defendant's track crossed the turnpike at grade. Mr. Rogers was then driving the car, which he had done during the entire trip, and they were all giving attention to the movements of the car and to whatever might promote the safety of the journey; Mr. Eline more especially so, as he sat by the driver and was cautiously looking ahead. They crossed a culvert about 60 feet before reaching the track; the automobile was moving some 10 or 12 miles per hour, and the darkness there was increased by a mist or fog. The deceased was the first to discover a passenger train approaching from their right and gave immediate alarm, which Mr. Rogers heeded and turned the automobile suddenly to one

side, but not in time to avoid a collision by which Mr. Eline was killed. There was no light on defendant's engine, and no warning signals given. According to defendant's evidence the headlight was burning, proper crossing signals were given both by whistle and bell, and it was a bright moonlight night, and those in the automobile had an unobstructed view of the track and approaching train. The trial judge submitted the case to the jury, and later entered judgment for plaintiff on the verdict, from which defendant appealed.

[1] We have carefully examined the assignments of error and entire record, but find no reversible error. The four surviving occupants of the automobile, as witnesses for plaintiff, positively asserted that neither whistle was blown nor bell rung to warn of the train's approach, and also that the headlight was not burning. This was more than negative testimony, and, although contradicted, made the question of defendant's negligence one of fact for the jury. *Winterbottom v. Philadelphia Ry. Co.*, 217 Pa. 574, 66 Atl. 864; *Buckman v. Philadelphia & R. Ry. Co.*, 232 Pa. 351, 81 Atl. 332.

[2-4] Mr. Rogers, in driving the car so near the track as to collide with the passing train without having stopped to look and listen, was clearly negligent. The duty to so stop is unbending, and darkness is no excuse for failure to perform it. *Anspach v. Philadelphia, etc., Ry. Co.*, 225 Pa. 528, 74 Atl. 373, 28 L. R. A. (N. S.) 382. But there was competent evidence, which the jury credited, that he was bailee of this car and had exclusive control of it, and was not the servant of Mr. or Mrs. Eline, and, if true, Rogers' negligence would not defeat plaintiff's action. The fact that Eline and Rogers were engaged in a common purpose would not of itself cause the negligence of one to be imputed to the other. See *Dunlap v. Philadelphia R. T. Co.*, 248 Pa. 130, 93 Atl. 873. Under the evidence, it was a question for the jury whether Mr. Rogers or the deceased had actual control of the automobile; while the latter suggested the route, it does not appear that he dictated the manner of driving the car. A man riding in a car is not liable for its management because owned by his wife, if at the time it is in the possession and control of another as bailee. Neither is the negligence of the bailee under such circumstances imputable to the owner of the car. See *Gibson v. Bessemer & L. E. R. R. Co.*, 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689, 18 Ann. Cas. 535.

[5, 6] Mr. Eline was responsible for his own negligence, even if riding in a vehicle driven and controlled by Rogers. A passenger who, having opportunity, fails to warn the driver of a known danger, and to protest against incurring it, is guilty of negligence. It was Mr. Eline's duty to use reasonable care and watchfulness for the protection of himself and his companions, and, so far as

he knew of or could discover approaching danger, to warn the driver. If he knew they were approaching this grade crossing, or by the exercise of reasonable care should have known it, in time to warn Mr. Rogers thereof, and failed to do so, he was negligent. In other words, a passenger who, knowingly and without protest, suffers the chauffeur to drive an automobile upon a railroad track without stopping to look and listen, is negligent. See *Hardie v. Barrett*, 257 Pa. 42, 101 Atl. 75, L. R. A. 1917F, 444; *Kunkle v. Lancaster County*, 219 Pa. 52, 67 Atl. 918; *Trumbower v. Lehigh Valley T. Co.*, 235 Pa. 397, 84 Atl. 403; *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367; *Winner v. Oakland Township*, 158 Pa. 405, 27 Atl. 1110, 1111. The duty of giving warning depends upon the knowledge of the passenger, whether acquired at the time or previously. There is no presumption that Mr. Eline knew in advance of the crossing, but Mr. Rogers says he and the deceased had been over this road together about five times. Assuming the truth of that statement, which was for the jury, yet there is nothing to show when or under what circumstances that occurred; whether they had passed over the road one year before, or many, or whether by day or night, does not appear. So, while Mr. Eline might be assumed to know there were grade crossings on this road, it cannot be affirmed as matter of law that he was bound to know at his peril that there was one down by the culvert where the mist had gathered; that was a matter for the jury. As plaintiff's evidence indicates that neither the track nor train could be seen on that occasion, except at close range, and that the deceased was watching, and was the first to discover and warn of the danger, whether he should have kept a sharper lookout or done something more was for the jury. The evidence is that at the beginning of the trip he had cautioned all the members of the party to keep a lookout for railroad crossings.

[7, 8] While the fixed duty to stop, look, and listen before going upon a railroad track applies to the driver under all circumstances, yet the duty of calling upon him to do so devolves upon the passenger only where he has knowledge of the crossing. See *Wanner v. Philadelphia & R. Ry. Co.*, 104 Atl. 570, and *Azinger v. Pennsylvania R. R. Co.*, 105 Atl. 87 (decided at this term); also *Wachsmith v. B. & O. R. R. Co.*, 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; *Senft v. Western Maryland Ry. Co.*, 246 Pa. 448, 92 Atl. 553. In *Brommer v. Pennsylvania R. R. Co.*, 179 Fed. 577, 108 C. O. A. 135, 29 L. R. A. (N. S.) 924, the plaintiff, who was held legally guilty of negligence in failing to warn the driver, not only sat by him, but actually saw and knew of the crossing. And in *Vocca v. P. R. R. Co.*, 259 Pa. 42, 102 Atl. 283, plaintiff's evidence was that he did warn the chauffeur, and we held the question of his contributory negligence was for the jury.

The extent to which suggestions should be made to the chauffeur depends upon the circumstances, and the duty of one passenger as to that may differ from that of another, while each must exercise ordinary care for his own safety.

[9] When a locomotive so violently collided with an automobile as to crush the skull of a man seated therein and throw him to the ground, where a moment later he is found dead, it is not error for the trial judge to tell the jury that, "the death, I think, from the testimony, you can clearly find was the result of the collision."

[10] The alleged declarations of a member of the automobile party, made three-quarters of an hour after the accident, were properly rejected as too remote to constitute a part of the res gestæ. *Briggs v. Railroad & Coal Co.*, 206 Pa. 564, 58 Atl. 36.

The case was carefully tried and well considered by the court below, and there is nothing further that seems to require discussion.

The assignments of error are overruled, and the judgment is affirmed.

(263 Pa. 21)

WINGERT v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. RAILROADS — §12(3) — CROSSING — SIGNALS.

A railroad is bound to give reasonable warning of the approach of a train towards a crossing.

2. RAILROADS — §350(7) — CROSSING ACCIDENT — WARNING — QUESTION FOR JURY.

In action for death of plaintiff's wife, and for injury to plaintiff and his automobile, resulting from a crossing collision, *held*, on the evidence, that whether ringing of bell was a sufficient warning, and whether a whistle should have been blown sufficient to give earlier warning of approaching train, was for jury.

3. RAILROADS — §327(7) — CROSSINGS — CARE REQUIRED.

One approaching a railroad crossing in an automobile is bound to look as he approaches, after stopping, but is not required to again stop before crossing.

4. RAILROADS — §350(31) — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE.

In action for death of plaintiff's wife, and for injury to plaintiff and his automobile, resulting from a crossing accident, *held*, on the evidence, that plaintiff's contributory negligence in starting his car ahead after backing on the track was for the jury.

5. RAILROADS — §334 — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — EMERGENCY.

Where plaintiff, who had backed his automobile upon a crossing before discovering the approaching train, instead of backing across, started ahead, he would not be responsible for failure to exercise the best judgment, as he was confronted with a sudden emergency.

Appeal from Court of Common Pleas, Cumberland County.

Trespass by Daniel H. Wingert against the Philadelphia & Reading Railway Company for the death of plaintiff's wife, injury to

plaintiff, and damage to his automobile. Verdict for plaintiff for \$4,200, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MOSCHZISKE, FRAZER, WALLING, and SIMPSON, JJ.

J. W. Wetzel, of Carlisle, for appellant. Edmund O. Wingerd, of Chambersburg, Joseph P. McKeehan, of Carlisle, and D. Edward Long, of Chambersburg, for appellee.

FRAZER, J. This action is to recover damages for injuries sustained by plaintiff as the result of a collision between his automobile and defendant's train at a grade crossing. In the court below one of the questions in dispute was whether or not the crossing was private, or a permissive public one. This question, however, the jury found in favor of plaintiff, and we find no complaint here as to the propriety of the action of the court in submitting it to them. The negligence of defendant and contributory negligence of plaintiff were also submitted to the jury. A verdict was rendered in favor of plaintiff, and the subsequent motion for judgment for defendant non obstante veredicto was refused. The questions for consideration are the sufficiency of evidence of negligence on the part of defendant to submit to the jury, and whether plaintiff was guilty of contributory negligence as a matter of law.

At the time of the accident plaintiff was driving an automobile in which were his wife, son, and three other passengers. The road on which he approached the crossing is a narrow one, and, after crossing the tracks, ascends a grade at the opposite side to reach the level of the adjoining land. There are two tracks of the railroad, both of which plaintiff crossed in safety. He was, however, owing to the almost impassable condition of the road, unable to ascend the grade on the opposite side, and, the road being of insufficient width to permit the car to be turned, was obliged to return to the main road, and to do so was required to back the automobile across the tracks. Plaintiff testified that before reversing the car he stopped, opened the side curtains, and looked and listened at a point 6 feet from the nearest or east-bound track, from which place he had an unobstructed view of the railroad for a distance of approximately 641 feet in the direction from which the train approached. At that distance from the crossing was a curve in the railroad, which, in connection with the embankment along the side, obstructed a further view of the track. Plaintiff stated he neither saw nor heard a train, and proceeded to back the car across the nearest track, and, when about the middle of the second or west-bound track, he

first saw the train approaching around the curve. Being of opinion danger could be more readily avoided by going forward, instead of backward, he reversed the direction of his car, and had almost cleared the track, when the train crashed into the rear end of the automobile.

[1, 2] It is conceded no whistle was blown; defendant's evidence, however, is that the bell was rung when the train was in the neighborhood of 100 yards from the crossing. This is denied by plaintiff and by his son, who was sitting with him on the front seat of the automobile, both testifying that, had the bell been rung, they would have heard it. Defendant contends this testimony was merely negative, and entitled to no weight against the positive evidence of defendant's witnesses to the contrary. Discussion of this point, however, is unnecessary, since, conceding the bell was rung, the question whether or not, under the circumstances, this was sufficient warning, was for the jury. Defendant's duty was to give reasonable warning of the approach of its train, and we cannot say, as matter of law, that the ringing of a bell at the distance of 100 yards from the crossing was adequate warning under the particular circumstances. According to the testimony of plaintiff, he saw the train as it rounded the curve, a greater distance from the point at which defendant's witnesses testified the bell was first rung, and yet was unable to avoid the collision. It might, therefore, be it was not rung in time to serve as ample warning to persons using the crossing; at all events, it was for the jury to say whether the warning was ample, and if a whistle should have been blown at a distance from the crossing sufficient to give earlier warning of the approaching train. *Longenecker v. Penna. R. R.*, 105 Pa. 328, 333; *Penna. v. Coon*, 111 Pa. 430, 439, 3 Atl. 234.

[3-5] Neither can it be said, as matter of law, that plaintiff was guilty of contributory negligence. He stopped at a point 6 feet from the nearest track, and, neither seeing nor hearing the approaching train, began backing his automobile across the tracks. Although it was his duty to continue to look as he approached, there is no rule of law requiring him to again stop before entering the crossing (*Witmer v. Railroad*, 241 Pa. 112, 88 Atl. 314); besides he was obliged to watch the rear end of his car to avoid running from the roadway, and whether, under the circumstances, he did everything required of a reasonably prudent man, was for the jury. In view of the distance from the curve to the crossing, and the slow speed at which plaintiff was necessarily required to drive backward, and of the necessity of having his attention divided between a possible approaching train and the guiding of his car, it may be that the train, though not in view

at the time he stopped, looked, and listened, rounded the curve immediately after plaintiff began to move backward across the track, and was not noticed by him until shortly after it appeared in view, at which time it was too late to avoid the collision. *Schwartz v. Railroad*, 211 Pa. 625, 629, 61 Atl. 255; *Cromley v. Railroad*, 208 Pa. 445, 448, 57 Atl. 832; *Cromley v. Railroad*, 211 Pa. 429, 432, 60 Atl. 1007. While it may be, had plaintiff continued backing his car after he saw the train approaching, instead of stopping to reverse and proceed in the opposite direction, the accident might have been avoided; yet he was confronted with a sudden emergency, and cannot be held responsible for failure to exercise the best judgment. *Phillips v. Railroad*, 190 Pa. 222, 42 Atl. 686; *Marfilues v. Railroad*, 227 Pa. 281, 75 Atl. 1072.

The judgment is affirmed.

(263 Pa. 25)

CARBAUGH v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE.

Plaintiff's deceased wife, a passenger in an automobile struck by a train at a grade crossing, could not be declared to have been guilty of contributory negligence in joining with driver in testing a manifest danger, where verdict for driver in his action against railroad established that he stopped, looked, and listened, and that no train was in sight or hearing.

2. RAILROADS — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — PASSENGER IN AUTOMOBILE.

A passenger in an automobile, who saw or was bound to see an approaching train, which driver also saw, was not bound to interfere with operation of car, where that might have only served to increase the danger.

Appeal from Court of Common Pleas, Cumberland County.

Trespass by Cyrus A. Carbaugh against the Philadelphia & Reading Railway Company for the death of plaintiff's wife. Verdict for plaintiff for \$2,500, and judgment thereon, and defendant appeals. Affirmed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

J. W. Wetzel, of Carlisle, for appellant. Edmund O. Wingerd, of Chambersburg, Joseph P. McKeenan, of Carlisle, and D. Edward Long, of Chambersburg, for appellee.

FRAZER, J. [1] This suit arose out of the accident referred to and described in the opinion in *Wingert v. Philadelphia & Reading Railway Co.*, 104 Atl. 859, herewith filed. Plaintiff is the husband of Mrs. Carbaugh, one of the victims of the accident, who was riding in the automobile driven by Wingert, the plaintiff in the case above men-

defendant contends deceased failed in her duty to look and listen for an approaching train, and thereby joined with the driver in testing a danger certainly apparent to her had she exercised due care. The verdict in the action by the driver of the automobile against this defendant, which was tried with the present suit, establishes the fact that he stopped, looked, and listened, and that no train at the time was within sight or hearing; hence there was no manifest danger to test.

[2] Assuming, however, deceased saw or was bound to see the approaching train at the moment it rounded the curve, the driver also saw it, and there was neither occasion nor necessity for interference by her with the operation of the car, and to have done so might only have served to increase the danger. *Vocca v. Railroad*, 259 Pa. 42, 102 Atl. 283.

The judgment is affirmed.

(262 Pa. 9)

KANAWELL et al. v. MILLER et al.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. DEEDS ¶208(7)—DELIVERY—SUFFICIENCY OF EVIDENCE.

In ejectment, where defendant, a nephew of decedent's wife and a member of his family, claimed as grantee under a deed from decedent, evidence as to delivery of the deed in decedent's lifetime *held* to sustain verdict for defendant.

2. DEEDS ¶194(1) — DELIVERY — PRESUMPTION.

While "the crowning fact" in the execution of a deed is delivery, yet it is not necessary to prove "actual manual investiture," since "delivery may be inferred or presumed from circumstances."

3. DEEDS ¶56(2)—DELIVERY—EVIDENCE.

Delivery may be made by words alone, or by acts alone, or by both together; but there must be sufficient to show an intention to pass the title.

4. DEEDS ¶194(3)—DELIVERY—PRESUMPTION AND BURDEN OF PROOF.

Proof of a deed to defendant, duly acknowledged and recorded, placed the title and right of possession *prima facie* in him; but the burden of proof shifted to him to show a delivery in grantor's lifetime, when it appeared that deed was found in grantor's safe, unrecorded, after grantor's death.

5. APPEAL AND ERROR ¶589—STATEMENT—CONSIDERATION OF COURTS.

The appellate courts are required to consider only points covered by the statement of questions involved.

Appeal from Court of Common Pleas, Snyder County.

Ejectment for recovery of land in Snyder county by J. Luther Kanawell and others against Charles A. Miller and another. Verdict for defendants, and judgment thereon, and plaintiffs appeal. Affirmed.

Argued before BROWN, C. J., and MOSCHZISKER, FRAZER, WALLING, and SIMPSON, JJ.

draw A. Lelser, of Lewisburg, Jay G. Weiser, of Middleburg, and Andrew A. Lelser, Jr., of Lewisburg, for appellees.

MOSCHZISKER, J. This is an action of ejectment. Judgment was entered on a verdict for defendants and plaintiffs have appealed.

Plaintiffs are the legal heirs of Dr. J. F. Kanawell, deceased. Charles A. Miller (hereinafter called the defendant) claims the real estate in suit as grantee of decedent; the other defendant, Fred. Musser, is a tenant under Miller. In view of the verdict, the following facts may be accepted as established:

In 1893, Dr. Kanawell purchased the farm sought to be recovered in this action. The defendant, a nephew of decedent's first wife lived in the household of the doctor, and was treated by him as though he were a son. In 1897, Dr. Kanawell, in consideration of "one dollar and natural love and affection," executed and acknowledged a deed for the farm to Miller, when the latter was but six years old. Subsequently this document was inclosed in an unsealed envelope, indorsed "Charles A. Miller," in the grantor's handwriting, and put in a safe in the doctor's office. From childhood on, the defendant had access to this safe, knew the combination, and frequently opened it. In 1905, Dr. Kanawell called upon a nephew, with whom he was intimate, and told the latter that, if anything happened to him (the doctor), "at any time," the nephew and Miller "should open his safe, and in there we would find papers, one addressed to myself [the nephew] and one to Charley [Miller]. The first he gave me to understand was Charley's deed, and the other was a will." At the time of this interview, the doctor said "the deed was Charley's," that the latter had the combination of the safe, and when the safe was opened the deed was to be "handed to Charley." In 1909 Dr. Kanawell made a will purporting to dispose of his entire estate, real and personal. Several pieces of real property are mentioned in this will, but the farm here in question is entirely omitted therefrom, as it is from two subsequent codicils executed February 28, 1914, and November 8, 1915, respectively, on which latter date the doctor died. The executor was obliged to obtain the services of Miller to open decedent's safe, and, when this was accomplished, the deed was found therein, indorsed as already stated. The executor placed the instrument upon record. Defendant offered to prove the deed had been actually delivered to him by Dr. Kanawell during the latter's life, and had been handed back to the grantor, with the request that he keep it in his safe as custodian for the grantee. This offer was rejected, and,

for present purposes, should be considered as much out of the case as though never made. Therefore defendant must point to other competent evidence sufficient to sustain the verdict and judgment in his favor. To meet this burden, he stands, first, upon the duly executed, acknowledged, and recorded deed itself, which, on its face, purports to have been "delivered"; next, he points to the evidence in support of the facts which we have already recited, and, in addition, to repeated declarations by the grantor, at intervals extending over many years (some in the presence and hearing of the grantee, and others in his absence), to the effect that he bought the farm for Miller, that it belonged to the latter, that he (the doctor) did not own it, but was only the overseer for defendant, and, finally, to many acts indicating ownership by Miller and acquiescence therein by decedent. Moreover, defendant directs attention to the fact that the testimony shows, not a mere direction of the grantor that the deed should be delivered after his death, with a statement or intimation that he would retain title during his own life (as in some of the cited cases), but rather what can justifiably be found to be an acknowledgment that the property then belonged to the grantee, and that, if "anything" happened to him, the grantor, the deed was to be taken by the grantee, not as a delivery at that time, but because it already was his; that is to say, the grantor's several declarations are not simply to the effect that the land and the deed were to be, but that they, respectively, actually "were," the grantee's property.

[1] Appellants correctly state the question involved thus: "Was there any evidence in the case showing that said deed was delivered to the grantee named therein in the grantor's lifetime?" In view of the foregoing facts, this determining question must be answered in the affirmative. There are two lines of cases dealing with the delivery of deeds, duly executed, but found apparently in the unqualified possession of the grantor at the time of his death. In one, the delivery is held to have been sufficiently proved. *Stinger v. Commonwealth*, 26 Pa. 422, 428; *Stephens v. Huss*, 54 Pa. 20, 22, 26; *Stephens v. Rinehart*, 72 Pa. 434, 440, 441; *Holt's Appeal*, 98 Pa. 257, 270; *Turner v. Warren*, 160 Pa. 336, 343, 28 Atl. 781; *Cummings v. Glass*, 162 Pa. 241, 251, et seq., 29 Atl. 848; *Wagoner's Estate*, 174 Pa. 558, 564, 34 Atl. 114, 32 L. R. A. 766, 52 Am. St. Rep. 828; *Kern v. Howell*, 180 Pa. 315, 321, 322, 36 Atl. 872, 57 Am. St. Rep. 641; *Chase v. Clearfield Lumber Co.*, 213 Pa. 46, 48, 62 Atl. 172; *Clymer v. Groff*, 220 Pa. 580, 584, 69 Atl. 1119, 14 Ann. Cas. 256. Also see what is said upon the subject in hand by *Sharswood, J.*, in *Pa. Co., etc., v. Dovey*, 64 Pa. 260, 266, 267, and by *Thomp-*

son, J., in *Diehl v. Emig*, 65 Pa. 320, 327, citing *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478. In the other, delivery is held not to have been sufficiently proved. *Critchfield v. Critchfield*, 24 Pa. 100, 103; *Du-raind's Appeal*, 116 Pa. 93, 102, 8 Atl. 922; *Benedick v. Benedick*, 187 Pa. 351, 355, 41 Atl. 40; *Cameron v. Gray*, 202 Pa. 566, 567, 569, 52 Atl. 132; *Sears v. Scranton Trust Co.*, 228 Pa. 126, 134, 188, et seq., 77 Atl. 423, 20 Ann. Cas. 1145; *Herroun v. Graham*, 258 Pa. 245, 101 Atl. 985. Albeit, owing to differences of fact, none of the authorities cited can be held to rule the present case, yet relevant general principles are stated and discussed in all of them.

[2, 3] While "the crowning fact" in the execution of a deed is delivery, yet it is not necessary to prove "actual manual investiture," since "delivery may be inferred or presumed from circumstances." *Rigler v. Cloud*, 14 Pa. 361, 364. "Delivery may be made by words alone, or by acts alone, or by both together; but there must be sufficient to show an intention to pass the title." *Dayton v. Newman*, 19 Pa. 194, 199.

[4] When the deed to defendant, duly acknowledged and recorded, was proved, this, *prima facie*, placed the title and right of possession in him. *Kern v. Howell*, supra, 180 Pa. 316, 317, 36 Atl. 872, 57 Am. St. Rep. 641; *Clymer v. Groff*, supra, 220 Pa. 583, 584, 69 Atl. 1119, 14 Ann. Cas. 256; *Diehl v. Emig*, supra. Then, when it was shown that, after Dr. Kanawell's death, the deed, unrecorded, was found in the latter's safe, the burden shifted, and it became the duty of defendant to establish a delivery in the lifetime of the grantor; but, as indicated by the authorities already cited, to do this it was not necessary for the grantee to prove the actual handing of the deed to him by the grantor, so long as sufficient circumstances were shown, by the weight of clear and satisfactory evidence, reasonably to justify the conclusion that a delivery did, in fact, take place.

In the present instance, it cannot justifiably be said that the burden resting upon the defendants was not fully sustained within the requirements of our decisions upon the subject; the question of delivery was for the jury (*Steel v. Tuttle*, 15 Serg. & R. 210, 217, 218; *Galbraith v. Zimmerman*, 100 Pa. 374, 377), and it was found against plaintiffs. The judgment entered on the verdict will not be disturbed.

[5] We have determined the sole point called to our attention by the statement of "question involved," which is all that is required of us. *Kennedy v. Rothrock*, 104 Atl. 746, not yet officially reported, and cases there cited. All the assignments have been examined, however, and, while they will not be discussed specifically, nothing appears therein which, considering the record as a whole, demonstrates reversible error.

The judgment is affirmed.

1. APPEAL AND ERROR §357(1)—TIME FOR APPEAL—POWER OF COURT—HARDSHIP.

Where an act of assembly fixes the time within which an appeal shall be taken, courts have no power to extend it to allow the act to be done at a later day, and something more than mere hardship is necessary to justify an extension, or its equivalent, an allowance of the act nunc pro tunc.

2. APPEAL AND ERROR §353 — TIME FOR TAKING APPEAL—FRAUD.

Where a party has been prevented from appealing by fraud, or wrongful or negligent act of court official, court may extend time for appeal; but, where no fraud or anything equivalent thereto is shown, such appeals cannot be allowed.

3. MASTER AND SERVANT §416—WORKMEN'S COMPENSATION ACT—APPEAL FROM DECISION OF REFEREE—JURISDICTION OF WORKMEN'S COMPENSATION BOARD.

Under Workmen's Compensation Act, § 419, permitting an appeal from referee's decision to Workmen's Compensation Board only when taken within 10 days after notice of referee's action has been served on parties, the board, where an appeal has not been taken within such time, cannot allow an appeal nunc pro tunc as of a time prior thereto.

4. MASTER AND SERVANT §417(9)—WORKMEN'S COMPENSATION ACT — APPEAL FROM REFEREE—REVIEW.

If Workmen's Compensation Board improperly allows appeal from decision of referee, and affirms decision, Common Pleas Court has no jurisdiction upon appeal to reverse referee's decision and dismiss claim.

Appeal from Court of Common Pleas, Crawford County.

Proceeding by Elizabeth Wise against the Borough of Cambridge Springs, brought before the Workmen's Compensation Board, which, on appeal by the United States Fidelity & Guaranty Company, insurer, affirmed the referee's award to claimant. From an order of the common pleas, reversing the decision of the board and dismissing the claim, claimant appeals. Appeal sustained, and award of referee affirmed.

Argued before BROWN, C. J., and MES-
TREZAT, POTTER, STEWART, MOSCH-
ZISKER, FRAZER, and WALLING, JJ.

Frank J. Thomas and John A. Northam,
both of Meadville, for appellant.

J. Roy Dickle, of Pittsburgh, Albert L.
Thomas, of Meadville, and Wm. W. Wishart,
of Pittsburgh, for appellee.

BROWN, C. J. In 1916 Roy Wise was a special policeman in the service of the borough of Cambridge Springs, this state. On September 21st of that year an automobile filled with passengers was stalled on a railroad crossing over one of the streets of the borough, and, in attempting to push it off, he was struck by a train, sustaining injuries which resulted in his death. His widow filed a claim against the borough before the

taken from this to the board by United States Fidelity & Guaranty Co. insurance carrier, and the award of referee was affirmed. From the action on appeal the insurance carrier and the widow appealed to the court below, while the award to the widow, on the ground that her husband was not an "employee" of the borough within the meaning of men's Compensation Act. On appeal from the action of the court below affirming her claim, she assigns several grounds for reversal, but only one need be considered as it is conclusive of her right to the award of the referee sustained.

[1-3] The right of appeal to the compensation board from an award or decision of compensation by a referee is given by section 419 of the Workmen's Compensation Act of June 2, 1915 (P. L. 736). If no appeal is taken it would not exist, and it is only if taken "within ten days after notice of the referee's action" that the right of appeal exists. In the case at bar the borough of Cambridge Springs, the United States Fidelity & Guaranty Company both appeared by their attorneys before the referee in opposition to the claim of the appellant. On December 6, 1917, the referee filed his award. On the 30th of December—24 days thereafter—the appellant filed his appeal. The appeal was taken from it by the insurance carrier, the Compensation Board. On January 1, 1917, when the case was called for trial before that board, this appellant moved that the appeal be stricken off, because it had not been taken within the time prescribed by the statute. This motion was refused by the board in an opinion filed on the 2nd of January following March, the reason assigned for the action being that it had been "liberally" allowed. The appellant appeals nunc pro tunc with the claim that one of the parties in the case had not had full notice of the findings of the referee. It is to be noted that the allowance of an appeal from the decision of a referee is not one of the functions of the compensation board. It has nothing to do with the allowance of an appeal, which is a matter left to the right under the statute, if taken within the time within which an appeal may be taken. All that the court has to do with it is to pass upon it when it is properly taken. If the board can allow an appeal nunc pro tunc, there would be no limit to the time within which an appeal might be taken, though the act of assembly limits it.

The right of the insurance carrier to appeal after the statutory period has expired was challenged by the widow of the deceased at the very threshold of the case before the compensation board, and the board could have allowed the appeal nunc pro tunc, it ought not to have done so in view of the testimony taken

on the motion to strike off. J. A. Boland, the solicitor of the borough of Cambridge Springs, testified that he had had charge of the proceeding on behalf of the borough; that at the hearing before the referee, E. J. Stetson, a local attorney, appeared for the United States Fidelity & Guaranty Company, the insurance carrier, and conducted the proceeding for it; that on December 12, 1916, he and the attorney for the insurance carrier received the findings of the referee, and on the 13th or 14th of the same month the said E. J. Stetson came to his office, when he handed him the finding in the matter; that after examining it Stetson handed it back to him; that Stetson, being attorney of record in the case, he considered the notice of the award was properly served on him; that Stetson read the award over, and that they discussed the advisability of taking an appeal or any further action in the case. Here is a distinct statement by the borough solicitor, not questioned by the attorney for the insurance carrier, that it had notice through him of the award more than 15 days before its appeal was taken, and as it was too late to be of any avail the Compensation Board was powerless to recognize it.

"Where a statute fixes the time within which an act must be done, as, for example, an appeal taken, courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent, an allowance of the act *nunc pro tunc*." *Schrenkeisen et al. v. Kishbaugh, Coslett et al.*, 162 Pa. 45, 29 Atl. 284.

In *Singer v. Delaware, Lackawanna & Western Railroad Co.*, 254 Pa. 502, 98 Atl. 1059, the court allowed an appeal from the report of a board of viewers in condemnation proceedings more than thirty days after it had been filed. A motion by the railroad company to strike it off was refused, and an issue framed, which resulted in a verdict for the plaintiff in three times the sum awarded her by the viewers. On appeal from the judgment entered on the verdict the sole question was as to the power of the court to allow the appeal from the report of viewers more than thirty days after it had been filed. In holding that it possessed no such power, we said, in reversing the judgment in favor of the plaintiff:

"Act April 9, 1856 (P. L. 288) § 3, provides that, 'upon the report of said viewers, or any four of them, being filed in said court, either party, within thirty days thereafter, may file his, her or their appeal from said report to the said court.' In the present case the 30 days expired on October 17, 1913, while the appeal was not taken until November 8th. In *Harris v. Mercur*, 202 Pa. 313, this court, speaking by Mr. Justice Mestrezat, said (page 317 [51 Atl. 969, 971]): 'If we are correct in holding that the act of April 22, 1874 (P. L. 109), required the appellant to file his exceptions within 30 days after he had received notice of the filing of the court's decision, the order of the court below in permitting exceptions to be filed there-

after was without authority and hence without effect or validity. The commands of a statute cannot be waived or dispensed with by a court. They require implicit obedience as well from the court as from its suitors: *Jackson ex dem. Bleecker v. Wiseburn*, 5 Wend. (N. Y.) 136. 'It has been repeatedly held,' says Mr. Sedgwick (Construction of Statutory and Constitutional Law, 277, 2d Ed.), 'that courts have no dispensing power, even in matters of practice, when the Legislature has spoken. Thus, where a statute declares that a judge at chambers may direct a new trial if application is made within ten days after judgment, it has been said that 'he can no more enlarge the time than he can legislate in any other matter.' When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice.'" Under the act of 1856, the period of 30 days allowed for taking an appeal from an award of viewers runs from the date of the filing of the report, not from its confirmation. *Gwinner v. Lehigh & Del. Water Gap R. R. Co.*, 55 Pa. 126. Where a party has been prevented from appealing by fraud, or by the wrongful or negligent act of a court official, it has been held that the court has power to extend the time for taking an appeal. *Zeigler's Petition*, 207 Pa. 131 [56 Atl. 419]; *York County v. Thompson*, 212 Pa. 561 [61 Atl. 1024]. But where no fraud or anything equivalent thereto is shown such appeals cannot be allowed. *Dunmore Borough School District v. Wahlers*, 28 Pa. Super. Ct. 35; *Guyer v. Bedford County*, 49 Pa. Super. Ct. 60. The mistake or neglect of the attorney for the party desiring to appeal is not sufficient ground for relief: *Ward v. Letzkus*, 152 Pa. 318, 319 [25 Atl. 773]."

[4] From the time this appellant protested in limine before the Compensation Board that the appeal from the award of the referee had been taken too late, it was prosecuted with due notice of its invalidity, and if that board had no jurisdiction of it—and it certainly had not—the court below had none on appeal from its action.

For the reason stated, this appeal is sustained, and the award of the referee affirmed.

(263 Pa. 320)

OBERLY et al. v. H. C. FRICK COKE CO.
(Supreme Court of Pennsylvania. July 17, 1918.)

1. INJUNCTION ⇐137(4) — PRELIMINARY INJUNCTION—REFUSAL.

The refusal to grant a preliminary injunction is error only when the right threatened with invasion is unquestioned, and the only protection from irreparable injury is to be found in a court of equity.

2. INJUNCTION ⇐163(5) — LESSOR'S USE OF COAL LAND—DISSOLUTION.

Where owner in fee conveyed underlying coal, with necessary rights of mining, removal, etc., and waived damages therefrom, and explosive gas accumulated over strata overlying coal, which could not be removed by ventilation, and owner was about to drill hole to release gas, a preliminary injunction was properly dissolved.

Appeal from Court of Common Pleas, Fayette County.

Bill in equity for injunction by John Oberly and another against the H. C. Frick Coke Company. From the action of the lower court in granting a preliminary injunction,

and in thereafter dissolving it, plaintiffs appeal. Affirmed.

Reppert, J., filed the following opinion in the common pleas:

Findings of Fact.

I. By deed dated October 19, 1889, recorded in the recorder's office of Fayette county in Deed Book No. 91, page 329, James F. Huestead, the owner of the fee, with his wife, conveyed to Gilbert T. Rafferty and Charles Donnelly all the 9-foot or Connellsville vein of coking coal in and underlying all that certain tract of land situate in North Union Township, in said county, describing it by metes and bounds, containing 109 acres and 48 perches, "together with the free and uninterrupted right of way under said land at such points and in such manner as may be necessary and proper for the purpose of digging, mining, draining, ventilating, and carrying away said coal, hereby waiving all damages arising therefrom or from the removal of all the said coal, together with the privileges of mining and removing through said described premises other coal belonging to said parties of the second part, their heirs and assigns, or which may hereafter be acquired."

II. By sundry mesne conveyances title to the said coal and mining rights became vested in H. C. Frick Coke Company, a corporation of Pennsylvania, defendant, and title to 99 acres and 38 perches of said tract of land, excepting and reserving the said vein of coal and mining rights, became vested in the plaintiffs.

III. On or about February 27, 1918, the defendant entered upon the surface of plaintiffs' land, and began preparations for drilling a bore hole 10 inches in diameter for the purpose of releasing gas from its mines, the coal being about 520 feet beneath the surface.

IV. The Huestead tract of coal is part of defendant's Lemont No. 1 mine and is now being operated as part of the workings of that mine. The coal is transported through the underground workings to an opening on the surface $2\frac{1}{2}$ miles distant. The mines are ventilated by a fan located the same distance from this tract. The current of air from the fan is distributed through the mine. A portion of the Huestead coal has been entirely mined, the supports removed, and falls from the overlying strata, called gob, loosely occupies the space from which the coal has been taken. Explosive gas, endangering the mine and those working therein, caused by the removal of the coal, has accumulated over the gob. It is impossible to reach the accumulation of gas by an air current from the fan. Its removal is necessary to the operation of the mine. It is lighter than air, and the only practicable method of removing it is by a bore hole from the surface to the high point of the gob, thus allowing it to escape. Under such circumstances the law requires that this be done.

V. The superintendent of the mine and the mine inspector of the defendant company testify that the gob from the mining of the coal under the surface of plaintiffs' land causes the accumulation of gas complained of, and that if the defendant was not engaged in mining the coal under that tract the bore hole would not be needed. There is no denial of this testimony and no reason to doubt the facts thus testified to. For the purpose and in the manner above described the bore hole when completed will be a part of the ventilating system of the mine.

Discussion.

The plaintiffs allege that the action and conduct of the defendant in entering upon their land with the object of drilling and maintaining said bore hole are unlawful and without authority or right under the grant of the coal owned and operated by the defendant company.

The rights of the owner of coal, when severed from the surface as to working and surface rights, are thus set forth in the "Law of Mines and Mining," Barringer & Adams, Edition of 1897, page 576:

"It is a general rule of law that, when anything is granted, all the means of attaining it and all the fruits and effects of it are also granted; when uncontrolled by express words of restriction all the powers pass which the law considers to be incident to the grant for the full and necessary enjoyment of it. Consequently, a grant or reservation of mines gives the right to work them, to enter and to mine, unless the language of the grant itself provides otherwise or repels this construction. And this right is so inseparable from a grant of minerals, that not only is it necessarily an implied incident thereof, but it and its derived rights cannot be restrained or excluded by a special affirmative power to do other acts, or by a grant of other privileges necessary or convenient to the working of mines.

"The right to work the mine involves the right to penetrate the surface of the soil for the minerals, to remove them in the manner most advantageous to the mine owner, and to use such means and processes in mining and removing them as may be necessary in the light of modern improvements in the arts and sciences. * * *

"The bare right to work carries with it the right to use so much of the surface as is reasonably necessary. The mine owner has the right to enter and take and hold possession even as against the owner of the soil, and to use the surface so far as may be necessary to carry on the work of mining, even to the exclusion of the owner of the soil. What is necessary and reasonable may be determined by reference to what is customary, and is a question of fact.

"Most frequently the privileges above described as impliedly incident to the right to mine are expressly granted or reserved in the instrument creating a mineral estate; but their character and extent are not altered by this expression, though there may be, of course, express privileges added which would not otherwise be implied. These rights do not create an estate in the surface, but are easements to do certain acts thereon.

"Surface rights and the incidental rights, such as that to use shafts, whether expressed or left to implication, may be used for the purpose only of mining under the particular premises conveyed, and not as a means of removing minerals from other lands. This, of course, may, however, be changed by the terms of the contract."

As we view it, this expression of the law is in harmony with Pennsylvania decisions, as shown by a number of authorities referred to by Mr. Justice Potter in *Baker v. Pittsburg, Carnegie & Western Railroad Co.*, 219 Pa. 393, 403, 68 Atl. 1014, 1015, where he says:

"As to the other specifications of error, which question the correctness of the ruling of the trial judge that, under the reservation in plaintiffs' deed, she had the right to sink a shaft upon the land sold by her for the purpose of mining the coal which she had reserved, we think the court below was clearly right. It is the established law in Pennsylvania. In a recent case, *Youghiogheny River Coal Co. v. Allegheny Nat. Bank*, 211 Pa. 319, our Brother Mestrezat said (page 324 [60 Atl. 924, 925, 69 L. R. A. 637]): 'If the owner of the whole fee conveys the coal in the land in general terms, retaining the residue of the tract, the purchaser acquires the coal, with the right to mine and remove it, provided he does so without injury to the superincumbent estate.' The undoubted right of the owner of coal to mine and remove it was also expressly recognized in *Pringle v. Vesta Coal Co.*, 172 Pa. 438 [33 Atl. 690], and the principle that 'one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as

it is necessary to carry on his mining operations' is laid down in *Turner v. Reynolds*, 23 Pa. 199. See, also, *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 236 [25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645].

"The general rule is stated in 2 Lindley on Mines, § 813, where it is said: 'A grant of minerals implies the right to win them from the underlying soil. The use of some portion of the surface is necessary for the proper enjoyment of this right. To reach the minerals the miner must pass from the surface downward; to do this he has a right of way of necessity. He may sink through such land from the surface to the mines, in order to reach and work them.' And in 2 Sugden on Mines and Mining, § 1003, it is said: 'An express grant of all the minerals and mining rights in a tract of land is by natural implication the grant also of the right to open and work the mines, and to occupy for those purposes as much of the surface as may be reasonably necessary.'"

The removal of gas is a necessary incident to the mining of coal, in order that mining operations may be carried on with safety. It is one of the implied rights incidental to every grant of minerals. The bore hole in controversy is necessary to the proper ventilation of the mine in the coal immediately underlying plaintiffs' land, which coal is now being mined.

Our conclusion is that the preliminary injunction heretofore granted should therefore be dissolved.

The lower court granted a preliminary injunction as prayed for, and thereafter dissolved same. Plaintiffs appealed.

Argued before BROWN, C. J., and MOSCHZISKER, FRAZER, WALLING, and SIMPSON, JJ.

H. S. Dumbauld, of Uniontown, for appellants.

W. J. Sturgis and S. J. Morrow, both of Uniontown, for appellee.

PER CURIAM. [1, 2] The refusal to grant or continue a preliminary injunction is error only when the right threatened with invasion is an unquestionable one, and the only protection from irreparable injury to it is to be found in a court of equity. *Crawford v. Sullivan*, 238 Pa. 142, 85 Atl. 1090. In view of this rule the court below did not err in refusing to continue the injunction, and its decree dissolving the same is affirmed, at appellants' costs.

(262 Pa. 112)

In re HILDEBRAND'S ESTATE.

Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. TAXATION — § 806 — INHERITANCE TAX — WIDOW'S EXEMPTION — "ESTATES PASSING BY WILL" — "CLEAR VALUE."

The widow's exemption of \$500 granted by Act June 7, 1917 (P. L. 447), is not subject to the direct inheritance tax imposed by Act July 11, 1917 (P. L. 832), making all estates passing by will or under intestate laws taxable at 2 per cent. on "clear value" of estate which is only that which remains after all claims against it have been paid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Clear Value.]

2. DESCENT AND DISTRIBUTION — § 53 — EXEMPTION ACTS—CONSTRUCTION.

Exemption acts have been conceived in a spirit favorable to widows, and should receive an interpretation consistent with their conception.

3. DESCENT AND DISTRIBUTION — § 52(2) — RIGHTS OF WIDOW—NATURE—EXEMPTION.

An exemption act creates an independent bounty, and is of no kin to one of distribution.

Appeal from Orphans' Court, Lancaster County.

The Commonwealth of Pennsylvania appeals from a decree sustaining an appeal from a direct inheritance tax appraisal in the estate of Isaac W. Hildebrand, deceased. Appeal dismissed.

Appeal from direct inheritance tax appraisal.

The facts appear from the following opinion by Smith, P. J., in the orphans' court:

"For the imposition and collection of certain inheritance taxes" an enactment was approved July 11, 1917 (P. L. 832). Concisely, it provides that, "All estates * * * passing from any person * * * either by will or under the intestate laws of this commonwealth * * * are * * * subject to the tax of two (\$2) dollars on every hundred dollars of the clear value of such estates." Because of this enactment the commonwealth of Pennsylvania contends that the \$500 exemption reserved for a widow by section 12 of the Fiduciaries' Act of 1917 (P. L. 471), subject to the tax, and to accomplish its collection has included it in the prescribed appraisal, and from which this appeal has been taken.

[1-3] Exemption acts have been conceived in a spirit favorable to widows and have received an interpretation consistent with their conception. *Lyman v. Byam*, 38 Pa. 475; *Peebles' Estate*, 157 Pa. 605, 27 Atl. 792. Such an act creates an independent bounty, and is of no kin to one of distribution. *Compher v. Compher*, 25 Pa. 31; *Nevins' Appeal*, 47 Pa. 230; *King's Appeal*, 84 Pa. 345; *Gilbert's Estate*, 227 Pa. 648, 76 Atl. 428; *Buckland's Estate*, 239 Pa. 608, 86 Atl. 1098.

The commonwealth cannot prevail because the inheritance tax act does not authorize its action. It provides that only "clear value" of a decedent's estate is taxable, and the clear value of an estate is only that which remains after all claims against it have been paid. A widow's exemption is a "preferred claim," and, therefore, must first be met. It is a "gift of the law prompted by considerations of public policy." *Beetem & Co. v. Getz*, 5 Pa. Super. Ct. 71; *Peebles' Estate*, supra.

An estate that passes "either by will or under the intestate laws" is subject to the tax, but a widow's exemption is not such an estate. It does not come by either of these ways. It is neither a legacy or devise, nor an inheritance. Subject to a purchase-money lien it is preferred to all claims against an estate. By asserting it the amount of it ceases to be regarded as part of a decedent's estate. Against it a decedent's creditors, legatees, devisees, or distributees cannot prevail. *Peebles' Estate*, supra. The action of a widow properly claiming it distinguishes it as her estate; which had been held in abeyance by her husband during his life. The act says it is something which she may "retain," thus pointedly implying ownership.

Such exemption is a wife's inchoate property right in a husband's estate, which becomes complete when as his widow she sustains her claim for it. It is not subject to the tax imposed on the estate passing from a deceased husband;

therefore the appeal is sustained and the appraisal for inheritance tax purposes is reformed by striking \$500 from it. Costs to be paid by the commonwealth.

The lower court sustained the appeal and reformed the appraisal by striking the sum of \$500 therefrom. Commonwealth of Pennsylvania appealed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

William H. Keller, First Deputy Atty. Gen., Francis Shunk Brown, Atty. Gen., and M. E. Musser, of Lancaster, for appellant.

F. Lyman Windolph, O. S. Schaeffer, and J. R. Kinzer, all of Lancaster, for appellee.

PER CURIAM. This appeal is dismissed, at the costs of the commonwealth, on the opinion of the learned court below disallowing its claim.

(262 Pa. 95)

COULTER v. LINE.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. LIENS ⇐16 — PRESUMPTION OF EXTINGUISHMENT.

Where person claiming payment of charge or lien on realty is unable to show either a claim or demand for payment on owner, or a payment upon or an acknowledgment of existence of lien by owner within 21 years, Act April 27, 1855 (P. L. 369) § 7, raises conclusive presumption of release or extinguishment of demand, and makes it irrecoverable.

2. JUDGMENT ⇐876(1) — PAYMENT — PRESUMPTION.

In action by administrator d. b. n. c. t. a. of wife whose trustee upon a separate trust had judgment in 1878 revived in 1888, against husband brought against husband's executor, where trustee died in 1902, and no successor was appointed until 1916, there was a conclusive presumption of payment under Act April 27, 1855 (P. L. 369) § 7.

Appeal from Court of Common Pleas, Lancaster County.

Scire facias sur judgment by William J. Coulter, successor to John Line, in trust for the separate use of Eliza Rissler, widow of Jacob B. Rissler, deceased, of whom Wm. J. Coulter is administrator d. b. n. c. t. a. against Theodore Line, executor of Jacob B. Rissler, deceased. From a judgment for defendant non obstante veredicto, plaintiff appeals. Affirmed.

The facts appear from the following opinion by Landis, P. J., in the common pleas sur defendant's motion for judgment n. o. v.:

On March 25, 1878, there was entered in this court to January term, 1878, No. 604, a judgment bond, in which John Line, in trust for the separate use of Eliza Rissler, wife of Jacob B. Rissler, was the plaintiff, and Jacob B. Rissler, of Ephrata township, was the defendant. The judgment was dated March 16, 1878, was given to secure the sum of \$1,900, and was made payable on April 1, 1879, with interest. On March 23, 1883, the judgment was revived by an amicable scire facias, entered to January term, 1883, No. 522; and on May 28, 1888, it

was, in a similar way, revived by an amicable scire facias, entered to April term, 1888, No. 457. No other proceedings were had concerning it, until the present scire facias was sued out.

On May 22, 1892, Eliza Rissler died, leaving a last will and testament, in which her husband, Jacob B. Rissler, was named as executor. No inventory nor account was ever filed by him in his wife's estate. Under this will, after certain small specific legacies, the balance of the estate was given to him during his natural life. On January 5, 1902, John Line, the trustee named in the judgment, died, and no trustee was appointed to succeed him, until some time in 1916. On May 14, 1915, Jacob B. Rissler died, and shortly thereafter William J. Coulter was appointed administrator d. b. n. c. t. a. of Elizabeth (Eliza) Rissler, deceased, and he was also appointed trustee in the judgment in place of the said John Line, deceased. Under these admitted facts, a verdict was directed by the court in favor of the plaintiff for the sum of \$4,750, and a rule was then granted for judgment for the defendant non obstante veredicto, on a point reserved, which raised the question whether the presumption of payment was a bar to the action.

[1] In *Coleman v. Erie Trust Co.*, 255 Pa. 63, 99 Atl. 217, it was held that "the presumption, arising from lapse of time, that a judgment has been paid, is not conclusive, but is merely a presumption of fact which is rebuttable. The presumption does not arise where there is affirmative proof that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditors." But section 7 of Act April 27, 1855 (P. L. 369), provides that, "in all cases where no payment, claim or demand shall have been made on account of, or for any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable." It was therefore said, in *Stephenson's Estate*, 256 Pa. 487, 100 Atl. 985, that it is not necessary to plead the act of 1855, and that, to remove the bar of that act, demand must be made of, or acknowledgment by, all the owners sought to be affected thereby. In *Wingett's Appeal*, 122 Pa. 486, 15 Atl. 863, the court held that "it is very clear, therefore, that if the person claiming payment of such charge or lien is able to show neither a claim or demand of payment made by him on the owner of such real estate, nor a payment upon or an acknowledgment of the existence of such lien or charge by such owner within the statutory period, then the act operates to raise a conclusive presumption of the release or extinguishment of the demand, and declares that it shall 'thereafter be unrecoverable.'"

In the recent case of *Yocum's Estate*, 242 Pa. 82, 88 Atl. 919, the question raised in the proceeding seems to have been determined by the Supreme Court. If there appeared, that, on June 2, 1875, Jesse Yocum executed his bond, with a warrant of attorney attached, for \$2,000, payable one year after date, to Stephen Coates, as trustee for his wife, Ann Yocum. Jesse Yocum died on October 10, 1896, devising his farm to his wife for life, with the privilege of borrowing on it to a limited amount for certain purposes. Mrs. Yocum resided on the property until May 31, 1911, the time of her decease. A claim upon the bond was presented against Jesse Yocum's estate, but was disallowed in the court below, first, upon the ground that the

bond was no lien upon the land, and, second, because a presumption had arisen "from facts and circumstances inconsistent with the idea that the debt had not been canceled." The Supreme Court disagreed with the court below as to the second reason given, but affirmed the judgment, deciding broadly that, "where a wife has loaned money to her husband who has given a bond to a trustee to secure the repayment of such money, under the Act April 15, 1851 (P. L. 689), the transaction assumes the form of a contract, equally binding on both parties, and is, like other contracts, subject to the statute of limitations and the presumption of payment," and that, where "such a bond, which has been due more than twenty years, is presented against the estate of a husband by the executor of the wife's estate, the presumption of payment applies, and in the absence of evidence to rebut it, the claim will be disallowed." Mr. Chief Justice Brown, in delivering the opinion of the court, said: "If a loan made by a married woman, in the way in which Mrs. Yocum lent her money to her husband, 'assumes the form of a contract,' as it certainly does, and 'is binding equally on both parties,' as it surely is by the express words of the act, why is it not subject, like other contracts, to the statute of limitations and the presumption of payment? Yocum did not contract directly with his wife, but with a third person as trustee for her, and the bond given to the trustee was 'as good and valid in law' against the obligor's estate 'as though the investment had been made by a trustee appointed by the court.' If these words of the act of 1851 mean anything, it is that a trustee named in an obligation given by a husband can enforce payment upon its maturity, for such would be the unquestioned right if the wife's money should be invested by a trustee appointed by the court. That there was a right in Coates as trustee to collect the bond by an action at law, if it had not contained a warrant of attorney for the confession of judgment, is recognized in *Galt v. Smith*, 145 Pa. 167 [22 Atl. 718], where the action was by a trustee named in a bond, the condition of which was that the husband should pay interest on a certain sum to his wife annually during her life. In the present case nothing was to be paid directly to Mrs. Yocum, but the entire sum of \$2,000, with interest, was payable to Coates, trustee, one year after the date of the bond. With the right in the trustee to enforce payment of the bond by proceedings at law, there was a corresponding right at law in Yocum to make defense to it, and whatever defense he might have made while living is now open to his legatees. *Hoch's Appeal*, 21 Pa. 280; *Ritter's Appeal*, 23 Pa. 96. When Yocum died a presumption of payment of the bond had arisen. Time had written a receipt across its face, and with no evidence to rebut this, the court below should have declared it paid in the eye of the law. The failure to do so was a failure to give effect to the manifest intention of the Legislature as expressed in the act of 1851—that the loan of the wife's money to Yocum, through Coates as trustee, had assumed the form of a contract, enforceable at law by the latter, with a reciprocal right of defense in the former, whether the wife was living or dead when the right to collect accrued."

[2] In this case, there is not a particle of evidence of demand by the creditor or acknowledgment of the debt on the part of the debtor. The whole matter remained quiescent from May 28, 1888, when the judgment was last revived, until after the death of Jacob B. Rissler, in 1915. It is true that, about five years after the amicable revival, Jacob B. Rissler became the executor of his wife's will; but this fact does not appear to have changed the situation. It is also true that, about 15 years after Mrs. Riss-

ler's decease, John Line, the trustee, died, and no one was appointed in his place. The omission, however, to take such action does not seem to me, under the authorities, to have taken away from Jacob B. Rissler his right under the law to claim the presumption of payment after the statutory period had passed, and, if this be true, the same principle applies in favor of his legal representatives. I am therefore of the opinion that the plaintiff is not entitled to recover in this case.

Verdict for plaintiffs for \$4,750; the lower court subsequently entered judgment for defendant non obstante verdicto. Plaintiffs appealed.

Error assigned, among others, was in entering judgment for defendant non obstante verdicto.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

B. F. Davis, of Lancaster, for appellant.

J. E. Malone, of Lancaster, and Joseph T. Evans, of Ephrata, for appellee.

PER CURIAM. This judgment is affirmed on the opinion of the learned court below making the rule for it absolute.

(363 Pa. 114)

In re MORRIS' ESTATE.

Appeal of PENNOCK et al.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. WILLS \Leftrightarrow 316(2)—TESTAMENTARY INCAPACITY—ISSUE.

Where testatrix, although prostrated with grief at her sister's death, prepared her will with assistance of her physician, and actively directed her business affairs up until then, and the chief beneficiary had been peculiarly close and useful to her for many years, an issue devisavit vel non on ground of her incapacity was properly refused.

2. WILLS \Leftrightarrow 52(1)—TESTAMENTARY CAPACITY—PRESUMPTION.

The law presumes testamentary capacity.

3. WILLS \Leftrightarrow 82—UNNATURAL DISPOSITION.

The very office of a will is to effectuate as the law of his property, and as the guide to its descent, the testator's particular preferences and desires, and it is immaterial if he shocks the common sense of the community.

Appeal from Orphans' Court, Chester County.

Petition by Charles M. Pennock and others for an issue devisavit vel non in the estate of Hannah J. Morris, deceased. From a decree refusing the issue, petitioners appeal. Appeal dismissed.

The facts appear from the following opinion by Butler, P. J., in the orphans' court:

That Hannah Morris was prostrated with grief and shock by the death of her sister, Adelaide, and for a few days thereafter took little interest in, or notice of, relatives, friends, or other worldly matters, is proved, but there is an entire absence of any proof that would support a finding that the purported will was the product of undue influence, or that Hannah Morris lacked testamentary capacity when she executed it.

There was manifest occasion for her to make a new will, and the practically undisputed evidence is that she fully appreciated this fact, determined to make it, and promptly effectuated her purpose, with the clerical help of her physician, who profits not a penny by her will, she giving all directions and instructions as to its dispositions and seeing to it that the new will took the place of the old one among her papers, where it was found after her death.

According to the appellant's proof, weak and ailing as she was physically about the time she executed her last will, she was vigorous enough mentally to very peremptorily veto the proposition to provide an attorney in fact, and her refusal, coupled with the resolute declaration that she would not permit her affairs to be thus rushed, was accepted as final.

[1-3] Starting out with the law's presumption that she possessed testamentary capacity, and in the evidence finding proof of nothing substantially challenging her possession of such capacity—facts, not opinions, control (*Browne v. Molliston*, 3 Wharton, 129, and *Combs & Hanksin's Appeal*, 105 Pa. 155)—but, on the other hand, the evidence affirmatively indicating that she was a woman of mental force and average intelligence and information, generally, accordingly to the great preponderance of proof, supervising and directing her business matters inside and outside her home, until about the time of her death, we entertain no doubt that the probate of the contested paper, as the will of Hannah Morris, should be sustained.

If, as contended, but under a review of the evidence not apparent we think, the provisions of the will are unnatural, different from what would have been expected, this in itself would afford no ground for finding the absence of testamentary capacity or presence of undue influence. The very office of a will is to effectuate as the law of his property, as the guide to its descent, the testator's particular preference and desires, and it matters not if he shocks the common sense of the community. *Johnson's Estate*, 159 Pa. 630, 28 Atl. 448 (see opinion of lower court); *Bitner v. Bitner*, 65 Pa. 347.

As a fact we view her will as natural, as what might have been expected to result from the operation of her surroundings upon her mind. The undisputed proof is that the chief beneficiary was peculiarly close and useful to the deceased for some years prior to her death; that she had good reason to feel grateful to him; that in his absence, without his knowledge, aided only by her physician, who took the instructions directly from her, she had the paper prepared, executed it, and arranged that it should appear among her effects upon her death. The conclusion follows, that it is her will, disposing of her property as she wished, and its validity is not challenged to the point where an issue should be granted, either by the evidence, relied upon to directly prove lack of capacity, or by the circumstance that the provisions of her will might surprise those who did not know of her inclination and preference. *Morgan's Estate*, 219 Pa. 355, 68 Atl. 953.

The lower court dismissed the appeal from the decree of the register of wills. Charles E. Pennock, Charles J. Pennock, and Anna F. Pennock appealed.

Argued, before BROWN, O. J., and MOSCHZISKE, FRAZER, WALLING, and SIMPSON, JJ.

S. Duffield Mitchell, of West Chester, for appellants.

Joseph Gillilan of Philadelphia, and Wallace S. Harlan, of Coatesville, for appellee.

PER CURIAM. This appeal is dismissed, at appellant's costs on the opinion of the learned president judge of the court below refusing an issue *devisavit vel non*.

(262 Pa. 93)

In re WOHLSEN'S ESTATE.

WOHLSEN v. NORTHERN TRUST & SAVINGS CO. OF LANCASTER.

(Supreme Court of Pennsylvania. July 17, 1918.)

EXECUTORS AND ADMINISTRATORS ~~OF~~ 402 — PAYMENT OF TAXES AND REPAIRS — SURCHARGE.

The executrix of a testator possessing no personalty and leaving two mortgaged lots, where subsequent judgment note for sum exceeding the equities was of record in trust for testator's creditors, after judicial sale, subject to mortgage, of one lot for payment of debts, would be surcharged, where she appropriated the proceeds of the sale to taxes, repairs, and interest on other mortgage.

Appeal from Orphans' Court, Lancaster County.

Exceptions to adjudications in case of Anna S. Wohlsein, executrix of Peter N. Wohlsein, deceased, against the Northern Trust & Savings Company of Lancaster, Pa., trustee for creditors in estate of Peter N. Wohlsein, deceased. From a decree sustaining exceptions, plaintiff appeals. Dismissed.

From the record it appeared that Peter N. Wohlsein died on January 3, 1915, leaving no personal property, but seised of two tracts of real estate. The one, No. 340 College avenue (in the city of Lancaster), was incumbered by a mortgage of \$5,000. The other was a lot on South Marshall street (in said city), on which were erected 10 dwelling houses. This lot was incumbered by two mortgages, for \$15,000 and \$3,000 respectively. Following all these mortgages was a judgment for \$12,857, confessed by the decedent to the Northern Trust & Savings Company, trustee, in trust for his creditors existing at the time the judgment was confessed. The decedent left no personal property.

On January 28, 1915, the executrix, Anna S. Wohlsein, presented her petition to the orphans' court, asking for the sale of property, No. 340 College avenue, for the payment of the debts of the decedent. No debts were scheduled, except funeral expenses and doctor bills and the judgment in trust for creditors above referred to. The sale was ordered, and was held in pursuance thereof on February 18, 1915, and the property, No. 340 College avenue, was sold, subject to the mortgage of \$5,000 incumbering it, for \$2,375, and the money paid to the executrix. It is this money which forms the subject-matter in dispute.

The South Marshall street properties were not sold at the same time, owing to a pending

equity suit as to the decedent's title. The executrix, who was also the sole legatee under the will, collected the rents. She applied the proceeds of sale of the property, No. 340 College avenue, to the payment of the taxes, repairs, and mortgage interest on the South Marshall street properties accruing after the College avenue house was sold.

The lower court surcharged the defendant to the extent of payments so made. Anna S. Wohlsen, executrix, appealed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

Edwin M. Gilbert, of Lancaster, for appellant.

William H. Keller, M. G. Schaeffer, and John A. Coyle, all of Lancaster, for appellee.

PER CURIAM. The correct conclusion of the learned court below was that the appellant had shown nothing which justified her in appropriating the proceeds of the sale of the College avenue property to the payment of indebtedness on the Marshall street properties, and her appeal from the surcharge is dismissed, at her costs.

(262 Pa. 75)

STEINMETZ et al. v. FENNESSY et al.
(Supreme Court of Pennsylvania. July 17, 1918.)

SCHOOLS AND SCHOOL DISTRICTS §63(5)—**SURCHARGE OF SCHOOL DIRECTORS—REVIEW OF FACTS.**

On appeal from surcharge of school directors for paying teachers salaries in excess of those fixed, facts found by lower court are not reviewable, as, in view of Act May 3, 1909 (P. L. 392), an appeal lies only from legal conclusions in such a case.

Appeal from Court of Common Pleas, Columbia County.

Action by Ferdinand Steinmetz and others against William J. Fennessy and others, directors of the School District of Conyngham Township, Columbia County. From a decree on report of auditors surcharging defendants with the amount of salaries paid school-teachers in excess of amount of salaries fixed at beginning of school year, defendants appeal. Affirmed.

Argued before BROWN, C. J., and MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

Edward J. Flynn, of New York City, for appellants.

R. S. Hemingway, of Bloomsburg, D. W. Kaercher, of Pottsville, and Fred Ikeler, of Bloomsburg, for appellees.

PER CURIAM. This appeal is from a surcharge by the appellants, school directors of Conyngham township, Columbia county. The facts found by the court below, upon which the surcharge was based, are not reviewable, for an appeal lies only from legal conclusions

in such a case. Section 4, Act May 3, 1909 (P. L. 392). The legal conclusions appealed from logically followed the facts found, and, on those conclusions, the decree of the court below is affirmed, at the costs of the appellants.

(262 Pa. 121)

COMMONWEALTH ex rel. COUNCIL, Dist. Atty., v. DICKEY et al.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. MANDAMUS §168(4)—**DUTY OF COUNTY COMMISSIONERS—REBUILDING OF BRIDGE.**

In mandamus to compel county commissioners to rebuild a bridge destroyed by flood, where defense was that it was not a county bridge, but where county commissioners had erected a bridge there, and after its destruction had rebuilt the destroyed bridge, the fact that record of 60 years ago which would conclusively show it a county bridge was missing was immaterial, and mandamus should have been awarded.

2. BRIDGES §21(2) — **MAINTENANCE — STATE ROUTE.**

Though the destroyed bridge which county commissioners refused to rebuild was on a state route, the duty of building and maintaining a bridge there, which had rested on the county for more than 60 years, would continue.

Appeal from Court of Common Pleas, Clinton County.

Petition for mandamus by the Commonwealth of Pennsylvania, on relation of H. M. Council, District Attorney, against Adam Dickey and others, Commissioners of Clinton County. From an order refusing mandamus, plaintiff appeals. Reversed, and record remitted, with direction that writ be issued.

Argued before BROWN, C. J., and POTTER, STEWART, FRAZER, and WALLING, JJ.

William H. Keller, First Deputy Atty. Gen., Henry Hipple, of Lock Haven, and Francis Shunk Brown, Atty. Gen., for appellant.

H. S. Furst, of Lock Haven, for appellees.

BROWN, C. J. This appeal is from the refusal of a writ of mandamus to compel the commissioners of Clinton county to rebuild a bridge which was swept away by a flood in 1913. The writ was denied because the court below was of opinion that the structure so destroyed was not a county bridge, and the appellees were, therefore, under no duty to rebuild it. The original construction of a county bridge is regulated by statute, and a county cannot be required to build it unless all statutory provisions are complied with. *Railroad Co. v. Lawrence County*, 198 Pa. 1, 47 Atl. 955; *Commonwealth v. Baker*, 212 Pa. 230, 61 Atl. 910; *Commonwealth v. Bowman*, 218 Pa. 330, 67 Atl. 622. The prerequisites to the authority of county commissioners to build a bridge are: (1) A report of viewers that the bridge is necessary and would be too expensive for the township;

sioners of the county; and (3) that the bridge has been entered on record as a county bridge. The question before the court below was not as to the duty of the county commissioners to build a bridge in the first instance, but as to their duty to rebuild what the relator avers had been a county bridge, originally constructed and subsequently maintained by the county under a statutory duty to do so.

[1] From the admitted facts in this case there is a conclusive presumption that the destroyed bridge was a county bridge, and we proceed to state them: In 1856 the commissioners of Clinton county presented their petition to its court of quarter sessions, setting forth that, as it had appeared to the said court, to the grand jury of the county, and to the petitioners that a bridge over Chatham run, at the point where the bridge involved in this proceeding was built, was necessary, and that its erection would be too expensive for the township in which it was located, the same had been entered of record, and the petitioners had procured an estimate, as nearly as might be possible, of the money needed to erect such bridge, amounting to the sum of \$1,772.44, which sum they had provided out of the county rates and levies, and had proceeded to have the bridge erected by entering into a contract with certain contractors for the building of the same; that the bridge was completed and the contractors had in every respect fulfilled their contract, and the prayer of the petition was for the appointment of persons to inspect the said bridge, the working thereof, and make report accordingly. The language of this petition followed strictly the words of the act of June 13, 1836 (P. L. 551), relating to the erection of county bridges, and averred affirmatively that everything required by the statute in imposing upon the county the duty of constructing the bridge had been complied with. But the admitted facts go still further. In 1893 the county commissioners presented a petition to the court of quarter sessions, setting forth that the "county bridge" which had been erected by their predecessors over Chatham run had been washed away by a flood, that they had entered into a contract for the erection of another in its place, and that the contractors had rebuilt the bridge. The prayer of the petition was for the appointment of viewers to inspect the same and make report to the court. From the foregoing facts the conclusive presumption is that the bridge over Chatham run was a county bridge more than 60 years ago, and the present county authorities are estopped from saying that it ought not to be regarded as such merely because a record is missing which it was the duty of their prede-

cessors in 1856 avers that the bridge entered of record," and the present commissioners, in their effort to impose on the state the duty of rebuilding the bridge, are not to be permitted to take advantage of the failure of some former board of county commissioners to preserve this record 60 years ago. If it had been preserved, the presumption is it would show that the county commissioners of 1856 had done nothing required of them as public officers under the County Bridge Act of 1836, for *presumuntur rite esse acta.*" *Vernon v. Ship et al. v. United Natural Gas Co.* Pa. 435, 100 Atl. 1007.

[2] Though the bridge which the appellant refused to rebuild is on a state route, the duty of building and maintaining a bridge there, which has rested on the county more than 60 years, still continues. *Commonwealth ex rel. v. Bird*, 253 Pa. 101, 104 Atl. 648, and *Commonwealth ex rel. v. Atty. Gen. v. Grove et al.*, 104 Atl. 732, 105 Atl. 107, 106 Atl. 107, 107 Atl. 107, 108 Atl. 107, 109 Atl. 107, 110 Atl. 107, 111 Atl. 107, 112 Atl. 107, 113 Atl. 107, 114 Atl. 107, 115 Atl. 107, 116 Atl. 107, 117 Atl. 107, 118 Atl. 107, 119 Atl. 107, 120 Atl. 107, 121 Atl. 107, 122 Atl. 107, 123 Atl. 107, 124 Atl. 107, 125 Atl. 107, 126 Atl. 107, 127 Atl. 107, 128 Atl. 107, 129 Atl. 107, 130 Atl. 107, 131 Atl. 107, 132 Atl. 107, 133 Atl. 107, 134 Atl. 107, 135 Atl. 107, 136 Atl. 107, 137 Atl. 107, 138 Atl. 107, 139 Atl. 107, 140 Atl. 107, 141 Atl. 107, 142 Atl. 107, 143 Atl. 107, 144 Atl. 107, 145 Atl. 107, 146 Atl. 107, 147 Atl. 107, 148 Atl. 107, 149 Atl. 107, 150 Atl. 107, 151 Atl. 107, 152 Atl. 107, 153 Atl. 107, 154 Atl. 107, 155 Atl. 107, 156 Atl. 107, 157 Atl. 107, 158 Atl. 107, 159 Atl. 107, 160 Atl. 107, 161 Atl. 107, 162 Atl. 107, 163 Atl. 107, 164 Atl. 107, 165 Atl. 107, 166 Atl. 107, 167 Atl. 107, 168 Atl. 107, 169 Atl. 107, 170 Atl. 107, 171 Atl. 107, 172 Atl. 107, 173 Atl. 107, 174 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5. APPEAL AND ERROR ⇨209(2)—PRESERVATION OF GROUND OF REVIEW—OMISSION OF EVIDENCE.

In action against carrier for personal injury, where defendant did not object to what it deemed a lack of evidence as to plaintiff's age and expectancy, it waived its right to object thereto on appeal.

6. APPEAL AND ERROR ⇨237(1)—REMARKS OF COUNSEL—PREJUDICE.

Appellant's complaint that remarks of plaintiff's counsel as to probable time a certain person would live was without merit, where, if improper, there was no request to withdraw a juror or for instructions as to impropriety.

Appeal from Court of Common Pleas, Lackawanna County.

Trespass by Thomas Indian and Mary A. Indian against the Delaware, Lackawanna & Western Railroad Company, to recover damages for personal injuries. From a judgment for plaintiffs, defendant appeals. Affirmed.

Trespass to recover damages for personal injuries.

On the trial the court affirmed plaintiffs' first and second points for charge, which were as follows:

(1) A carrier of passengers, having impliedly invited the public to enter its cars, is required to exercise a high degree of care in protecting the passengers while entering the car and going through the aisles and passageways to seats. And it is the duty of the carrier to exercise care in seeing that the threshold of the cars and carpets in the aisles of the cars are in a reasonably safe condition so that passengers will not be injured.

(2) It is the duty of a carrier of passengers for hire to provide reasonably safe means for passengers going in and out of its passenger cars, and these means include reasonably safe steps, aisles, and passageways in the cars, and the failure to use due care to keep and maintain these means of egress and ingress in a reasonably safe condition and repair is negligence on the carrier's part.

The opinion of the Supreme Court further states the facts.

Verdict for Thomas Indian for \$1,757.75 and for Mary A. Indian for \$1,022.25 and judgment thereon. Defendant appealed to the Supreme Court from the judgment in favor of Thomas Indian.

Errors assigned were in refusing to enter judgment for defendant n. o. v., rulings on evidence, and instructions to the jury.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHISKER, and WALLING, JJ.

J. H. Oliver, H. A. Knapp, and D. R. Reese, all of Scranton, for appellant.

Joseph O'Brien and William J. Fitzgerald, both of Scranton, for appellees.

PER CURIAM. On the trial below the defendant asked that a verdict be directed in its favor, but on this appeal admits that the case was for the jury.

[1] Appellant's first contention is that there was a variance between the allegata and probata. The variance, if any, was very

slight. Mary A. Indian and her daughter both testified, without objection by the defendant, to the condition of the carpet on the floor of the car, and the mother was cross-examined as to this. No formal objection to the variance was raised at the time of the trial, and, as the case proceeded on its merits, with no motion for a nonsuit or a continuance by the defendant, it cannot now, after a verdict and judgment against it, complain of the alleged variance. *Carter v. Henderson & Co., Ltd.*, 224 Pa. 319, 78 Atl. 554; *Herlein v. City of McKeesport*, 247 Pa. 277, 93 Atl. 319.

[2] Appellant's second complaint is of testimony admitted and excluded. The assignments relating to this disclose no substantial injury to the defendant, which was the actual or probable result of the errors complained of, and the said assignments are therefore dismissed. *City of Allegheny v. Nelson et al.*, 25 Pa. 332; *Trego v. Pierce*, 119 Pa. 139, 12 Atl. 864.

[3] The third complaint is of the inadequacy of the charge on the questions of negligence and the measure of damages. The jury were instructed that the negligence of which the appellees complained was the failure and neglect of the defendant company to construct and maintain the floor, threshold, and carpet in a reasonably safe condition in the passenger car in which Mrs. Indian fell, and the instruction to them was that it was the duty of the defendant company, as a common carrier, to maintain its cars in a reasonably proper manner. This, taken in connection with the answers to plaintiffs' first and second points, made it most clear to the jury what would have constituted negligence in the matter of which complaint was made.

[4, 5] The complaint that the court erred in its instruction on the measure of damages, because there was no testimony as to the age of Thomas Indian, is sufficiently answered by the following from the opinion of the court below refusing a new trial:

"The husband was present at the trial and pointed out by the first witness on the stand. The jury had ample opportunity during the four days of the trial to form its own opinion of his age, if this was required. The defendant having gone to trial and taken its chances of a verdict without objection to what it deemed a lack of evidence as to the question of the husband's age and expectancy, it has by so doing waived its right to now object. If it had objected at any proper time the wife and daughter might have testified to the age of the husband and father. He could not have testified very well on account of his defective hearing."

[6] The final complaint of the appellant of remarks made by counsel for the plaintiffs as to the probability of the time Mrs. Young would live is also without merit. If they were improper, there was no request for the withdrawal of a juror nor for instructions to the jury as to their impropriety.

All of the assignments are overruled, and the judgment is affirmed.

1. PHYSICIANS AND SURGEONS §6(9) — OFFENSES — ADVERTISING AS PHYSICIAN — INDICTMENT.

In prosecution for advertising and holding one's self out as a physician, it is unnecessary to allege that accused practiced medicine without a license.

2. CRIMINAL LAW §1178—APPEAL—WAIVER OF EXCEPTIONS.

Exceptions not briefed are waived.

3. CRIMINAL LAW §1050—APPEAL—EXCEPTIONS.

Where the only ground of demurrer stated in the brief was not raised by the exceptions, the court would not, to reverse the case, search the record for other defects or errors.

4. CRIMINAL LAW §1147 — REVIEW — FINAL TRIAL—DISCRETION OF COURT—TRANSFER.

It is, under Gen. Laws, § 2262, wholly within the discretion of the trial court whether it shall pass the case to the Supreme Court before final trial; and, it not appearing that such discretion has been abused, it is not reviewable.

5. CRIMINAL LAW §1165(1) — APPEAL — HARMLESS ERROR.

In prosecution for unlawfully holding one's self out as physician and surgeon, accused held not prejudiced by the trial court's refusal to pass the case to the Supreme Court before final trial, where the demurrer, not being waived by going to trial on the merits, could be heard as well after as before trial.

Exceptions from Chittenden County Court; Frank L. Fish, Judge.

Frank C. Kaatz was convicted under Pub. St. §§ 5370, 5371, and amendments, of advertising and holding himself out as a physician and surgeon, and he excepts. No error.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Allen Martin, State's Atty., of Essex Junction, and Rufus E. Brown, of Burlington, for the State.

M. G. Leary, of Burlington, M. H. Alexander, of St. Albans, and Morris & Hartwell, of La Crosse, Wis., for respondent.

MILES, J. This is a prosecution against the respondent for advertising and holding himself out to the public as a physician and surgeon without being licensed as required by law, and was by information in three counts, to which the respondent demurred. The demurrer was overruled, and to this the respondent excepted. Upon the overruling of the demurrer, the respondent moved to have the case sent to this court before final trial. This motion was overruled, to which action of the court the respondent excepted. The case was then tried by jury, and a verdict of guilty was found, and the case comes here on the exceptions to the overruling of the respondent's demurrer and motion.

[1-3] The only ground of demurrer stated in the respondent's brief is that the information does not specifically charge the respondent

with practicing medicine without a license, and the prosecution is not for practicing medicine contrary to law. The respondent commences his exceptions by saying:

"This is a prosecution against the respondent for advertising and holding himself out to the public as a physician and surgeon."

It was therefore unnecessary to allege that the respondent practiced medicine without a license, and the information was not subject to demurrer for failure to so allege. The point argued is not raised by the exceptions, and, no other ground of demurrer being stated and relied upon in the respondent's brief, we do not, to reverse a case, search the record for defects or errors not called to our attention by the respondent. Exceptions not briefed are waived. *Rogers v. Bigelow*, 90 Vt. 41, 96 Atl. 417; *Parry & Jones v. Empire Granite Co.*, 90 Vt. 231, 97 Atl. 985; *Bagley v. Cooper*, 90 Vt. 576, 99 Atl. 230.

[4, 5] The other exception relied upon by the respondent is to the trial court's refusal to pass the case to this court before final trial. No authorities are cited in the respondent's brief supporting this exception, and none, we think, can be found. It was a matter wholly within the discretion of the trial court (G. L. § 2262), and being within the discretion of the trial court, and it not appearing that that discretion has been abused, it is not reviewable by this court (*Lincoln v. C. V. Ry. Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998; *Manley Bros. v. B. & M. R. R. Co. et al.*, 90 Vt. 218, 97 Atl. 674); besides, the respondent has not been harmed by the court's refusal to send the case here before final trial, for, being a criminal case, the demurrer was not waived by going to trial on the merits, and the respondent could be heard on his demurrer as well after as before trial in county court (*State v. Bosworth*, 74 Vt. 315, 52 Atl. 423; *State v. Perkins*, 88 Vt. 121, 92 Atl. 1).

Judgment that there is no error, and that the respondent take nothing by his exceptions. Let execution be done.

(92 Vt. 454)

DODGE BROS. v. CENTRAL VERMONT RY. CO.

(Supreme Court of Vermont. Washington. Nov. 11, 1918.)

1. RAILROADS §443(6)—FENCES — PROOF OF NEGLIGENCE.

Under P. S. 4453, requiring railroads to maintain good and sufficient fences, mere proof that a hook on a gate was so loose in the staple that it was easily unhooked, and might be displaced by the whisk of a tail or the rubbing of a nose of a horse, was not alone sufficient to show proximate cause of the gate being open; but, however, direct evidence is not necessary to show that such was the proximate cause.

2. RAILROADS ⇨446(13)—FENCES—STOCK ON TRACK—QUESTION FOR JURY.

In an action for damages for stock killed on a railroad, whether a loose hook on a gate in the right of way fence, which might be displaced by the whisk of a tail or the rubbing of a nose, was the proximate cause of the gate being open, *held* for the jury.

3. TRIAL ⇨251(1)—INSTRUCTIONS—SUBMISSION OF ISSUES.

It is error to submit to jury a basis for recovery outside the pleadings.

4. RAILROADS ⇨413(4)—FENCES—GATES—KEEPING CLOSED—"MAINTAIN."

Under P. S. 4453, making it the duty of a railroad to "maintain" sufficient fence, does not make it the duty of the railroad to keep closed a gate provided for use and benefit of a stock owner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintain.]

5. APPEAL AND ERROR ⇨273(6)—MATTERS REVIEWABLE—EXCEPTIONS.

Where, after exception was taken, court gave supplemental charge on matter excepted to and other subjects, a question, "May our exception be noted to the supplemental charge?" and an answer, "Yes," did not constitute a sufficient exception.

6. APPEAL AND ERROR ⇨280—MATTERS REVIEWABLE—EXCEPTIONS.

Where a supplemental charge was not a correction or modification of the original charge but a reiteration of it, appellant is entitled to the benefit of an exception to the original charge, although its exception to the supplemental charge was not sufficiently explicit to be available.

Exceptions from Washington County Court; Leighton P. Slack, Judge.

Action by Dodge Brothers against the Central Vermont Railway Company. Verdict for plaintiffs, and defendant brings exceptions. Reversed and remanded.

John W. Gordon and S. Hollister Jackson, both of Barre, for plaintiffs.

John W. Redmond, of Newport, and Charles F. Black, of St. Albans, for defendant.

POWERS, J. During the night of September 30, 1915, five colts belonging to the plaintiffs escaped from the pasture adjoining the defendant's railroad by passing through an open gate onto the track, and were there killed by the defendant's train. It was conceded below that the value of the colts was \$700, and after the trial a plaintiffs' verdict for that amount was returned. At the close of the evidence, the defendant moved for a verdict on the grounds: (1) That there was no evidence in the case tending to show any faulty construction of the gate or its appurtenances was the proximate cause of the injury complained of; (2) that there was no evidence in the case tending to show how, when, or by whom the gate was opened so as to allow the colts to escape; (3) that, assuming that the evidence warranted an inference that the gate and its appurtenances were improperly constructed, there was no evidence in the case tending to show that

such defects were the proximate cause of the injury complained of; and (4) it was not permissible to allow the jury to act upon mere surmise or conjecture in determining how the gate was opened. This motion was overruled, and the defendant excepted.

[1] By P. S. 4453, the defendant was required to build and maintain a good and sufficient fence between the road and the plaintiffs' pasture. The gate through which the colts escaped was a part of the fence so required, and it was the defendant's duty to keep it and its appurtenances "good and sufficient." This is admitted. There was evidence tending to show that the device provided and used to keep the gate closed—a hook and staple—was insufficient and inadequate; that the hook was so loose in the staple that it was easily unhooked, and might be displaced by the whisk of a tail or rubbing of a nose. But this alone was not enough to charge the defendant with liability. The plaintiffs were required to go one step further, and show by a fair preponderance of evidence that the defects referred to were the proximate cause of the escape of the colts. On this subject the jury is not to be allowed to speculate; and, if the evidence is equally consistent with the existence or nonexistence of liability, it is error to leave the question to the jury at all. In order to sustain the verdict, there must be found in the record evidence fairly and reasonably tending to show that the escape of the colts resulted from the defects shown. The law does not require, however, that this fact be established by direct evidence. Circumstantial evidence may be resorted to, and, if it is of the requisite character and force, it is sufficient. It must be admitted that the circumstances here relied upon to show that the colts themselves unhooked this gate in some such way as stated above, and then pushed it open, are not of a very decisive character; but it cannot be said that they are not sufficient to create a legal tendency, or to sustain a jury inference.

[2] One of the plaintiffs testified that the gate was closed at about 5 o'clock of the day before the accident. The character and location of the pasture made it improbable that any person would have occasion to use the gate between that time and the time when the colts were killed. The character of the soil inside the gate was such that footprints would naturally be discoverable if a person had passed through the gate during or about the time named. No such tracks were to be seen, though the ground was examined the next morning. In these circumstances, the question of the proximate cause was for the jury. It is true that one of the trainmen testified that he went through the gate into the pasture immediately after the accident, and that his tracks were not seen by the witnesses who examined the place.

tiffs, and was nothing more than a circumstance to be weighed and considered by the jury. The suggestion that the evidence shows that third persons made use of the gate is without force. The evidence coming nearest to this is that showing that persons were seen on the track near by. But this had no tendency to show that they made any use of this gate.

The defendant excepted "to that part of the charge in which the court held that the defendant was under a legal duty to keep the gate closed." In connection with this exception, the defendant insisted that if it had built and maintained a good and sufficient fence, including the gate and its fastenings, it had discharged its full duty and was under no obligation to see to it that the gate was kept closed.

[3, 4] Any reference to this duty was outside the issue. The only insufficiency in the fence or gate charged in the declaration was that—

"The latch of said gate, whereby it was hooked and closed, was fastened to the pasture side of said gate and was loose."

There was no allegation suggesting that the defendant was at fault in any other respect. So no other shortage of duty was involved. Seeley v. Cent. Vt. Ry. Co., 88 Vt. 178, 92 Atl. 28. The rule is that it is error to submit to the jury a basis for recovery outside the pleadings. Smith v. C. V. Ry. Co., 80 Vt. 208, 67 Atl. 535. But the exception to to this instruction was not put upon this ground, but upon the ground that it embodied an erroneous statement of law. The court did not charge in express terms that it was the defendant's duty to keep the gate closed; but it was the plain import of the instruction that this duty rested on the defendant, and that its failure therein would amount to a failure to "maintain" a sufficient fence at that point. This view is supported by courts of great respectability. Nevertheless we do not think it is sound. The gate was provided for the use and benefit of the plaintiffs. The defendant made no use of it and derived no advantage from it. We cannot regard an open gate as an insufficiency in the fence. If it and its fastenings were "good and sufficient" within the meaning of the law, the duty of keeping it closed was upon the plaintiffs, and the fact that it was found open is not enough to impute negligence to or establish liability on the part of the defendant. This view seems to be supported by the weight of authority and harmonizes better with our statutory provisions. Megrue v. Lennox, 59 Ohio St. 479, 52 N. E. 1022; Swanson v. Chicago, M. & St. P. R. Co., 79 Minn. 398, 82 N. W. 870, 49 L. R. A. 625; Adams v. Atchison, T. & S. F. R. Co., 46 Kan. 161, 26 Pac. 439; Diamond Brick Co. v. N. Y. Cent. & H. R. R. Co., 55 Hun, 605, 7 N. Y. Supp. 868. See, also, other

etc., R. Co., 49 L. R. A. 625.

[5, 6] The instruction was manifestly harmful, and the exception to it will have to be sustained unless it was waived or vitiated by what followed. After the exception was taken, the court gave a supplemental charge on this and other subjects. At the close of this supplemental charge, the defendant attempted to except, saying merely, "May our exception be noticed to the supplemental charge?" To which the court replied, "Yes." It is apparent that this exception was not sufficiently explicit to be available, for it did not point out which of the several matters covered it referred to. The general rule is that, when a supplemental instruction is given on a point excepted to in the original charge, the exception must be renewed or the supplemental instruction will be regarded as satisfactory and the error, if any, cured. Davis v. C. V. Ry. Co., 88 Vt. 460, 92 Atl. 973. But here the supplemental charge was not a correction or modification of the original charge, but a reiteration of it. In the circumstances shown, the defendant is entitled to the benefit of his original exception, though it failed in its attempt to renew it.

Judgment reversed, and cause remanded.

(93 Vt. 405)

FORD et al. v. HERSEY et al.

(Supreme Court of Vermont. Chittenden.

Nov. 5, 1918.)

1. APPEAL AND ERROR ⇐959(2)—ABUSE OF DISCRETION—REVIEW.

The Supreme Court will not interfere with an order of chancellor denying a motion for leave to file a cross-bill during trial, unless there is a clear case of abuse of discretion.

2. APPEAL AND ERROR ⇐1048(5)—HARMLESS ERROR—EVIDENCE.

A question asked but not answered could not have resulted in prejudice to the exceptant.

3. APPEAL AND ERROR ⇐230—MATTERS REVIEWABLE—TIMELY OBJECTION.

Exceptions to questions asked a witness, made after questions were answered, cannot be considered on appeal, where answers were responsive and the record contains nothing to show questions were answered before objection could have been interposed.

Appeal in Chancery, Chittenden County; Frank L. Fish, Chancellor.

Suit by Mattie H. Ford and another against Harvey Hersey and others to set aside deeds from plaintiffs to defendant, which defendant was alleged to have altered after execution, having obtained possession of them without the consent of plaintiffs and placed them on record. Thereafter defendant sold part of the premises covered by the deeds to defendants Smith. Decree for plaintiffs, and the defendants appeal. Altered, affirmed, and remanded, with directions.

Argued before WATSON, C. J., and HASELTON, POWERS, TAYLOR, and MILES, JJ.

Edward H. Deavitt, of Montpelier, and J. Ward Carver, of Barre, for appellant Hersey.

Erwin M. Harvey, of Montpelier, for appellants Smith.

V. A. Bullard and Sherman R. Moulton, both of Burlington, for appellees.

WATSON, C. J. [1] It is said that the decree rendered below gives no consideration to the matters sought to be brought into the case by the motion of defendant Hersey for leave to file a cross-bill, and that in the circumstances of the case the denial of the motion was an abuse of discretion, and consequently an error which this court will correct. The principle here invoked is well understood, but to make it applicable a clear case of such abuse must be made to appear. Our attention is called to the fact that it appears from the transcript that when the consideration or inducement for the deeds of April 6, 1904, was under consideration and Hersey was testifying concerning the matter he was asked whether there was any other consideration or inducement for making those deeds. Whereupon counsel for plaintiffs objected on the ground that it went to those prior conveyances, which could not be done in the absence of a cross-bill; and that it was not material to any issue in the case. The answer, which was in the negative, was received and exception saved by plaintiffs. The direct examination continued, and, so far as it appears, the course of it was not changed by reason of this objection and exception. The master's report shows that the case was heard on the evidence in December, 1915, closing on the 29th; that, after the taking of testimony was thus concluded, a further hearing was granted by the master, at Hersey's request for the purpose of receiving more evidence, and such hearing was had on the 27th day of July, 1916. The master's report was filed on August 2, 1917, and exceptions thereto were filed by all the defendants on the 16th day of the same month. The motion by Hersey for leave to file the so-called cross-bill was in fact a motion for leave to file a certain paper then presented, consisting of an amendment to his answer by way of allegations of new matter, and a cross-bill praying for specific and for general relief, all of great length and sworn to by him on November 9, 1917. Consequently this action was not presented to the chancellor at the earliest until the day last named, which was nearly two years after the aforementioned objection, based upon the want of a cross-bill, was made. The additional allegations, except as to change of counsel and prejudice of the master presently to be noticed, show nothing not fully known to Hersey when he made answer to the bill. It is alleged therein, however, that he told all such additional facts to his counsel before the latter drew the answer, but that they were not included, and many of

them were not shown in evidence. It is a part of the new allegations that, during the progress of the hearing before the master, Hersey became dissatisfied with the handling of his case, dismissed his counsel, and procured the service of new counsel; that the failure to bring out such additional facts and the change of counsel created prejudice in the master's mind against Hersey, by reason whereof the master did not give proper consideration to the evidence adduced by him, and found against the evidence in the case.

Just when the change of counsel took place does not appear; but it was prior to the hearing had before the master in July, 1916. On that occasion Hersey was represented by the new counsel. So if there was neglect of duty by his former solicitors in the respect named, the hearing of the case on the merits was concluded by the new solicitor, who thereafter had charge of the matter without applying for leave to take steps remedying the effect of the alleged neglect of duty, until at least a year and four months after his employment and some three months after the report and exceptions thereto were filed, and immediately preceding the rendition of the decree. The record discloses no attempt to explain this delay in making the application. The full scope and purpose of the motion are realized when we notice that one of the special prayers of the proposed cross-bill is that, on account of the prejudice and bias of the master, a retrial may be had of the facts and issues involved in the case, and that such retrial may be had before the chancellor. Nothing is shown of record reasonably subjecting the master to criticism in the respect named. So far as appears, he performed his duties fairly, fearlessly, honestly, and well. By the third and fourth paragraphs of the decree, the chancellor very properly disposed of the motion by denying it, and there was no abuse of discretion in so doing.

In his direct examination in defense Hersey testified that, at the time he gave the two deeds to plaintiff Mattie H. Ford, there were several other matters which were embarrassing him. In cross-examination he testified that the property in question in the town of Barre was deeded to him by one Payne. He was then asked whether Payne embarrassed him, and answered, "That was all settled." Being asked if Payne was one of the gentlemen who was embarrassing him, he answered:

"Not in 1905. Q. About that time? A. Five years before that. Q. When did you get settled up with Payne? A. When that deed was given."

Thereupon his counsel objected on the ground of immateriality because of remoteness, and an exception was noted. The next question related to the same subject-matter, and an exception was saved; but the question was not answered. He was asked whether the Payne Case was tried before Mr. Senter as

master, and answered in the affirmative. Objection was then made and exception noted. He was further asked whether he had had some experience in making erasures in deeds prior to 1904. Objection was made to the question, but no exception was saved to the ruling.

[2, 3] It is argued that, since one much contested question in the suit at bar was whether Hersey made erasures in the two deeds in controversy, as alleged in the bill, the foregoing evidence relating to the Payne matter was pressed for the purpose of creating prejudice in the mind of the master against him by insinuating that he made erasures in a matter entirely immaterial here, and the reception of the evidence in the circumstances was error. The question asked but not answered could not have resulted in prejudice to the exceptant. This leaves the two exceptions taken after the questions had been answered. The record contains nothing showing that either of these questions was answered before an objection could have been interposed, and it will not be presumed. The answers given were responsive to the questions, and the exceptions were too late to be availing. *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *State v. Fitzgerald*, 72 Vt. 142, 47 Atl. 403; *State v. Powers*, 72 Vt. 168, 47 Atl. 830.

Hersey was asked in direct examination what wages the plaintiff Harry L. Ford received from his different employers while he was living at the witness' home. The master ruled, excluding evidence of this character pointing to the time prior to 1904, when the deeds were given by the latter to Mrs. Ford, and an exception was noted. An offer was made to show the actual amount of money paid in to the witness by Harry L. while he lived in the family there with the witness, the amount per week, and the different amounts from the time he went there and during the time he lived there. This offer was excluded and exception saved. The offer did not include a statement of the amount which defendant purposed to show was paid in either as a whole or at the different times. The object of the evidence which defendant was trying to introduce was to show the sum total and the different sums so paid in, not the fact of there being money paid in by Harry L. This being so, we cannot say that any harm resulted to defendants from the ruling, and the exception is without force.

Defendants Smith took exceptions to the report, and an appeal from the decree; but in argument they only ask that the payment to them by the plaintiffs of the \$1,100 and interest mentioned in the decree be made secure by the terms of the decree. In this respect the decree, as rendered, is based upon the principle that he who seeks equity must do equity. Whether this rule, as generally applied, extends far enough to affect the mat-

ters in which defendants Smith are here particularly interested, we need not inquire; for not only are the plaintiffs satisfied with its application as made by the chancellor, but consent that the provisions in this respect be made more specific, as desired by the Smiths, if they can be and the decree in its general provisions remain unchanged. By the decree, the deed therein specified as given to them by defendant Hersey is "adjudged to be null and void and of no effect, and is ordered to be expunged from the land records, provided and on condition that the plaintiffs pay to said defendants" Smith the sum specified, within a time limited, with interest thereon, etc. That such payment may be secure as desired by the Smiths, and as consented to by the plaintiffs, this part of the decree should be so amended as to have an alternative provision to the effect that if the said sum with interest thereon be not paid as there ordered, within the new time limited therefor, relief to the plaintiffs as against the said deed from Hersey to defendants Smith is denied, and the bill dismissed as to the latter with their costs. When thus amended, the decree in this regard will conform in substance to decrees as sometimes rendered, when based upon the equitable principle mentioned, and be sufficiently protective of the rights of the parties.

The decree is altered to conform to the views above expressed, and, being so altered, it is affirmed and cause remanded. Let a new time be fixed within which the payment shall be made by the plaintiffs to defendants Smith.

(92 Vt. 501)

SEEVER et al. v. LANG et al.

(Supreme Court of Vermont. Orleans. Nov. 19, 1918.)

1. VENDOR AND PURCHASER \S 314(1)—REMEDIES OF VENDOR—PLEADING.

Recovery of purchase price by vendor, on an executory contract under seal may be had under a general count.

2. VENDOR AND PURCHASER \S 302—REMEDIES OF VENDOR—MEASURE OF DAMAGES.

Where a vendee under a contract for the sale of land takes and retains possession and the promise to pay is absolute, recovery of the purchase price should be allowed, and vendor is not confined to an action for damages.

3. VENDOR AND PURCHASER \S 269 — REMEDIES OF VENDOR.

When default is made on an executory contract for the sale of land, the vendors may proceed in equity, bring ejectment, or sue for general damages or to recover the purchase money.

4. HUSBAND AND WIFE \S 79 — RIGHTS OF WIFE—CONTRACTS.

A married woman can make contracts and bind herself and her property at law only so far as the statute authorizes her to do so.

5. HUSBAND AND WIFE \S 79 — RIGHTS OF WIFE—COMMON LAW.

When a married woman enters into a contract affecting property not held to her sole and separate use, her responsibility is to be

measured by the common law, and not by the statute.

6. HUSBAND AND WIFE §110 — SEPARATE ESTATE.

The real estate of a wife is not held to her sole and separate use, except where there is some provision so limiting it in the contract, deed, or decree by which she acquires it.

7. HUSBAND AND WIFE §79 — RIGHTS OF WIFE—CONTRACTS.

Under G. L. 3521, the capacity of a married woman to make contracts is general, capacity being the rule, and incapacity the exception.

8. HUSBAND AND WIFE §86 — RIGHTS OF WIFE—PURCHASE OF REALTY.

Under G. L. 3521, a married woman may buy real estate and bind herself for its payment, and that she has no separate estate does not affect her personal liability.

9. HUSBAND AND WIFE §159—SURETSHIP FOR HUSBAND.

Where husband and wife deeded land to plaintiffs in consideration of plaintiffs' assuming or paying husband's debts, and plaintiffs gave wife a contract by which they agreed to sell, and she to buy, the land for a certain sum, specified as the amount of husband's debts, the contract was not invalid as making wife surety for her husband's debts, contrary to P. S. 3039 (G. L. 3523), provided she contracted under arrangement with her husband that she could have what she could save out of the property; for in such case the debt would be hers, although it resulted in the payment of his debt.

10. TRIAL §177 — MOTION FOR DIRECTED VERDICT BY BOTH PARTIES—QUESTIONS FOR JURY.

In an action against a married woman on a contract for the purchase of realty, that each party moved for a verdict does not amount to a consent to take the case from the jury where defendant requests submission on the issue of defendant's relation to the debt.

11. APPEAL AND ERROR §231(8)—RESERVATION OF EXCEPTIONS—NECESSITY.

Grounds for the granting of a motion for a verdict not made below will not be considered on appeal from refusal to grant motion.

12. HUSBAND AND WIFE §23 — WIFE AS AGENT—AGENT'S INDIVIDUAL LIABILITY.

A married woman acting as agent for her husband as a disclosed principal may bind herself by contract in her own name.

13. PLEADING §380—ISSUES.

Evidence is inadmissible when outside the issues made by the pleadings.

Exceptions from Orleans County Court; Frank L. Fish, Judge.

Action by H. T. Seaver and others against Lillian A. Lang and others. Verdict for plaintiffs, and defendants bring exceptions. Reversed and remanded.

W. W. Reiriden, of Barton, and E. A. Cook, of Lyndonville, for plaintiffs.

Williams & Smith, of Newport, and F. D. Thompson, of Barton, for defendants.

POWERS, J. In the spring of 1914 the late Frank Lang held title to certain property in Barton. It consisted of a village lot and residence thereon occupied by him and his family, called the home place; a barn on the fair ground near by, called the Holder barn, and a pasture called the Brown pasture. He also owned two valuable horses,

one a mare called Delisle, and the other a stallion called Childs. This property was all mortgaged to the Barton Savings Bank & Trust Company to secure Lang's debts to the amount of over \$4,000. He owed other notes and bills to various parties, on some of which suits had been brought and his equity in the property mentioned or some of it attached. With his affairs in this situation, he accepted a position in Wisconsin, and went there, leaving his wife and family in Barton living in the home place. Soon after his departure other attachments were put onto his property, and finally Mrs. Lang, the defendant, set herself to the task of straightening out the tangle in her husband's affairs, and saving what she could out of the property. After some discussion, the following arrangement was entered into between the plaintiffs and Mrs. Lang, who, as evidence tended to show, acted upon the authority and approval of her husband: Mr. Seaver took the Brown pasture at \$1,250, and he and Mr. Reiriden took the Holder barn at \$1,500; both these sums being paid partly in money and partly in canceled debts against Lang. The money involved was used to pay other debts against him. These two properties were conveyed by deed, and the transactions were final. Then Lang and his wife deeded the home place to Seaver, who immediately conveyed a third interest therein to each of the other plaintiffs. The latter, having paid or assumed the other Lang debts, gave Mrs. Lang a land contract for the home place, which she had occupied all the time, and which she continued to occupy until her death as hereinafter stated. The foregoing arrangement was one transaction only; the deed of the home place and the contract to Mrs. Lang being successive steps in it. The contract was nothing more than an arrangement to secure the amount specified as the purchase price therein. By its terms the plaintiffs agreed to sell to Mrs. Lang, and she agreed to buy, the home place for \$4,492.83, payable on demand with interest annually. The plaintiffs agreed therein that on payment of this sum and compliance with her other agreements therein they would convey to Mrs. Lang the premises by warranty deed. The amount specified as the purchase price was the remainder of the Lang debts, paid or assumed by the plaintiffs, as they then figured it.

Lang died in 1916, and left an insurance, \$1,500 of which was payable to Mrs. Lang. This suit is brought for the recovery of the sum specified as the purchase price in the land contract, and the insurer is summoned as trustee. Mrs. Lang died after the trial below, and her administrator is here defending. The declaration was in the common counts, and the plea was the general issue. The court below ordered a verdict for the

plaintiffs, and the case is here on the defendant's exceptions.

[1] When the land contract was offered in evidence, the defendant objected on the grounds that it was an executory contract merely, and that it was under seal, for each of which reasons recovery could not be had under the common counts. On the first of these propositions the defendant cites *Hemenway v. Smith*, 28 Vt. 701. Just what the court decided in that case was this: That the plaintiff there could not recover the amounts which the defendants agreed to pay him for an assignment of an executory contract of purchase of the so-called Gould farm, under a declaration containing only the general counts there used. But it appears that these were only three in number, one for money had and received, another for use and occupation, and the third for money lent and accommodated. None of these was adapted to a case of the kind then at bar. So the decision goes no further than the one in *Wertheim v. Fidelity & Casualty Co.*, 72 Vt. 326, 47 Atl. 1071. The origin and growth of the so-called common counts forms an interesting chapter in the development of our system of pleading; but it is enough here to say that new counts have been from time to time added to the common counts until there is now in use, in some parts of the state at least, a printed form containing a general count adapted to a case of this kind. It must be admitted that this declaration did not originally contain any such count. But this defect was remedied by an amendment.

[2, 3] In this connection it is further urged that a vendor's remedy at law in a case like this is an action for damages for the breach of the executory contract, and that the sum specified cannot be recovered, but only damages represented by the difference between the purchase price and the value of the premises. There are cases apparently holding this doctrine. So far as those are at hand, they are cases where the vendor retains the possession. In such cases the rule just referred to may afford compensation. But where the vendee takes and retains possession, and the promise to pay is positive and absolute, and the position of the parties is unaffected by foreclosure or other proceedings, recovery of the purchase price should be allowed. To refuse it would be to ignore the plain terms of the engagement. The contract before us contains a direct and absolute promise to pay. In such a case we assert the rule approved in *Waite v. Stanley*, 88 Vt. 407, 92 Atl. 633, taken from *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520. When Mrs. Lang defaulted, the plaintiffs had several remedies available: They could proceed in equity, as was done in *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; they could bring ejectment, as was done in *Reynolds v. Bean*, 91 Vt. 247,

99 Atl. 1013; they could sue for general damages, as was done in *Allen v. Mohn*, 86 Mich. 328, 49 N. W. 52, 24 Am. St. Rep. 126; or they could sue for the purchase money. See *Arbuckle v. Hawks*, 20 Vt. 538.

Assuming that the plaintiffs had done all that the contract required of them, there was nothing for the defendant to do but pay the money. Under our simplified system of pleading, if not before, this could be recovered under an appropriate general count. Such a count was allowed to be filed as an amendment to the original declaration. No question as to the sufficiency of this new count is before us, as the only exception saved was to the action of the court in allowing it to be filed. And in this there was no error. G. L. 1796.

Nor can the contention be sustained that the damages are to be measured by the difference between the value of the premises and the purchase price. The damages are compensatory. Whatever the rule might be when a purchaser surrenders the possession or the vendor secures it, when, as here, the purchaser holds the possession and manifests a purpose to continue to hold it, the recovery is the amount due on the contract.

At the close of the evidence, the defendant moved for a verdict, and, the motion being overruled, excepted.

One of the grounds relied upon in support of this motion is that the defendant, being at the time a married woman, and it not being provided in the contract that the home place was to be conveyed to her sole and separate use, was incapable of making this executory contract and thereby binding herself and her property.

[4, 5] In the consideration of the question thus raised, it must constantly be kept in mind that a married woman can make contracts and bind herself and property at law only so far as the statute authorizes her to do so. Nor should we forget that our holdings are that, when a married woman enters into a contract affecting property not held to her sole and separate use, her responsibility is to be measured by the common law, and not by the statute. *Rowley v. Shepardson*, 83 Vt. 167, 74 Atl. 1002, 188 Am. St. Rep. 1078; *First Nat. Bank v. Bertoli*, 87 Vt. 297, 89 Atl. 359, Ann. Cas. 1917B, 590; *Barrows v. Dugan's Estate*, 88 Vt. 441, 92 Atl. 927; *French v. Slack*, 89 Vt. 514, 96 Atl. 6.

The determining question then is this: Is this contract one affecting property not held to the sole and separate use of the wife within the meaning of this rule?

[6] That the home place was not then or thereafter to become property held to the sole and separate use of Mrs. Lang is apparent; for the real estate of a wife is not so held except it be that there is some provision so limiting it in the contract, deed, or decree by which she acquires it. *Alinger v.*

White's Adm'x, 85 Vt. 446, 82 Atl. 666. That a married woman was not, at common law, liable upon an executory contract like this, is not to be doubted. 13 R. C. L. 1281; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; 1 Benj. Sales, § 84. This resulted from her general incapacity to contract, under which she could not create a valid debt against herself (*Farrar v. Bessey*, 24 Vt. 89), or ratify one thus attempted after she became single (*Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762).

[7, 8] But under our statute (G. L. 3521) the capacity of a married woman to make contracts is general. Capacity is the rule, and incapacity the exception. She may contract like a single woman, except as forbidden by the statute (*Bartholomew v. Allentown Nat. Bank*, 260 Pa. 509, 103 Atl. 954; *Anderson v. Citizens' Nat. Bank*, 38 Ind. App. 190, 76 N. E. 811), and except as forbidden by the holdings referred to (*Barrows v. Dugan's Estate*, 88 Vt. 441, 92 Atl. 927). Under such a statute—the last-named exception aside—a married woman may buy real estate on credit and bind herself for its payment (21 Cyc. 1318), and the fact that she did not have a separate estate would not affect her personal liability (*Barrows v. Dugan's Estate*, supra).

An examination of our cases above referred to shows that they are founded upon the necessity of protecting the marital rights of the husband in the real estate of the wife. Such rights are still recognized and protected, and cannot be taken away without his consent. But, unless this contract was valid, the husband never acquired any marital rights under it. To assert that his marital rights attached to the home place under the contract here in question is to assert the validity of that contract. If the contract is not valid, it is wholly void. If it is to be tested by common-law rules, it is void, and not voidable. *Hayward v. Barker*, supra. And if the contract is void as to Mrs. Lang, it is void as to these plaintiffs (13 R. C. L. 1254), and void as to everybody whose rights would be affected by it if valid (6 R. C. L. 591; *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588), and Lang acquired no marital rights under it. It is not necessary, then, in order to protect the husband's rights here, to declare this contract to be void for want of capacity, and the case does not come within the spirit of our previous holdings.

[9] It was also claimed under this exception that this contract was not binding upon Mrs. Lang, because she thereby became holden for her husband's debt, which is expressly prohibited, except by way of mortgage, by P. S. 3039 (G. L. 3523).

In examining this question, attention is to be given to the real purpose and character of the undertaking rather than its form. *First Nat. Bank v. Bertoli*, 87 Vt. 297, 89

Atl. 359, Ann. Cas. 1917B, 590. As we have already seen, the sum specified as the consideration of the contract was the unpaid balance of Lang's debts. This was what Mrs. Lang agreed to pay. Her evidence tended to show that the entire arrangement was made by her under directions from her husband and for his benefit. That she gave her own promise or obligation, instead of his or a joint one, is unimportant. Unless the debt became her debt, by some arrangement based upon a valid consideration moving to her, it remained his, and her obligation is in essence that of suretyship. *Bank v. Bertoli*, supra.

But the evidence on this branch of the case was not all one way. There was evidence tending to show that Lang told the defendant that she could have what she could save out of the property. If this was the arrangement between herself and her husband, and she contracted with the plaintiffs with that end in view and on her own account, and for her own benefit, then the debt was hers, and not her husband's, though it resulted or was to result in the payment of his debt. In such circumstances, after the contract with the plaintiffs, Lang's rights in the property were marital only; whereas prior to that contract her rights in the property were marital only. With this conflict in the evidence, it was not error to overrule the defendant's motion so far as it depended upon this point.

[10] The plaintiffs also moved for a verdict at the close of the evidence. Just what took place in this connection is shown by the transcript, which is referred to and made controlling. It was this: The court asked defendant's counsel what question there was for the jury, and the latter replied, "I don't think there is any, if the court takes the view of the law as we do." Then, turning to the plaintiffs, the court asked if they thought there was any question for the jury, and they replied that they did not, and that they joined in the motion and thought a verdict should be ordered for them. Thereupon the court said, "You both agree that there is no question for the jury," and directed the plaintiffs to figure up the amount of their claim immediately. Counsel for the defendant explained:

"I would like to qualify or withdraw one statement, and that is that I thought there was nothing to be submitted to the jury. What I meant was that the plaintiffs' evidence shows that the defendant, if she assumed anything, it was as surety for her husband, and we also claim that she had no legal capacity to make such a contract in regard to real estate; but if the court says that the plaintiffs' evidence tends to show that she did make a contract which she had a right to do, we say that the defendant's evidence tends to show that she was acting as her husband's agent in executing this land contract and doing what she did, and that is a question which should be submitted to the jury, in addition to our claim which shows that she simply was a surety."

Notwithstanding this, the court asserted that both parties had claimed that there was no question for the jury, and in this view ordered a verdict for the plaintiff. The mere fact that each party moved for verdict did not amount to consent that the case should be taken from the jury. It is only when it affirmatively appears that neither party wishes to go to the jury that it is for the court to direct such verdict as in its judgment the evidence requires. *Fitzsimmons v. Richardson*, 86 Vt. 229, 84 Atl. 811. In the case before us it did not affirmatively appear that both parties assented to the proposition that there was nothing for the jury. The court was mistaken in its assertion that they agreed on this question. The defendant's assent was conditional. When her counsel saw the misapprehension of the court, he immediately explained his position fully and clearly. He was in a position to insist that the question of Mrs. Lang's relation to the debt she agreed to pay should be submitted to the jury, and the question of agency also, if there was any evidence fairly and reasonably tending to establish it.

It is here urged that the contract presented the case of mutual and dependent covenants; that the plaintiffs' engagement to deed and the defendant's promise to pay were dependent; and that no recovery could be had without proof of a tender of a deed or its equivalent.

[11] And this is urged as a reason why the defendant's motion for a verdict should have been granted. But the defendant did not make the point below. The grounds of her motion were there made specific. This was not one of them. Therefore we will not consider it. *Spencer v. Potter's Estate*, 85 Vt. 1, 80 Atl. 821. And for the same reason the defendant will not now be heard to urge this ground as a reason why the plaintiff's motion for a verdict should not have been granted.

As we have said, the defendant was, at the close of the evidence, in a position to insist that the question of her relation to this debt be submitted to the jury. But the plaintiffs take the position that she has lost this right through the inadequacy of her exceptions. When the court disposed of the plaintiffs' motion by granting it, the presiding judge addressed the jury briefly, explaining the situation, appointed a foreman, and directed him to sign the plaintiffs' verdict. Following this, an exception was taken by the defendant to the refusal of the court "to submit the question of agency to the jury." So far, then, no question but that of agency was saved. But after the verdict had been read by the clerk, another exception was taken, which must have been to the granting of the plaintiff's motion for a verdict, and which was unrestricted. In so construing the record before us, we are not

unmindful of the rule that a bill of exceptions is to be construed against the excepting party. But it is to be construed reasonably, and in a way to preserve the rights of all parties so far as its language permits. From the course of the trial, the position taken and adhered to by the defense, and the unrestricted statements of the bill itself, the only reasonable construction of this record is the one we have adopted.

[12] For the reasons hereinbefore stated, this exception is sustained. It was not error to refuse to submit the question of agency. There are, here and there in the transcript, statements which, taken by themselves, could be taken as indicating an agency on the part of Mrs. Lang; but the evidence as a whole is not subject to that interpretation. One acting for a disclosed principal may, if he chooses, bind himself. *Bradley v. Blandin*, 89 Vt. 542, 95 Atl. 894. And he does bind himself when, as here, the contract is in writing, and in clear and unambiguous language purports to be the engagement of the agent, and not the principal. *Story, Agency*, par. 269 et seq.; 2 C. J. 814; 21 R. C. L. 848; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Arfridson v. Ladd*, 12 Mass. 173; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Clealand v. Walker*, 11 Ala. 1068, 46 Am. Dec. 238; *Bank of Rochester v. Monteth*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681.

In the contract before us the promise is Mrs. Lang's, not Mr. Lang's; the signature is hers, not his; the seal is hers, not his. *In re Barron's Estate*, 105 Atl. 255.

[13] There was no error in excluding the evidence regarding the profits made by the plaintiffs on the property when sold. This was wholly outside the issues made by the pleadings, and therefore inadmissible. *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

Judgment reversed, and cause remanded.

MILES, J., did not sit.

(93 Vt. 16)

NEWMAN v. GARFIELD.

(Supreme Court of Vermont. Caledonia. Nov. 19, 1918.)

1. STATUTES \S 225 — CONSTRUCTION — STATUTES IN PARI MATERIA.

Statutes in *pari materia* are to be construed with reference to each other as parts of one system.

2. STATUTES \S 225½ — CONSTRUCTION — PARTICULAR WORDS — CURRENT CONSTRUCTION.

When in a later act on the same general subject the Legislature uses a particular word or form which has been construed by the court, it is to be presumed in the absence of anything to the contrary that it adopted the judicial construction.

3. FRAUDULENT CONVEYANCES \S 47 — BULK SALES ACT — "FRAUDULENT AND VOID."

P. S. 5010 (G. L. 6013), providing that sales in bulk of merchandise shall be fraudulent and

void as against the creditors of the seller unless certain things are done, by the use of the words "fraudulent and void" means constructively fraudulent and voidable upon action by creditor, and as between the parties the transaction is final and binding, with title in the purchaser.

4. FRAUDULENT CONVEYANCES \Leftrightarrow 230—BULK SALES—RIGHTS OF CREDITOR—REMEDIES.

Since if a debtor makes a sale of his goods fraudulent under Bulk Sales Law, the creditor may under P. S. 1723, hold the purchaser as a trustee, and since under P. S. 5783, the fraudulent seller and purchaser forfeit the value of the goods, and in view of P. S. 2204, creditor defrauded by sale in bulk cannot proceed by attachment, execution, and sale, which give the purchaser no hearing as to whether he had complied with the Bulk Sales Law.

Exceptions from Caledonia County Court; Frank L. Fish, Judge.

Action by R. S. Newman against M. O. Garfield. Verdict for plaintiff, and both parties except. Judgment reversed, and judgment for plaintiff rendered.

Argued before WATSON, C. J., and POWERS, TAYLOR, and MILES, JJ.

Frank D. Thompson, of Barton, and Porter, Witters & Harvey, of St. Johnsbury, for plaintiff.

Ellisha May, of St. Johnsbury, and W. W. Reirden, of Barton, for defendant.

POWERS, J. M. H. Lewis was a merchant at West Burke. On July 7, 1916, in good faith and for an adequate price, he sold his stock of goods to this plaintiff, who paid for and took possession of the same, and continued the business in the same store which he rented of Lewis for that purpose. At the time of this transaction Lewis owed the Haskell-Armstrong Company, of Portland, Me., an unpaid bill for merchandise, and that concern brought suit against him and attached the goods in the plaintiff's possession, and, having obtained judgment therein, took out an execution and sold a part of these goods to satisfy the same. The defendant is the deputy sheriff who did the business for the Haskell-Armstrong Company, and the action is tort for the conversion of the goods. The defense is predicated upon a noncompliance by Lewis and the plaintiff with the terms of the Bulk Sales Law (P. S. 5010 [G. L. 6013]).

By that statute it is provided that the sales in bulk of a part or the whole of a stock of merchandise "shall be fraudulent and void as against the creditors of the seller," unless certain things are done by the parties to the sale.

The first important question in the case is as to the true meaning of the terms "fraudulent and void" as here used. Notwithstanding these positive terms, as was said by Judge Poland in Woodcock v. Bolster, 35 Vt. 632, in many cases where statutes use the word "void" it is construed to mean "voidable." Thus in Merrill v. Englesby, 28 Vt. 150, this court had under consideration

a statute providing that general assignments should be "null and void as against creditors of said debtors"; and it was held that such assignments were voidable at the instance of creditors. And in the recent case of Tudor v. Tudor, 80 Vt. 220, 67 Atl. 539, 130 Am. St. Rep. 977, this court had under consideration P. S. 5782, which provides that fraudulent conveyances of houses and lands or of goods and chattels shall be, as to the party defrauded, "null and void." Upon full consideration and discussion, it was held that by proper construction the statute made such conveyances voidable merely.

[1] Here, then, is the construction of a statute sufficiently cognate to be in pari materia; and it is the established rule that such statutes are to be construed with reference to each other, as parts of one system. *Isham v. Bennington Iron Co.*, 19 Vt. 230; *State v. C. V. Ry. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065. This rule necessarily involves recourse to the construction of such statutes by the courts. *Endlich*, Interp. par. 367.

[2] So it is that, when in a later act, on the same general subject, the Legislature makes use of a particular word or form of words which the courts have construed, it is to be presumed, in the absence of anything to the contrary, that it used such words in the sense attributed to them by such construction. *Whitcomb v. Rood*, 20 Vt. 49.

[3] We have no hesitation, therefore, in holding that this statute really means that bulk sales are constructively fraudulent and voidable at the instance of creditors, and that as between the parties the transaction is final and binding, with title passing to the purchaser, where it remains until divested by proceedings instituted by a creditor for that purpose.

This view of the statute is approved in *McGreenery v. Murphy*, 76 N. H. 338, 82 Atl. 720, 39 L. R. A. (N. S.) 374, *Kelley-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297, and *Rothchild Bros. v. Treweila*, 36 Wash. 679, 79 Pac. 480, 68 L. R. A. 281, 104 Am. St. Rep. 973.

The next question of importance relates to the remedy available to the creditor. On this subject the statute in question is silent. It must be taken, therefore, that it was the intent of the Legislature that the creditor should resort to such remedy or remedies as the law then provided in similar cases. Here, again, reference may be had to the statutes on the same or analogous subjects and the remedies therein provided. Thus consistency and harmony throughout a particular topic of the law will be secured. While this statute establishes a new and drastic restraint upon the free disposition of a certain class of property, in essence it is nothing more than a further extension of the general scheme of preventing fraudulent

conveyances. So in our search for the proper remedy we look to the law of that subject.

P. S. 1723 provides that a person who holds goods under a title void as to creditors may be held as a trustee thereof, though the defendant could not maintain a suit against him. Here, then, is a plain and convenient remedy; one that provides for an action to which all interested are parties, and in which all questions may be litigated. In ordinary circumstances, at least, it would be complete and adequate. P. S. 5782, as we have seen, refers to fraudulent conveyances of goods and chattels, and P. S. 5783 provides that the parties to such fraudulent transfer shall forfeit the value of such goods and chattels; recovery to be had in an action on the statute, and one-half the recovery to go to the party aggrieved and one-half to the county. Then, too, there is the long-recognized jurisdiction in equity, available at least in cases where in the above remedies might be inadequate. This is the remedy expressly provided by P. S. 2204 for cases where real estate has been conveyed in fraud of creditors. In such cases the creditor obtains and levies his execution upon the land in question, and then proceeds in chancery for the satisfaction of the same. No good reason is suggested why a remedy in chancery should not be available in cases like this, and free use seems to be made of it under bulk sales statutes in other jurisdictions. *Squire v. Teller*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; *Wheeler & M. Mercantile Co. v. Moon*, 49 Mont. 307, 141 Pac. 665; *Scheve v. Vanderkolk*, 97 Neb. 204, 149 N. W. 401; *Daly v. Sumpter Drug Co.*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101.

[4] We are aware that the procedure followed by this defendant has been approved in several of the states having statutes on the subject of bulk sales much like ours. But, in view of the remedies available here, we cannot hold that such procedure was lawful. It gave the plaintiff no opportunity to test any of the questions affecting his title. He could not even show that the terms of the statute had been complied with. His only remedy for an unlawful seizure and sale was by a new and independent proceeding. It is not a sufficient answer to say that the title had not passed to him as against the creditor. It had passed subject to the right to vacate it. And to say that it had not passed on account of a noncompliance with the statute is to assume a fundamental fact that had never been judicially established. It is wholly unnecessary to support the defendant's action in order to protect the creditor. As we have seen, his rights are otherwise protected. And it is to be assumed that the Legislature intended to interfere with the right of contract only so

far as was necessary for the creditor's protection.

Nor are we unmindful of the fact that in cases of actual fraud (*Hall v. Eaton*, 25 Vt. 458), and even in cases of so-called fraud in law (*Mills v. Warner*, 19 Vt. 609, 47 Am. Dec. 711; *Weeks v. Prescott*, 53 Vt. 57), we have allowed the creditor to proceed by attachment and sale. But we do not think the rule should be extended, even if its soundness is admitted.

These views are conclusive of the rights of the parties so far as these proceedings are concerned, and the other questions discussed by counsel need not be considered.

Judgment reversed, and judgment for the plaintiff for the sum of \$817.75, with interest thereon from February 17, 1917, and his costs.

(42 R. I. 20)

GEOFFROY et al. v. NEW YORK, N. H. & H. R. CO. (No. 5217.)

(Supreme Court of Rhode Island. Dec. 5, 1918.)

1. RAILROADS \Leftrightarrow 348(8)—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In action for death of automobile driver in collision with train at crossing, assuming that he neither heard nor saw the train, held, that he was guilty of contributory negligence, in that he must have neglected to take any precaution whatever for his own safety.

2. RAILROADS \Leftrightarrow 330(2)—CROSSING ACCIDENTS—RELIANCE ON OPEN GATES.

A traveler cannot rely exclusively on the fact that grade crossing gates are open, but must, to some extent, use his senses before going upon the track.

3. RAILROADS \Leftrightarrow 347(11)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In determining contributory negligence of an automobile driver struck by a train at a grade crossing, the fact that the gates were open may be considered by the jury.

4. RAILROADS \Leftrightarrow 330(2)—CROSSING ACCIDENTS—RELIANCE ON OPEN GATES.

Where automobile driver, with unobstructed view for 700 feet, drove on track at 12 miles an hour, without stopping, looking, or listening, immediately after the engineer, seeing that the gates were open, had blown his whistle with more than usual force, the driver was not entitled to rely exclusively on the fact that the gates were open, since an ordinarily prudent man would have looked before going on the track.

Exceptions from Superior Court, Kent County; Chester W. Barrows, Judge.

Action by Alfred Geoffroy and others against the New York, New Haven & Hartford Railroad Company. On plaintiff's exceptions. Exceptions overruled, and case remitted, with directions.

Quinn & Kernan, of Providence, for plaintiffs.

Eugene J. Phillips, of New Haven, for defendant.

STEARNS, J. This is an action of trespass on the case for negligence, brought by

the plaintiffs, the heirs and next of kin of one Ephrem Geoffroy, who was killed on the night of December 21, 1917, by a passenger train of the defendant. The accident occurred on the grade crossing in the village of Arctic, where River street, a state highway, crosses the railroad at grade. At this place the railroad, a single track line, runs north and south, and River street crosses the railroad at a slight angle from the southwest to northeast. South of the crossing on the west side of the track is the Arctic passenger station, a small wooden building, the center of which is 114 feet from the center of the crossing. East of the railroad, and running parallel to it for 100 feet south from the crossing, there is an unnamed street, a town highway, which approaches the railroad from the east and joins River street just east of the crossing. Between this street and the railroad there is a board fence, which continues up to a point opposite the south end of the crossing planks. This fence is about 23 feet from the nearest rail, and varies in height at different places from 5.9 feet to 6.9 feet. On the east side of the unnamed street there is a stone store, called the Arctic store, the northern side of which is about 100 feet south of the northerly end of the board fence above mentioned. At the Arctic store the town highway leaves the line of the railroad and bears away from the railroad in an easterly direction. Just south of the crossing a spur track leaves the main line track, extending southerly and on the east of the main track, and parallel to it. On the easterly side of this spur track, and about 400 feet south of the crossing, there is another building, described as the "store house," "cotton house," or "waste house." The crossing is planked to a width of 52 feet, and there are crossing gates, which are operated by hand. The view from the center of the crossing looking south extends for 714 feet. The view from the corner of the fence looking south is unobstructed, and is somewhat more extended. There is no obstruction to the view at any point from the corner of the fence to the rail; north of the crossing the track is straight and the view is unobstructed. On the westerly side of River street, and 104 feet west of the crossing, is the home and grocery store of Joseph E. Maynard, the employer of Ephrem Geoffroy. The train was a regular express train from Willimantic to Providence, which did not stop at Arctic station. It was due to pass this crossing at 8:07 p. m. each evening, and this fact was known to Ephrem Geoffroy, who was familiar with the crossing, over which he had occasion to pass frequently.

On the night of the accident Geoffroy, who was driving an automobile delivery truck, approached the railroad crossing from the east on the town highway. The train was about 30 minutes late and was running at

the rate of about 45 miles an hour. The railroad gates were operated by hand by the station agent during the day and by a night-crossing tender during the night. This night-crossing tender, who was called as a witness by the plaintiff, testified that at the time of the accident the gates were not lowered on the approach of the train; that he was in and out of the station and on the platform; the electric alarm bell did not ring as usual, and he first heard the locomotive whistle when the train was at the waste house, and it was then too late for him to get to the crossing and lower the gates in time; that the engineer, perceiving that the gate was up, continued to blow his whistle, after passing by the waste house, up to the crossing.

Joseph E. Maynard testified that Geoffroy, who was 21 years old, had worked for him soliciting orders and delivering goods for a year and a half; that the automobile was a Ford delivery truck, open body, with a closed-in winter top. There was an isinglass curtain on the left of the driver's seat, and the side to the right of the driver was open. There was a curtain at the rear of the driver's seat, which separated the driver's seat from the body of the truck. Maynard was standing outside the doorway of his store, and saw the top of the automobile, which was moving at the time in front of the stone store, and at the same time heard the whistle of the train, which was then at the cotton house. The train was running 45 or 50 miles an hour; the automobile was running about 12 miles an hour, and kept the same speed from the time he first saw it until the collision. When the machine turned at the corner of the fence, the locomotive was at the Arctic station. Geoffroy usually finished his work about 9 p. m., and left the machine in back of the store. A boy, who was not produced as a witness, was riding with Geoffroy at the time of the accident.

Joseph Potvin, an overseer in the Royal Mill was walking toward the crossing on the road opposite Maynard's store, and saw the lights of the automobile when the machine turned the corner at the end of the fence near the crossing. At this time the locomotive was in front of the railroad station. He stood there waiting for the train to pass. The gates were up, with red light on top, and he saw the engine strike the automobile. He heard the locomotive whistle when he was near a telephone post, between Maynard's store and the crossing, and it was about three seconds after he heard the whistle that he saw the lights of the automobile as it came around the corner of the fence.

Arthur Vanasse was standing in front of Maynard's store, talking with Maynard, and heard the train whistle somewhere in the vicinity of the cotton house. When he first saw the train the locomotive was passing the station, and the automobile was then coming

train was running between 40 and 50 miles an hour.

Arselia Antaya, bookkeeper for Maynard, saw the accident. She was standing inside the store, looking out of a window, and could see the station and the board fence. The weather was cold, and the door and window were closed. She heard the train coming, and saw the top of the machine on the curve, and then heard the crash. She heard the rattle of the train, but did not hear any whistle. The train was at the station at the time she saw the automobile turning the curve by the fence. She was watching the train, and consequently did not see the automobile go on the track.

This includes all of the testimony in regard to the happening of the accident, and at the conclusion of the plaintiffs' testimony the trial court granted the motion of the defendant for a nonsuit on the ground that the plaintiffs' intestate was guilty of contributory negligence. The case is now before this court on the exception of the plaintiffs to the action of the court in granting a nonsuit.

There is no conflict in the evidence. The deceased was familiar with the surroundings, and knew that he was approaching the railroad crossing, which was a place of danger. There was nothing unusual to distract his attention. As he came up the grade by the Arctic store he knew that the board fence along the railroad track obstructed his view of the track from the crossing to the south. As he turned at the store there was a level stretch of road for 100 feet to the end of the fence, and the view of the track to the north after he left the corner of the store was unobstructed, so that when he reached the end of the fence near the railroad crossing he knew that the track was clear to the north, and the only direction from which danger was to be apprehended was from the south. When he turned the corner at the store he was 100 feet from the crossing, and the locomotive at that time was at or near the cotton house, about 426 feet south from the center of the crossing, behind him and running north in the same direction he was traveling. The whistle was blown repeatedly, and the only noise was that coming from the train and from the operation of the automobile. It seems almost incredible that the deceased did not hear the whistle before he turned at the corner of the fence, and the fact that the boy who was riding with the deceased was not called as a witness, and that no explanation was given of the failure to call this witness, who presumably could throw some light on the situation, furnishes a basis for the conclusion that the deceased did hear the whistle and decided to take a chance.

[1] However this may be, we assume that the deceased did not hear the warning and

glass window of his curtain he had a clear and unobstructed view of the track to the south for a distance of more than 71 feet. He was then about 23 feet from the railroad, and his automobile was running about 10 miles an hour, at such slow speed that it easily have been brought to a stop within a few feet of the corner. If the deceased had heard nor saw the train until it was too late to avoid a collision, the conclusion is unavoidable that he neglected to take any precaution whatever for his own safety, and that he disregarded the opportunity to protect himself from danger by looking south of the track to the south, and relied entirely on the fact that the crossing gates were closed.

The plaintiffs claim that when the crossing gates are open a traveler on the highway is relieved from the obligation of approaching the railroad track to look ahead, and that in such circumstances the question of his contributory negligence is a question for the jury. In support of this proposition they rely on the cases of *Wilson v. N. Y., N. H. & H. R. R. Co.*, 18 R. I. 29 Atl. 258, and 18 R. I. 598, 29 Atl. 300.

The Wilson Case first came before the court on demurrer to the declaration. The court held that the leaving open of the gates was in effect an invitation, or, strictly speaking an implied assurance to travelers on the highway that the crossing might safely be crossed. The plaintiff in that case was a passenger in a large automobile which was struck by a locomotive at a railroad crossing. The demurrer was overruled and it was held that the question of the plaintiff's contributory negligence was for the jury. In discussing the effect of certain decisions of other jurisdictions, the court used language which perhaps not unfairly may be understood as approving the doctrine that in every such case the question of contributory negligence is for the jury. When the case again came before the court (18 R. I. 598, 29 Atl. 300) it was on the petition of defense for a new trial after verdict for plaintiff by jury. The opinion of the court in the latter case, as in the first case, was delivered by Matteson, C. J. Although the court at page 605 of 18 R. I. (29 Atl. 300) affirms the decision above referred to on demurrer, it nevertheless qualifies what otherwise might be regarded as a statement of general rule as follows:

"The fact that the gates were open and attended was evidence of negligence. * To relieve itself from the charge of negligence in leaving the gates open, it was necessary for the defendant to show that the other warning of the approach of the train were such that the plaintiff should have heard or perceived them in the exercise of due care. The jury were to determine that closed gates would be but one means of notifying travelers of danger; that if they were notified by the ringing of the bell or by

blowing of the whistle or by their vision or by any other means, that would be sufficient; because if the traveler had notice in any way of the approach of the train it would be contributory negligence for him to cross the track, and it would matter not that the defendant might have been negligent. We think this instruction was correct and was sufficiently favorable to the defendant."

[2] The Wilson Case does not support the contention of the plaintiffs. As the closing of the gates is simply one means of notifying a traveler of danger, the traveler cannot rely exclusively on the fact that the gates are open, but must to some extent use his senses before going on to the railroad track.

[3] The fact that the gates are open is an important fact for consideration in the determination of the question whether the deceased exercised due care. The weight properly to be given to this fact necessarily will vary in different cases and will be affected by consideration of the location of the gates, whether on a street in a populous city or in the country, the presence or absence of traffic on the highway at the particular time and place, the presence or absence of obstructions near the track, the presence or absence of a gateman, etc. If the facts are in controversy or if fair-minded men can draw different conclusions from facts which are not controverted the question of contributory negligence would be then properly submitted to a jury.

[4] In the present case, however, there is no dispute in regard to the facts. In the circumstances the deceased could not rely absolutely on the fact that the gates were open and fall altogether to use his senses to ascertain whether the track was clear. If he had looked down the track to the south at a time he was in a place of safety, he would have seen the train and could have stopped his car in safety. He did not look, but drove on to a dangerous crossing without taking precautions which he should have done. No reasonably prudent man, in the circumstances disclosed, would have gone onto the tracks without looking, and, such being the case, as the plaintiffs have failed to show that the deceased was in the exercise of due care, there was no error in the granting of the nonsuit.

Following are some of the cases cited by the defendant in its brief which are in accord with the conclusion of this court in the case at bar: *Ellis v. B. & M. R. R.*, 169 Mass. 600, 48 N. E. 839; *Lundergan v. N. Y. C. & H. R. R.*, 203 Mass. 400, 89 N. E. 625; *Koch v. So. Cal. R. R. Co.*, 148 Cal. 677, 84 Pac. 176; *Coyle v. B. & M. R. R.*, 77 N. H. 604, 94 Atl. 509; *So. Ry. v. Jones*, 118 Va. 685, 88 S. E. 178; *Schaub v. Kansas City So. Ry. Co.*, 133 Mo. App. 444, 113 S. W. 1163; *Lindsay v. Penn. R. R. Co.*, 78 N. J. Law, 704, 75 Atl. 912; *Schnackenberg v. D. L. & W. R. R.*, 86 N. J. Law, 517, 93 Atl. 701; *Romeo v. Boston & Me. R. R.*, 87 Me. 540, 33 Atl. 24;

Hayes v. N. Y., N. H. & H. R. R. Co., 91 Conn. 301, 99 Atl. 694.

The exception of the plaintiffs is overruled, and the case is remitted to the superior court with direction to enter judgment for the defendant on the nonsuit.

(43 R. I. 17)

MERCURIO v. BOARD OF CANVASSERS AND REGISTRATION OF CITY OF PROVIDENCE. (No. 304.)

(Supreme Court of Rhode Island. Dec. 4, 1918.)
ELECTIONS — 181 — BALLOTS — "CANCEL NAME."

A wavering line passing through 11 of the 12 letters of a name, but by a depression just clearing one letter satisfies Gen. Laws 1909, c. 11, § 46, providing that to cancel a name, within the secret ballot law, the voter shall draw a pencil mark through the full name.

Certiorari by Giuseppe A. Mercurio against the Board of Canvassers and Registration of the City of Providence. Record of board quashed in part.

Pettine & De Pasquale, of Providence, for petitioner.

Elmer S. Chace, City Sol., and Alexander L. Churchill, both of Providence, for respondent.

VINCENT, J. This is a petition for a writ of certiorari, brought by Giuseppe A. Mercurio, of the city of Providence, against the board of canvassers and registration of said city. The petition sets forth that the petitioner was a candidate for councilman in the Ninth ward of said city at the election held on November 5, 1918; that his name appeared upon the ballots in the Democratic column as such candidate, and that in the Republican column appeared the name of Thomas F. Black as a candidate for the same office; that the board of canvassers and registration on November 8, 1918, counted the votes cast at said election, including those cast for the petitioner and the said Thomas F. Black, and announced that the number of votes cast for the petitioner was 346 and for the said Thomas F. Black 347. The petition further sets forth that 1 of the ballots counted for Thomas F. Black by said board of canvassers and registration should have been counted for the petitioner, Mercurio.

At the hearing before us 2 ballots were presented and marked respectively Petitioner's Exhibit 1 and Respondents' Exhibit 1. There is some conflict of testimony as to which of these two ballots is the one alleged by the petitioner to have been improperly counted for the said Thomas F. Black. Without discussing the evidence in detail, we think that we must hold, upon the testimony offered, that the ballot marked Petitioner's Exhibit 1 is the ballot referred to. In the Petitioner's Exhibit 1 the name of Thomas F. Black, in the Republican column, appears to have a black penciled line passing through

Democratic column. The line passing through the name of Thomas F. Black is not straight. It is wavering, and at one point becomes sufficiently depressed to clear the letter "o" in the first name, at the same time preserving its contact with all of the other letters.

The board of canvassers and registration counted this ballot for Thomas F. Black for councilman, on the ground that the line as drawn did not sufficiently comply with the statute, and therefore did not effect the cancellation of that name. The statute (chapter 11, § 46, Gen. Laws of R. I. 1909) provides that "to cancel a name within the meaning of this chapter the voter shall draw a pencil mark through the full name," and the respondents now claim that, inasmuch as one portion of the line falls below one of the letters of the name, there is no cancellation within the meaning and intent of the statute, and that such ballot should be counted for Thomas F. Black.

We think that the cancellation upon this ballot, as described, is a substantial compliance with the words of the statute which we have above quoted. The letters composing the name of Thomas F. Black upon the ballot are not large, and to say that the failure of the canceling line to cross a single letter thereof would render nugatory the act of the voter would be giving to the statute a more narrow construction than could have been intended or would be reasonable. It requires some skill to make, with a pencil, a comparatively straight line through a name composed of 12 small letters, and we do not think that the statute should be construed with such strictness that the failure to cross one letter of the name should render ineffectual the act of the voter.

We think that the ballot, Petitioner's Exhibit 1, should be counted for the petitioner, Giuseppe A. Mercurio.

So much of the record of the board of canvassers and registration as declares that the petitioner received 346 votes and the said Thomas F. Black 347 votes is quashed.

(79 N. H. 82)

FIFIELD v. MAYER et al.

(Supreme Court of New Hampshire. Rockingham. Nov. 6, 1918.)

1. SUBROGATION § 7(7) — MORTGAGE NOTE SURETIES—VOLUNTEERS.

Sureties paying a real estate mortgage note and taking a mortgage therefor are not volunteers loaning to mortgagor, but are entitled to subrogation to rights of the mortgagee whose mortgage was paid by the money they guaranteed, as against a holder of an equitable lien whose rights were unaffected by the transaction.

2. SUBROGATION § 7(7) — SURETIES — PAYMENT—IGNORANCE OF LIEN.

The fact that sureties paying a real estate mortgage note were negligent in not discovering

they guaranteed, the lienor's rights are affected thereby.

Exceptions from Superior Court, Fham County; Allen, Judge.

Action by C. F. Fifield against E. D. and another to enforce a mechanic's lien involving a question of subrogation of a Judgment for the defendant surety plaintiff excepts. Exceptions over Judgment for the sureties.

Action to enforce a lien under P. S. In pursuance of a contract for equipment between the parties, the defendant furnishes labor and material on the plaintiff's theater building, for which the defendant claimed.

The following facts were reported by the referee: The defendant Mayer bought theater property some time previous to September 9, 1915. At that time it was subject to a mortgage to secure a note due the Union Five Cent Savings Bank for \$2,500. On that date Mayer paid \$1,000 of this loan and a new note secured by a mortgage on the same property for the balance \$1,500. On the first day of May, 1915, Mayer entered into a contract with the firm of Kelly Bros. for the construction of the theater building. On July 20, 1915, Mayer gave Kelly Bros. a mortgage in the sum of \$30,000 on the same property, conditioned to secure their charge on the building the theater, and on the same date a mortgage for \$1,500 of the Union Five Cent Savings Bank was assigned to Kelly Bros. On November 1, 1915, Kelly Bros., having completed their contract, were pressing for a settlement. On November 6, 1915, Mayer executed a mortgage to the Amoskeag Savings Bank, to secure a loan of \$14,000, but did not receive the money until November 19, 1915. Mayer procured a loan from the Union Five Cent Savings Bank of Exeter for \$5,500; the defendants Cunningham, Nute, Folsom, and Sawyer signed the note as sureties. On November 19, 1915, Mayer, having secured the above \$5,500 loan from the Union Five Cent Savings Bank, sent it to the Kelly Bros.' office. There was present at the time a representative of the Amoskeag Savings Bank with the \$14,000 borrowed of that bank, and with the proceeds of these two loans Mayer paid the Kelly Bros. their bill in the sum of \$16,887.16, which sum included the mortgage note of \$1,500, assigned by the Union Five Cent Savings Bank to the Kelly Bros. On July 20, 1915, and which mortgage was discharged by Kelly Bros.; and out of the same funds he paid the other bills for labor and material. The above-named sureties, when they signed the \$5,500 note to the Union Five Cent Savings Bank at the request of Mayer, were informed by him that t

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ceeds of the note were to clean up Kelly Bros. and leave nothing against the theater. They did not know of the mortgage of the Amoskeag Savings Bank and had no knowledge of the several builders' liens on the theater property, and they made no actual investigation or inquiries as to the condition of the title. When they signed the note, Mayer agreed to secure them by a mortgage on the theater property, which he afterwards did on the 22d day of November, subject to the mortgage of the Amoskeag Savings Bank. They have since paid the \$5,500 note. It is found that they were negligent in not ascertaining the existence of the plaintiff's lien. The court, Allen, J., found they were entitled to subrogation to the rights of Kelly under his mortgage, and the plaintiff excepted.

Samuel K. Bell and Sleeper & Brown, all of Exeter (Wm. H. Sleeper, of Exeter, orally), for plaintiff.

Scammon & Gardner and Arthur O. Fuller, all of Exeter, for defendants.

WALKER, J. The defendants claim they are entitled to be subrogated to the rights of the mortgagee Kelly whose mortgage and liens were paid by the bank's money for which they were sureties and which they have paid to the bank, while the plaintiff claims that his lien is superior to the defendants' mortgage, which ought not to be treated as a prior incumbrance or to occupy the position of the former mortgage which was discharged. Upon these evidentiary facts which were reported by a referee, the court found that the defendants were entitled to subrogation in accordance with their claim. To this finding the plaintiff excepted.

[1] The plaintiff's positions are that when the original Kelly mortgage was discharged his lien was thereby advanced and was no longer subject to that incumbrance; that the mortgage to the defendants, which is subject to the plaintiff's lien, was what they contracted for; and that, having no interest in the discharged mortgage, they are not equitably entitled to subrogation. In short, the claim is that in paying or furnishing security for the payment of the Kelly mortgage they were what is termed "volunteers" having no right to redeem from that mortgage, and consequently no right of subrogation. It may be conceded that merely furnishing the money for the payment of a mortgage debt upon receiving a new mortgage as security for the money advanced does not entitle one to the benefit of the original security by way of subrogation. There is no equity in relieving one from the consequences resulting from his voluntary contract in such a case. *Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537. The question, then, is whether the defendants were mere volunteers in furnishing the money by which the first mortgage was paid. The

answer to that question makes it necessary to ascertain what the arrangement or contract was which resulted in the discharge of one mortgage and the giving of another.

It is not disputed that the sureties signed the note in question at the request of Mayer upon his representation that, upon the application of the money thus secured in payment of the claims of Kelly, the land would be clear of all incumbrances; in other words, that the mortgage he proposed to give them would be a first mortgage. The fact that there was another mortgage on the premises, which Mayer did not disclose, is unimportant in this case, as there is no contention in regard to it. It is clear that the arrangement was that, as security for their liability on the note, they were to have in practical effect the same rights in the land under their mortgage that Kelly had under his. And such would have been the result of the transaction if it had not been for the plaintiff's lien, of the existence of which the sureties were ignorant and which rendered their mortgage worthless. Upon this state of facts, the law seems to be well established that the sureties are not mere volunteers loaning their money to the debtor and taking a mortgage subject to all previous liens, but that they are entitled to subrogation to the Kelly mortgage as against the plaintiff's lien, whose existing equitable rights are not affected thereby. His security is not lessened by the substitution. His position is the same it was before the Kelly mortgage was discharged.

In *Hammond v. Barker*, 61 N. H. 53, it was held that if A., holding a mortgage on the premises of B., subject to one to C., in ignorance of a subsequent attachment of the premises by C. on a different debt, release his mortgage and take a new one for the same consideration, equity will as against the attachment restore the lien of his first mortgage; and if D., in ignorance of such attachment, pay to C. the amount of his mortgage, which is thereupon discharged, and take a new one from B. for the money so paid to C., he will be regarded as the equitable assignee of the mortgage to C., and will be subrogated to the original rights of C. therein. The principle applied in that case is decisive of the same question presented in this case. The apparent purpose of the parties to the transaction and the consideration for the sureties signing the note to the bank was, not merely the wish to assist the debtor, but to be protected by succeeding to Kelly's rights under his mortgage. In the case above referred to, the consideration which induced D. to pay the mortgage debt to C., who thereupon discharged the mortgage, was that the new mortgage he took from B. was deemed to stand in the place of C.'s mortgage, in accordance with the presumed intention of the parties. Other cases sustaining the same principle are *Stantons v. Thompson*, 49 N. H. 272; *Buchanan v. Balkum*, 60 N. H. 406;

Vittum, 71 N. H. 466, 52 Atl. 848, 93 Am. St. Rep. 561; Levy v. Martin, 48 Wis. 198, 4 N. W. 35; Sidener v. Pavey, 77 Ind. 241; Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Gans v. Thieme, 93 N. Y. 225; Farm Land Co. v. Elsbree, 55 Kan. 562, 40 Pac. 906; Homeopathic Ins. Co. v. Marshall, 32 N. J. Eq. 104; 3 Pom. Eq. § 1212; 37 Cyc. 468. Cases like Rice v. Winters, 45 Neb. 517, 63 N. W. 830, Kitchell v. Mudgett, 37 Mich. 81, Fort Dodge Association v. Scott, 86 Iowa, 431, 53 N. W. 288, and Sandford v. McLean, 3 Paige, 116, 23 Am. Dec. 773, if in conflict with the foregoing views, cannot be followed. Whether, in view of the facts involved in those cases, they may be distinguished, it is not necessary to inquire.

[2] The finding of the referee that the defendants were negligent in not discovering that the plaintiff had a lien upon the land when they took their mortgage does not constitute a reason why he should have the benefit of the money they advanced for the discharge of the Kelly mortgage. The effect of a failure to examine the records upon one's right to subrogation was a question presented by counsel in Hammond v. Barker, supra (see 131 Briefs & Cases 325, 351), but it was not considered to be of sufficient importance to defeat the application of the doctrine of subrogation. Indeed, in most of the cases upon this subject it is apparent that the mistake of the party claiming subrogation might have been avoided by reasonable investigation as to the state of the title. The absence of such investigation does not prejudice the second or subsequent lienholder; for, if his lien were discovered, the party paying off the first mortgage by taking an assignment of it would be preferred to the lienholder, while if it were not discovered the latter suffers no damage in his security by a decree giving the former the rights of the first mortgagee by an assignment of it, or, what amounts to the same thing, by an order of subrogation. The principle is that the lienholder's equitable rights are not infringed, impaired, or in any respect changed by the mere fact that the other party was negligent of his own rights in not discovering the existence of the lien. In Sheldon, subsec. 43, it is said that—

"The mere fact that the loss of the party seeking to be subrogated arose from his own negligence will not debar him from the right, unless its enforcement would be prejudicial to others who are not in fault."

Equity does not require that the plaintiff should be enriched in consequence of the misplaced confidence of the sureties in the untrue statement of the debtor, or in consequence of their neglect to ascertain by independent research that it was untrue. Emmert v. Thompson, 49 Minn. 386, 392, 52 N. W. 31, 32 Am. St. Rep. 566; McKenzie v.

the case of Bohn Door Co. v. Case, 42 Neb. 281, 297, 60 N. W. 576, in which a contrary view is entertained, is not of convincing force. The mistake of the sureties as to the condition of the title induced by the evident fraud of the debtor did not in equity give the plaintiff a title which he would not otherwise have had, and does not constitute a defense to their claim to subrogation. To hold otherwise would render the doctrine of subrogation ineffective in all cases where a second recorded mortgage is in force, of the existence of which the first mortgagee is ignorant, if he discharges his mortgage upon receiving a new mortgage for the same consideration, upon the mistaken idea that no other incumbrance existed. To prevent such an injustice equity affords relief.

Exception overruled; judgment for the sureties.

All concurred.

(79 N. H. 37)

POTTER v. MOODY. (No. 1528.)

(Supreme Court of New Hampshire. Rockingham. Nov. 6, 1918.)

1. APPEAL AND ERROR ¶1060(1)—HARMLESS ERROR—ARGUMENT OF COUNSEL—UNWARRANTED INFERENCE FROM EVIDENCE.

Argument of counsel, urging jury to draw unwarranted inference from appearance of writing in evidence to the effect that it was not a copy but an original letter, furnishes no ground for setting aside verdict; the inference to be drawn from the appearance of the letter being a question of law.

2. APPEAL AND ERROR ¶907(2)—ERRORS OF LAW—CORRECTION BY TRIAL COURT—PRESUMPTION.

Statement of counsel in argument that, if fact that defendant was taken sick during trial had been brought to attention of trial court, trial might have been delayed, was, if incorrect, nothing more than an erroneous statement of law which in the absence of evidence will be presumed to have been corrected by trial court's instructions.

Transferred from Superior Court, Rockingham County; Branch, Judge.

Action by Wilbur L. Potter against Dora Moody. Defendant excepted to argument of plaintiff's counsel, and case was transferred. Exceptions overruled.

Action on the case to recover, on the ground of misrepresentations, a portion of the consideration paid for a farm. The defendant testified that, immediately after receiving a notice from the plaintiff rescinding the contract, she had an attorney write a letter for her to the plaintiff which she signed and handed to him. The plaintiff denied receiving it. The defendant introduced in evidence an exhibit which she alleged was a copy of this letter. There was no evidence offered to contradict the exhibit as a copy. Relative to this exhibit being a copy of the

letter, the plaintiff's counsel argued as follows:

"There is one very significant fact about that letter. That letter isn't a copy, it is the original. You can tell by looking at it that it is not a carbon copy; you can tell by looking at it, it is the original document."

To this argument the defendant excepted.

On the day of the trial the defendant's husband returned to his house at Newburyport to obtain an unrecorded deed to be used as evidence in the case. His daughter brought the deed to the court, but he, as claimed, was suddenly taken sick and did not return. Counsel for plaintiff in argument commented upon his absence as follows:

"I very much regret, as I said before, that Mr. Corthell is not here, or Mr. Moody is not here. We are sorry he is sick and surprised that he was taken sick so quickly; over here all right yesterday morning apparently. They need not have gone on with this trial unless they chose to. If he had been taken sick and it was brought to the attention of this court, under certain rules they might have had the trial delayed."

Excepted to by the defendant.

Scammon & Gardner, of Exeter, for plaintiff.

Sleeper & Brown, of Exeter (Wm. H. Sleeper, of Exeter, orally), for defendant.

PLUMMER, J. [1] The defendant excepted because counsel for the plaintiff stated in argument that an exhibit introduced in evidence by the defendant, purporting to be a copy of a typewritten letter, was not a copy, but was the original; that you could tell by looking at it that it was not a carbon copy. It does not appear that the exhibit was introduced as a carbon copy, but simply as a copy of a typewritten letter. While the appearance of the exhibit might furnish evidence to prove that it was not a carbon copy, it could not be determined by its appearance that it was not a copy, because the typist may have written the original, and then written a copy from that, instead of making a carbon copy at the same time the original was written. Counsel asked the jury to draw an inference from the evidence that could not properly be drawn. Whether an inference can be drawn from the evidence is a question of law, and argument of counsel, urging the jury to draw an inference not warranted by the evidence furnishes no ground for setting aside the verdict. *Mitchell v. Railroad*, 68 N. H. 96, 117, 34 Atl. 674; *Conn. River Power Co. v. Dickinson*, 75 N. H. 353, 358, 74 Atl. 585; *Turner v. Cochecho Mfg. Co.*, 75 N. H. 521, 523, 77 Atl. 990. If the defendant had regarded the unwarranted inference made by the plaintiff's counsel prejudicial to her case, upon request, the court in the charge to the jury would undoubtedly have corrected the error. *Cavanaugh v. Railroad*, 76 N. H. 68, 79 Atl. 694; *Gosselin v. F. M. Hoyt Shoe Co.*, 78 N. H. 149, 151, 97 Atl. 744.

[2] The second exception of the defendant cannot be sustained. The statement of counsel in relation to the postponement of the trial under certain rules, if incorrect, could be nothing more than an erroneous statement of law, which, in the absence of evidence, it is presumed was corrected by instructions to the jury. *Leavitt v. Telephone Co.*, 72 N. H. 290, 292, 56 Atl. 462; *Seeton v. Dunbarton*, 73 N. H. 134, 137, 59 Atl. 944; *Curtis v. Railroad*, 78 N. H. 116, 97 Atl. 743. Exceptions overruled.

YOUNG, J., absent. The others concurred.

(117 Me. 577)

BAILEY v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Nov. 27, 1918.)

LANDLORD AND TENANT §326(1)—RENTING ON SHARES—LANDLORD'S RIGHT TO HAY.

Under a farm lease for a second term, and in view of the landlord's letters, held, that the tenant was entitled to the hay crop for the year and could remove it from the premises and sell to a third person.

Report from Supreme Judicial Court, Penobscot County, at Law.

Actions of replevin by Edwin G. Bailey against the Maine Central Railroad Company. Reported by agreement. Judgments for defendant.

Argued before SPEAR, BIRD, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

Percy A. Hasty, of Dexter, and Gillin & Gillin, of Bangor, for plaintiff.

Morse & Cook and Fellows & Fellows, all of Bangor, for defendant.

PER OURIAM. Two actions of replevin between the same parties, reported by agreement to this court for determination. The plaintiff, Edwin G. Bailey, replevined from the Maine Central Railroad Company two carloads of hay, the first car consisting of 36 tons, and the second carload consisting of 12 tons of hay. The plaintiff leased a farm to O. H. Southard, and Southard sold the hay to one Bean, whose possession of the hay was interrupted by these suits. There were two leases, one in 1914, the other in 1915. The plaintiff claims:

"That the agreement and understanding was for the lease of 1915, made on the 18th day of November, that the same amount of corn was to be left in the silo and the same amount of wood to be left in the shed and the hay and straw cut in 1915 was to be left in the barn. While the corn and wood was not mentioned in the lease of 1915, Southard left them. Southard left the same amount he found there in 1914 and which was there under the 1915 lease, but claimed the hay, and this is the only controversy, as to who was the owner of the hay cut in the summer of 1916."

The first lease covered the period from November 1, 1914, to November 1, 1915, and read as follows:

"Sangerville, Me., Oct. 19, 1914.

"Know all men be these presents that I Edwin G. Bailey have this day leased my Farm to C. H. Southard of Easton, Me. One year (said farm is located in Sangerville on road running from Silver's Mills to Dover) together with all the farming tools, One pair Horses now on farm Dairy Utencils now on farm this years crop Hay, together with grain and straw three acres incilage corn in silow eight cows or their equivalent. The same amount of wood to be left as when taken. Said Farm is to be carried on in a husbandlike manner.

"Amount of Rent is to be five hundred dollars and taxes. Lease of farm begins Nov. 1st, 1914 and runs one year.

"Same amount of fodder to be left in Barn as when taken.

Edwin G. Bailey,
"C. H. Southard."

The second and last lease was made November 18, 1915, covering the same premises, and including the personal property, but differed from the first in these provisions, viz.:

"Said lessee takes said premises with the crop of hay and straw for the year 1915 on said premises and it is agreed and understood that the same shall be fed on the premises.

"At the expiration of this lease, said Southard is to leave on the said premises four bins (streaked) of the same kind of grain that was there when he took said premises and also one small bin of grain (streaked)."

It will be noted that in both leases "the crop of hay and straw" for 1915, and fodder, were the subject of special mention, showing clearly that for purposes of his own the plaintiff controlled the hay crop of 1915, and Mr. Southard so understood it, and from the testimony it appears performed his contract.

The plaintiff contends that there was a mutual mistake in the last lease, that there should have been in addition to the foregoing reservations further concessions by the lessee affecting the crop of 1915, to the same extent and in the same manner as in the lease for 1914; but this claim is not supported by the testimony. This conclusion makes unnecessary further reference to the point raised by plaintiff's counsel that there was a mistake made which justified and made admissible evidence showing that the last lease should have contained other provisions limiting the rights of Southard, the lessee, under the last lease. That the plaintiff admitted the right of Southard to sell surplus hay in 1915 appears from a letter written by him to Southard June 3, 1916, in which he says:

"If there is a car of hay left over or a car load by pressing some straw it would be best to let it go, give more room for this year's crop. Let me hear from you soon as it would want to be pressed very soon."

And again, on June 8th, after Southard had written him that the hay for 1915 was to be fed on the premises, the plaintiff wrote in reply:

"What surplus hay there is and straw will only be in your way. I would think it would be better for you to have the room you can put your hay in cheaper. If you have 10 acres grain and it grows good it will fill up. Your

hay last year was only $\frac{1}{2}$ crop, and the grain was light on account of season. 12 tons for a car. If you want to press a car and there is not hay enough make the Bal straw. I will give you shipping directions, this is likely the old hay left over last year, it ought to be shipped the mice will eat it all up.

"There will be no chance for any trouble on contra if you have used what hay you wished and Bal shipped to me, so to make room and save the hay from getting older and drop in price—

"Raining most of the time and cold.

"Resp. yours, E. G. Bailey."

The surplus hay amounted to 22 tons, and there was some straw, all of which the plaintiff took and did not account for, which if left on the farm would have been sufficient for the stock on the farm, in 1916. The case clearly shows that the lessee owned the hay crop of 1916, that he had the right to sell the same to Mr. Bean or any other person. In this case he sold to Mr. Bean, who from the evidence was a purchaser for value, and without notice of any defect in the title of Mr. Southard, if a defect had existed. But no mistake of the parties or defect in title appears. The defendant is therefore entitled to judgment in both cases and judgment for a return of the property. *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462. So ordered.

(117 Me. 578)

CLARK v. LUCE et al.

(Supreme Judicial Court of Maine. Nov. 27, 1918.)

NEW TRIAL \Leftarrow 71—MOTION — CONFLICTING EVIDENCE.

Where the evidence on questions for the jury was conflicting, the verdict will not be set aside on motion for new trial.

On motion from Supreme Judicial Court, Penobscot County, at Law.

Action of assumpsit by David A. Clark against Joseph W. Luce and another. There was a verdict for plaintiff, and defendants move for a new trial. Motion overruled.

Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ.

L. B. Waldron, of Dexter, for plaintiff.

W. B. Peirce, of Bangor, for defendants.

HANSON, J. The plaintiff in this action of assumpsit sued to recover for money loaned, and for wages for his personal labor on the defendants' farm. The jury returned a verdict for the plaintiff in the sum of \$152.56, and the case is before the court on defendants' general motion for a new trial.

The record discloses much conflict in the testimony, and the jury believed the plaintiff and his witnesses. The questions legally arising in the case were all for the jury, and on examining the evidence we find no reason to interfere with the verdict.

Motion overruled.

(262 Pa. 80)

SOISSON v. SCHOOL DIST. OF CITY OF CONNELLSVILLE.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. EVIDENCE — 655—EXPERTS—VALUE OF LAND.

On appeal from award of viewers, testimony of a properly qualified expert witness that, at a date of taking, the market value of property was a certain sum, should not have been stricken merely because he elsewhere stated that he would have given that sum if he had wanted it as a residence, which he did not.

2. EVIDENCE — 488—OPINION AS TO VALUE OF PROPERTY—QUALIFICATION.

Witness who had lived in borough 15 years and owned store property near condemned land for six years before condemnation, and who thereafter bought property on street on which it was located, and who had inquired of owners in vicinity as to value of their properties, was qualified to testify as to value of condemned land.

3. EVIDENCE — 118(2)—VALUE OF LAND—PRICE PAID.

On appeal from award of viewers in a condemnation proceeding, the court properly refused to permit defendant to show the price plaintiff had bid for the land more than four years before its condemnation.

4. EMINENT DOMAIN — 202(4) — MARKET VALUE — EVIDENCE — AVAILABILITY FOR BUILDING LOTS.

On appeal from award of viewers, plaintiffs point that, if the jury believed land available for subdivision and that the market value would be increased by dividing it into smaller building lots, the jury might consider such availability, was proper.

Appeal from Court of Common Pleas, Fayette County.

Guela F. Solsson and husband appealed from an award of viewers in eminent domain proceedings by School District of the City of Connellsville. From a judgment on a verdict for plaintiffs, the defendant district appeals. Affirmed.

From the record it appeared that the school district of the city of Connellsville on May 9, 1916, appropriated four adjoining lots in the said city for the purpose of erecting thereon a high school building. Plaintiffs, Guela F. Solsson and William H. Solsson, the owners of one of the lots in question, appealed from the award of viewers which was in their favor. Thereafter an issue was framed in the common pleas, and on the trial of the appeal a verdict was rendered in favor of the plaintiffs.

[1] At the trial a duly qualified expert, after testifying that in his opinion the market value of the property in question was \$10,000, subsequently stated on cross-examination when asked what would have been offered for the lot if it had been made known that it was for sale in the early part of May, 1916, answered:

"That is a pretty hard question to answer. You might get people there, just as I said before, that would bid it up above that and some that would bid it up about that; but if I

wanted the property to build a residence I would give \$10,000 for it."

And thereafter he stated that he did not want to buy it for a residence himself, as he had one. Plaintiffs moved to strike out the testimony of said witness because of his answers on cross-examination. The trial judge overruled the motion. (1)

[2] A witness called for the plaintiffs testified that he had lived in Connellsville 15 years and owned a store property 40 feet from the condemned land prior to the condemnation thereof, and thereafter bought a property on the street on which the condemned land was located, and before the condemnation had made inquiries of two property owners in the immediate vicinity, as to the value of their properties with a view of purchasing a property for himself. The trial judge overruled defendant's objection to the competency of such witness to express an opinion concerning the value of the condemned property. (2)

[3] The trial judge refused to permit defendant to show the price defendant had bid for the land in question in March, 1912. (3)

[4] The court affirmed plaintiffs' point for charge, which was as follows:

"If the jury believe that the land was available for subdivision and that the market value thereof would be increased by subdividing it into smaller building lots, then they have the right to consider such availability as an element of value in making up their verdict." (8)

Verdict for plaintiffs for \$6,784.11 and judgment thereon.

Errors assigned, among others, were various rulings on evidence (1, 2, and 3), and the charge of the court (8).

Argued before BROWN, C. J., MOSCH-ZISKER, FRAZER, WALLING, and SIMPSON, JJ.

E. C. Higbee, of Uniontown, for appellant.
James R. Gray, of Uniontown, for appellee.

PER CURIAM. The issue in the court below was for the ascertainment of damages to which the plaintiffs were entitled for land taken for school purposes. The assignments of error do not call for discussion. It is sufficient to say of them that they disclose no reversible error, and the judgment is, accordingly, affirmed.

(262 Pa. 100)

PENNIMAN et al. v. HOFFMAN et al.
(Supreme Court of Pennsylvania. July 17, 1918.)

INJUNCTION — 189—BUILDING RESTRICTION — SCOPE OF RELIEF—USE OF BUILDING—REMOVAL.

In suit to enjoin erection of garage in alleged violation of building restriction against offensive occupations, in which preliminary injunction restrained use of building as a public garage, but where it was thereafter completed, apparently for use as public garage, refusal to

that it was erected in violation of injunction, but could only act when use of building became offensive.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by James H. Penniman and others against Joseph B. Hoffman and others to restrain the erection of a garage building. From a decree refusing prayer of bill, complainants appeal. Affirmed.

From the record it appeared that plaintiffs and defendants held their respective properties subject to the following covenant and restriction:

"And subject also to the express condition and agreement that no slaughterhouse, skin-dressing establishment, hose or engine house, blacksmith shop, carpenter shop, glue, starch, soap, or candle manufactory, livery stable, or other building for offensive occupation shall at any time hereafter be erected or used upon any part of the aforesaid lot of ground."

The lower court found that the neighborhood immediately surrounding the property upon which the building was erected was exclusively residential in character. The defendants' premises were Nos. 4317 and 4319 Walnut street, Philadelphia. The plaintiffs were owners of property in the same block.

The opinion of the Supreme Court further states the case.

The lower court entered a decree perpetually restraining defendants from using or permitting others to use the buildings on the lots in question for the purpose of a public garage or storage house for automobiles. Thereafter the defendants continued the erection of the building having such appearance. The lower court refuses to decree the removal of the building. Plaintiffs appealed.

Error assigned was the decree of the court.

Argued before BROWN, C. J., and MOSCHZISKER, FRAZER, and WALLING, JJ.

Ira J. Williams and Charles L. Guerin, both of Philadelphia, for appellants.

PER CURIAM. The final decree in the proceedings instituted against the appellees enjoined them from using, or permitting any one to use, any buildings on the lots described in the bill "for the purpose of a public garage or storage house for automobiles," and the mandatory order asked for by the appellants was properly refused for the following reason, given by the learned court below:

"Between the time of the grant of the preliminary injunction and the final hearing the defendants had proceeded with the erection of the building substantially without change from the one originally projected. It bears all the appearance of a building erected for use as a public garage. The plaintiffs have requested the court to conclude as a matter of law that, the buildings having been erected in violation of the terms of the injunction, the court should now require the same to be removed. With this view we cannot concur. The character of the

may not exercise supervision. It is only when the use to which the building is put becomes offensive that this court may act."

Decree affirmed, at appellants' costs.

(262 Pa. 136)

ALCORN v. D. L. WARD CO.

(Supreme Court of Pennsylvania. July 17, 1918.)

1. EQUITY \S 359—VOLUNTARY DISMISSAL OF BILL—EFFECT.

The complainant may generally move to dismiss his own bill with costs at any time before the decree, it being a matter of course to permit him to do so; and, when the bill has been dismissed and costs paid, the suit is terminated.

2. EQUITY \S 359 — DISMISSAL OF BILL — INJUNCTION.

Where bill in equity for an accounting has been withdrawn by leave of court and costs have been paid by plaintiff, who thereafter brings an action at law for the same cause of action, defendant cannot maintain a motion entitled in former equity suit to enjoin plaintiff from proceeding in his action at law.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for accounting by Samuel S. Alcorn against the D. L. Ward Company. Motion by defendant for an order to restrain the plaintiff from proceeding at law refused, and defendant appeals. Appeal dismissed.

Argued before BROWN, C. J., and POTTER, STEWART, MOSCHZISKER, and FRAZER, JJ.

S. Heckscher and Alfred Aarons, both of Philadelphia, for appellant.

William T. Connor and John R. K. Scott, both of Philadelphia, for appellee.

BROWN, C. J. On February 1, 1917, Samuel S. Alcorn, the appellee, filed a bill in equity in the court below for an accounting by the defendant on a contract of employment. A demurrer to the bill was overruled and an answer filed. When the case was called for hearing on September 28th of the same year, the plaintiff withdrew his bill and subsequently paid the costs. In the following November he brought an action at law on the same contract, and on January 30, 1918—some four months after the bill had been withdrawn—the appellant filed a petition in the equity proceeding, asking for an order enjoining the plaintiff from proceeding in his action at law. This petition was denied, on the ground that the equity proceeding was no longer pending, as the bill "had been withdrawn upon motion and with permission before the taking of testimony before the court."

[1, 2] If the equity proceeding was at an end at the time appellant's petition was filed, the court could make no order in it, and appellant's remedy, if entitled to the restrain-

ing order asked for, was by a bill filed by it against the appellee. That the equity proceeding had been fully ended is not open to question by the appellant. The bill was withdrawn by leave of court, and this was a dismissal of it by the court's permission. "In a court of law the plaintiff may suffer a nonsuit at any time during the trial until the jury are ready to give in their verdict, and even then he might, were it not for our act of assembly. This is often a great hardship upon defendants. So it is the general rule in a court of chancery that a complainant may move to dismiss his own bill with costs, at any time before the decree, and it is a matter of course to permit him to dismiss it. *Cummings v. Bennett*, 8 Paige [N. Y.] 79; 4 Milne & Craig, 194, *Curtis v. Lloyd*. And even upon the hearing of the cause, if the court has merely directed an issue, the plaintiff may, before the trial of the issue, obtain an order to dismiss the bill with costs, because the directing of an issue is only to satisfy the conscience of the court preparatory to its giving judgment." *Saylor's App.*, 39 Pa. 495.

In the present case the appellee had offered no testimony at the time he withdrew his bill. When the case was called for hearing he abandoned it, and the appellant having presented to him its bill of costs and received payment of the same—not due until the cause had finally ended—is not now to be heard that the proceedings is still pending and an order can be made in it. This being so, it is unnecessary to determine whether the action of the court below in denying appellant's petition was interlocutory or final. Whatever it was, the appellant has no standing to complain of it.

Appeal dismissed, at appellant's costs.

MEMORANDUM DECISIONS

CURTIS v. NIXON. (Supreme Judicial Court of Maine. Sept. 7, 1918.) On motion from Superior Court, Kennebec County, at Law. Action by George H. Curtis against L. O. Nixon. Verdict for plaintiff. On motion. Motion overruled. Argued before CORNISH, C. J., and HANSON, PHILBROOK, DUNN, and MORRILL, JJ. Andrews & Nelson, of Augusta, for plaintiff. Harvey D. Eaton and Frank O. Dean, both of Waterville, for defendant.

PER CURIAM. The plaintiff recovered a verdict of \$406.33 for damages sustained in an automobile collision. The issue was legal liability on the part of the defendant. As is usual in this class of cases, the testimony was sharply contradictory. The jury sustained the plaintiff's contention, and the evidence abundantly justifies the verdict. The responsibility was placed, where it belongs, on the defendant. Motion overruled.

HARVEY v. HARVEY. (Supreme Judicial Court of Maine. Nov. 16, 1918.) On Motion from Supreme Judicial Court, Arcoostook County, at Law. Action by Fred H. Harvey against Simon Harvey. Verdict for plaintiff, and defendant moves for new trial. Motion overruled. Argued before CORNISH, C. J., and SPEAR, HANSON, PHILBROOK, DUNN, and MORRILL, JJ. Shaw & Thornton, of Houlton, for plaintiff. Powers & Guild, of Ft. Fairfield, D. L. Theriault, of Ft. Kent, and Benedict F. Maher, of Augusta, for defendant.

PER CURIAM. Verdict was rendered for plaintiff and defendant moves for new trial on the customary grounds. The plaintiff claimed that he was deceived by the defendant in a trade for exchange of horses, that the defendant stated, when the trade was made, that the horse was "all right in every way," that the horse, in fact, was wind-broken and of an ugly disposition, which facts were well known by the defendant at the time the trade was made, and that finally the horse sickened and died. The defendant denied any representations as to the conditions of the horse at the time of the trade, and urged that the plaintiff's ill treatment of the horse after he obtained him was the real cause of the bad condition of the horse and of his death. We must judge the testimony from the colorless pages of a printed record. The jury saw the witnesses, heard them testify, and weighed the testimony in the light of such opportunity to see and hear. We have examined the record carefully, and are unable to say that the verdict, based upon the testimony as the jury saw and heard the witnesses, was so clearly wrong, or was the result of such bias or prejudice, as would warrant us in declaring that the verdict is a palpable error. Motion overruled.

THURSTON v. BENTON & FAIRFIELD ST. R. CO. (Supreme Judicial Court of Maine. July 3, 1918.) On Motion from Supreme Judicial Court, Kennebec County, at Law. Action by Alsada Thurston against the Benton and Fairfield Street Railroad Company. Verdict for plaintiff. On motion. Motion sustained, unless certain damages be remitted. F. W. Clair, of Waterville, for plaintiff. Weeks & Weeks, of Fairfield, for defendant.

PER CURIAM. In this case the jury found a verdict for the plaintiff for \$3,737.50. The case comes up on the usual form of motion. The verdict of the jury upon the question of liability cannot be disturbed. But the damages are manifestly excessive. It is the opinion of this court that \$1,500 is ample and liberal. It is therefore ordered: Motion sustained, unless the amount of the verdict above \$1,500 be remitted within 30 days from the certification of this decision.

PURCELL v. INTERNATIONAL MOTOR CO. (No. 84.) (Court of Errors and Appeals of New Jersey. March 4, 1918.) Appeal from Supreme Court. Proceeding by Patrick Purcell under the Workmen's Compensation Act, opposed by the International Motor Company, employer. From a judgment of the Supreme Court (103 Atl. 860), affirming an award, the employer appeals. Affirmed. Kallsch & Kallsch, of Newark, for appellant. Codington & Blatz, of Plainfield, for appellee.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons ex-

larger in the Supreme Court.

TRENCHARD, PARKER, and KALISCH, JJ., dissent.

PARKER, J. (dissenting). The award rests on a finding of permanent injury to the eye-sight which in my judgment is not supported by any evidence in this case. At the trial both sides rested without any testimony of the permanent character of the injury. Petitioner had not lost either eye, and claimed only impairment of vision. The court called attention to lack of evidence of permanency of impairment, and petitioner recalled an expert previously examined, who declined to give any opinion that it was permanent; and an examination of the whole of his testimony makes it clear that he considered the petitioner a malingerer. He said in substance that injuries of that character were sometimes permanent but usually not. Further he would not go. The court, in deciding the case, said that as the injury was not shown to be temporary he must conclude it was permanent. This manifestly reversed the burden of proof. I take it for granted that in a workmen's compensation case the petitioner must bear the burden imposed on other plaintiffs who seek to deprive defendant of money or property by a claim of damages, of proving the amount of damages to which he was entitled. Of course, if he has lost an arm, or a leg, or an eye, the situation itself speaks, because we know the missing member will not grow again. But when the injury is not claimed to be more than a functional impairment of vision, the court must depend on the knowledge and experience of experts and if no expert testimony points to permanent impairment, the court should not assume it. I think the judgment should be reversed.

ERIK FRUSTI COMPANY (Court of Errors and Appeals, Oct. 11, 1917.) Appeal by the company. Interpleader by the company. Works against the Liberty Tr. S. Schwarzwaelder, as executor. From a decree of the Court of Appeals (102 Atl. 841), the Liberty Tr. Affirmed. Archibald F. Lintot, for appellant. Newark, for appellee.

PER CURIAM. The judgment will be affirmed, for the opinion filed in the court below (102 Atl. 841).

R. W. HARTNETT COMPANY PUBLICATION CO. (Supreme Court, July 17, 1918.) Appeal by the company. Common Pleas, York County. R. W. Hartnett Company v. Fancier Publishing Company. Report of Ray P. Sherwood pointed to distribute proceeds of the company dismissed, and report of Delone, a creditor, appointed before BROWN, C. J., KER, FRAZER, WALL, JJ. V. K. Keesey, of York, for appellant. John J. Bollinger, of York, for appellee.

PER CURIAM. To sustain the claim of the auditor, confirmed, would have to be based on evidence not been convinced of such disturbance, the decision affirmed, at appellant's expense.

END OF CASES IN VOL. 104

